

THE DE MINIMIS REQUIREMENT AS A SAFETY VALVE: COPYRIGHT, CREATIVITY, AND THE SAMPLING OF SOUND RECORDINGS

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INTRODUCTION

“[H]ip-Hop literally reintroduced the world to George Clinton and Parliament-Funkadelic.”

Kembrew McLeod & Peter DiCola, 2011¹

Before George Clinton’s songs became a favorite of hip-hop artists, you might have had a hard time tracking down his albums. Despite his superstar status,² “[b]y the 1980s . . . most of Clinton’s records were out of print and in danger of being forgotten.”³ But as hip-hop artists began to include samples of Clinton’s works in their own, this changed.⁴ As Clinton said, “it was the way to get back on the radio.”⁵ Clinton’s two main groups, Parliament and Funkadelic, are now the 22nd and 35th most sampled artists of all time, respectively.⁶

Many of these sampling artists did not get a license, perhaps because this was the prevailing practice among hip-hop artists at the time,⁷ or in some cases because the samples were de minimis and thus not infringing.⁸ Despite Clinton’s gratitude to samplers, one of his songs—“Get Off Your Ass and Jam”—was at the center of the *Bridgeport* case,⁹ which ended the nationwide rule that the de minimis

¹ KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 93 (2011) (quoting journalist and hip-hop historian Jeff Chang).

² See *George Clinton*, BIOGRAPHY.COM, <http://www.biography.com/people/george-clinton-537674#synopsis> (last visited June 25, 2017) (“Clinton and Parliament-Funkadelic released more than 40 R&B hit singles and several gold and platinum albums during the ’70s . . . with . . . four singles topping the charts.”). Clinton’s two main musical groups—Parliament and Funkadelic—were inducted into the Rock and Roll Hall of Fame in 1997. *Parliament Funkadelic*, ROCK & ROLL HALL OF FAME, <https://www.rockhall.com/inductees/parliament-funkadelic> (last visited June 25, 2017).

³ W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443, 445 (2015).

⁴ See MCLEOD & DICOLA, *supra* note 1, at 93 (“Parliament-Funkadelic records remained out of print until artists began sampling them on songs like De La Soul’s ‘Me, Myself, and I.’”).

⁵ *Id.* (quoting George Clinton).

⁶ *Most Sampled Artists*, WHOSAMPLED, <http://www.whosampled.com/most-sampled-artists/> (last visited June 25, 2017). Combining their numbers would put them at 1640 samples, ranking seventh on this list. *Id.*

⁷ See *infra* notes 88–90 and accompanying text (describing the “golden age of sampling”).

⁸ See *infra* Part I.C.

⁹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005). As an indirect result of *Bridgeport*’s litigiousness, this Note cites several cases whose caption begins with *Bridgeport*. All references to *Bridgeport* refer to *Bridgeport Music, Inc. v. Dimension Films* unless otherwise stated.

requirement applies to sound recordings and has had an “extraordinarily chilling” impact on the music industry.¹⁰

Bridgeport arose not because Clinton was feeling particularly litigious, but rather because “he lost ownership of much of his catalog in the early 1990s” as a result of “shady music-industry shenanigans.”¹¹ The copyrights were thus held by the plaintiff Bridgeport Music (and affiliated entity Westbound Records),¹² a “sample troll” that “hold[s] portfolios of old rights (sometimes accumulated in dubious fashion) and use[s] lawsuits to extort money from successful music artists for routine sampling, no matter how minimal or unnoticeable.”¹³ Taking this trolling¹⁴ to a whole other level, Bridgeport filed over eight hundred lawsuits, including one suing Clinton “for sampling *his own song*.”¹⁵ Many of these suits involved small samples that were arguably *de minimis*. For any type of copyrightable work besides sound recordings, takings only infringe if they are more than *de minimis*: “courts consistently have applied the [*de minimis*] rule in all cases alleging copyright infringement.”¹⁶ But the law is not so uniform when it comes to sound recordings.

Does this standard rule that merely *de minimis* takings are not copyright infringement apply to the sampling of sound recordings? Two Courts of Appeal have directly addressed this question. The first is the Sixth Circuit, which held in *Bridgeport Music, Inc. v. Dimension*

¹⁰ See McLEOD & DiCOLA, *supra* note 1, at 141–43 (quoting musicologist Lawrence Ferrara).

¹¹ See *id.* at 93 (“Th[e] loss stemmed from an allegedly fabricated contract that transferred many of Clinton’s composition copyrights . . . to Armen Boladian of Bridgeport Music, a copyright aggregator. This document—which a New York court ruled was a cut-and-paste job—relieved Clinton of his publishing rights for a ridiculously small sum of money, despite the fact that these copyrights were extremely valuable.”). Clinton put it more bluntly, saying “[t]he guy just stole them.” *Id.* (referring to Armen Boladian, who founded Westbound Records, the label which released some of Clinton’s albums). Clinton later regained some of these copyrights. *Id.* at 94.

¹² *Bridgeport*, 410 F.3d at 796.

¹³ Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE: CULTUREBOX (Nov. 16, 2006, 1:50 PM), http://www.slate.com/articles/arts/culturebox/2006/11/jay_z_versus_the_sample_troll.html.

¹⁴ The term comes from the patent world, where it refers to the practice of companies that buy existing patents not to produce the patented invention, but rather to file or threaten lawsuits. See *Patent Trolls*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/resources-patent-troll-victims> (last visited June 25, 2017) (“A patent troll uses patents as legal weapons, instead of actually creating any new products or coming up with new ideas. Instead, trolls are in the business of litigation (or even just threatening litigation). They often buy up patents cheaply from companies down on their luck who are looking to monetize what resources they have left, such as patents.”).

¹⁵ See McLEOD & DiCOLA, *supra* note 1, at 94.

¹⁶ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881 (9th Cir. 2016) (“Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the *de minimis* doctrine does not apply in a copyright infringement case.”).

Films that a de minimis taking from a sound recording violates the exclusive rights of the copyright holder.¹⁷ The second is the Ninth Circuit, which explicitly rejected *Bridgeport* in *VMG Salsoul, LLC v. Ciccone*.¹⁸ There, the court held that “the ‘de minimis’ exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions.”¹⁹

The Ninth Circuit’s holding that the de minimis threshold applies to sound recordings is both the better reading of the Copyright Act and the superior policy outcome. First, that reading better comports with the language and statutory structure of the Act, which does not indicate that a different rule should apply to sound recordings than to other works of authorship. Second, the legislative history makes clear that infringement takes place only when a substantial portion is reproduced. Third, applying a de minimis requirement to sound recordings will better promote creativity in the music industry than the rule adopted in *Bridgeport*.

While no petition for certiorari has been filed, the issue is likely to trigger Supreme Court review in due time because two Courts of Appeal have ruled in opposite ways on an important issue of federal law.²⁰ Should the Supreme Court address this, it ought to resolve the circuit split by upholding the Ninth Circuit’s approach and finding that reproductions of sound recordings do not violate a copyright owner’s exclusive rights when the taking is a de minimis one—the same rule that has successfully been applied to all other types of copyrightable works.

Scholars have often criticized *Bridgeport*’s result and reasoning.²¹ While this Note does so as well, it also makes two novel contributions.

¹⁷ 410 F.3d 792, 801 (6th Cir. 2005) (“[A] sound recording owner has the exclusive right to ‘sample’ his own recording.”). Under *Bridgeport*, when the defendant concedes sampling, evaluating whether the second work is substantially similar is unnecessary. See *id.* at 798 (“[Plaintiff] claim[s] that no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording. We agree . . .”).

¹⁸ 824 F.3d at 886 (“Because we conclude that Congress intended to maintain the ‘de minimis’ exception for copyrights to sound recordings, we take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit’s contrary holding in *Bridgeport*.”).

¹⁹ *Id.* at 874.

²⁰ In deciding whether to grant certiorari, the Court considers whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” SUP. CT. R. 10(a).

²¹ See, e.g., Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 292 (2009) (“*Bridgeport Music*’s bright-line rule negating de minimis use runs counter to the doctrine’s extensiveness and Congress’s express intentions.”); Julian Azran, Note, *Bring Back the Noise: How Cariou v. Prince Will Revitalize Sampling*, 38 COLUM. J.L. & ARTS 69, 106 (2014) (“The bright-line rule in *Bridgeport* has been widely criticized and should be

First, it evaluates the newly created circuit split, which postdates those pieces. Second, it analyzes the connection between sampling, creativity, and the de minimis requirement, showing how the strict rule of *Bridgeport* has stifled creativity by ushering in a culture of requiring licensing for even de minimis samples.

Part I begins with an introduction to sampling, its importance in music, and an outline of the relevant doctrines of copyright law—including the de minimis requirement. It then explains how the de minimis requirement functions as a safeguard that protects creativity against what would otherwise be the excesses of copyright law. Part II explains the *Bridgeport* and *VMG Salsoul* cases. Part III explains why the Ninth Circuit’s approach better comports with the Copyright Act’s text, structure, and legislative history, and is superior on policy grounds.

I

SAMPLING AND THE LAW

A. *Sampling and Its Importance*

Sampling is “the incorporation of short segments of prior sound recordings into new recordings.”²² The practice began in analog form in 1960s Jamaica, “when disc jockeys (DJs) used portable sound systems to mix segments of prior recordings into new mixes, which they would overlay with chanted or ‘scatted’ vocals.”²³ Unsurprisingly, digital technology has made sampling a much easier endeavor: software programs allow artists to simply copy, alter, and incorporate samples

overturned.”). For a defense of *Bridgeport*, see Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 357 (2008).

²² *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004). For a history of music sampling and its connection to copyright law, see Wayne M. Cox, Note, *Rhyming and Stealing? The History of Sampling in the Hip-Hop and Dance Music Worlds and How U.S. Copyright Law & Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L.J. 219 (2015).

²³ *Newton*, 388 F.3d at 1192.

into their creations.²⁴ The resulting sounds may be very similar to the original, or sufficiently altered to make them almost unrecognizable.²⁵

The cultural import of sampling comes from two considerations: first, the connection between sampling and creativity, and second, the importance of sampling to many forms of modern music.²⁶ “With the rise of disco, hip-hop, and electronic dance music, transformative appropriation has become the most important technique of today’s composers and songwriters,” writes musicologist Joanna Demers.²⁷ One reason for this is simply that sampling has helped to democratize music by allowing those without expensive equipment or formal training to create works just as compelling as those of more conventional professionals.²⁸

But of greater weight is that sampling allows for the expression of new meanings that could not be easily communicated through other means. “[S]ampling may have a myriad of purposes and effects, from

²⁴ See Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 515–16 (2006) (“With today’s advanced digital equipment . . . a musician or sound engineer can easily record, distort, or manipulate the pitch, tempo, and tone of any piece of digital music before incorporating these bits and pieces into new music.”); Ryan Lloyd, Note, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 153 (2014) (“‘Noisepad,’ developed in 2012, further eliminated the resources and steps needed to create a sample, by allowing amateur artists to craft a digital sample with little more than an MP3 and an iPhone or iPad.”).

²⁵ Lloyd, *supra* note 24, at 164 (“[M]any samples distort and manipulate the excerpt of the original sound, sometimes even to the point where it is unrecognizable”); see also Scott Parsons, *How to Use Samples in Your Tracks Without Getting Sued*, LANDR BLOG, <http://blog.landr.com/use-samples-tracks-without-getting-sued/> (last visited June 25, 2017) (“Apply effects to your sample. Reverse it. Pitch it down. Layer it. Or bury it in the mix. . . . Sure, the original sound is in there somewhere. But you’ve made it your own and it’ll be hard to hear any trace of the original.”).

²⁶ “[S]ampling certainly plays a vital role in the creation of music in a number of genres.” John Schietinger, Note, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 212–15 (2005) (giving examples from hip-hop, electronic music, trip-hop, and rock); see also Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 856–57 (2011) (“The sampler has ingrained aesthetic value to hip hop music and, ultimately, to music creation as a whole. To understand the importance and pervasive presence of digital sampling in hip hop on a broader scale one need only turn to the Billboard charts of the most prominent albums. In 1989 only eight of the top 100 albums contained samples but by 1999 almost one-third of the Billboard 100 incorporated samples in some capacity.”).

²⁷ JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 9 (2006).

²⁸ See McLEOD & DiCOLA, *supra* note 1, at 4–5 (“Sampling has had a leveling effect on music making by allowing virtually anyone to make music, even those without formal training.”); see also *infra* note 200 (noting free and inexpensive software packages for sampling).

giving new meaning to work to paying homage to past musicians, evoking a time, person or place, or aiming for a certain musical aesthetic.”²⁹

Take for example Jay-Z’s “Hard Knock Life (Ghetto Anthem)” which extensively samples “It’s a Hard Knock Life” from the musical *Annie* to “convey[] [Jay-Z’s] own understanding of what it means to live a ‘hard knock life.’”³⁰ In doing so, Jay-Z “juxtaposes . . . divergent meanings in a way that would be impossible without using the sample” and “communicate[s] with a broader audience using multiple layers of meaning.”³¹ As Azran writes: “‘Hard Knock Life’ unsettles the meaning of the original in the viewer’s mind and thus makes a comment on the original work, adding ‘new expression, meaning or message.’”³² Or take Public Enemy’s “Fight the Power,” which uses “sampled loops of melodies, vocals, speeches, and other noises” to create “an assemblage of a quarter century of sounds that invoke the black experience.”³³ These examples help explain why sampling has been called “aural storytelling.”³⁴

Given the importance of sampling to many forms of musical creativity,³⁵ its prevalence should not be surprising. Far from being confined to rap or hip-hop, sampling is a key building block of songs in a wide range of genres. WhoSampled, a user-driven website which compiles info on sampling, identifies more than 251,000 songs that include

²⁹ Ashtar, *supra* note 21, at 284; see also McLEOD & DiCOLA, *supra* note 1, at 98 (describing sampling as “an intergenerational [exchange] in which younger musicians engage with and recontextualize earlier forms of music”).

³⁰ Azran, *supra* note 21, at 84 (“[A]rtists sample as a way of re-contextualizing their social environment.”).

³¹ *Id.*; see also McLEOD & DiCOLA, *supra* note 1, at 88 (“[T]he effect of hearing a familiar recording of children’s voices in a hip-hop song was for many listeners both jarring and intoxicating and it is this quality that arguably made ‘Hard Knock Life (Ghetto Anthem)’ a hit.”).

³² Azran, *supra* note 21, at 84 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

³³ McLEOD & DiCOLA, *supra* note 1, at 99 (paraphrasing Chuck D of Public Enemy); see also *id.* at 99–100 (“The interesting thing is that [Public Enemy] used something as cold and brittle as computer chips, and samplers, to give this kind of resurrection and life to the voices of pain of black people—as uttered in song and voice.” (quoting Harry Allen of Public Enemy, discussing their song “Show ‘Em Whatcha Got”)).

³⁴ *Id.* at 100.

³⁵ Admittedly, some more traditional artists decry this idea. Mark Volman of the ‘60s rock group The Turtles argues that “[s]ampling is just a longer term for theft.” *Id.* at 63 (quoting separately music lawyer Anthony Berman as saying, “[t]he view on the traditional side was that sampling is a very lazy way of making music, of songwriting”). This characterization contrasts with the high degree of effort good sampling often requires. See *id.* at 24 (quoting Hank Shocklee of Public Enemy as saying, “we had to comb through thousands of records to come up with maybe five good pieces,” and noting that a single drum track might include parts of a dozen different beats).

samples.³⁶ It lists more than 6000 such works from 2016 alone, including songs by top artists such as Rihanna, David Guetta, Bastille, and Bon Iver.³⁷ Sampling is sufficiently ubiquitous that it is hard to imagine what some genres would sound like without sampling.³⁸

B. *Why Sampling Raises Copyright Issues*

Before examining the circuit split in depth, it is important to discuss why the legal issue arises. Copyright protects “original works of authorship fixed in any tangible medium of expression.”³⁹ These include both “musical works,” often called musical compositions, and “sound recordings.”⁴⁰ The two copyrights are distinct and may be held by different owners. Consequently, a sampler can infringe the copyright in the sound recording without infringing the copyright in the musical work, or vice versa.⁴¹ The sampler thus may need licenses for both.⁴² The musical work copyright covers “an artist’s music in written

³⁶ *About Us*, WHOSAMPLED, <http://www.whosampled.com/about/> (last visited June 25, 2017).

³⁷ *Browse 2016 Music that Uses Samples*, WHOSAMPLED, <http://www.whosampled.com/browse/year/2016/> (last visited June 25, 2017) (scattered throughout the early pages of the results).

³⁸ See Jeremy Scott Sykes, Note, *Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 756 (2006) (“Though sampling is widespread, the practice is prominently featured in hip-hop and nearly all subgenres of electronic and dance music to such an extent that these genres would likely not exist without sampling.”); Andrew Blake Sorkin, *A Brief Introduction to Sampling Audio*, TOM’S HARDWARE (Oct. 24, 2005, 12:06 PM), <http://www.tomshardware.com/reviews/a-introduction-sampling-audio,1155.html> (“The quintessential building block for most songs made in the last 15 years, there is nothing more ubiquitous than the sample. Almost every recent rock, hip hop, R&B, pop, and electronic music track now incorporates the use of samples.”).

³⁹ 17 U.S.C. § 102(a) (2012). The power to establish copyrights derives from the Copyright Clause. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). The requirement of originality is a very low bar. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”).

⁴⁰ 17 U.S.C. § 102(a)(2), (7).

⁴¹ See Ponte, *supra* note 24, at 524 (“The copyright to the musical score does not include ownership of the sound recording while the copyright to the sound recording does not extend to the musical composition itself.”).

⁴² Ashtar, *supra* note 21, at 269–70 (“[T]o sample a song, one needs rights to both ‘master use’ (recording) and ‘synchronization’ (composition) licenses . . .”). There is a compulsory licensing scheme under § 115 for musical compositions, for use by cover songs. 17 U.S.C. § 115 (2012). However, because it is limited to arrangements that do “not change the basic melody or fundamental character of the work,” § 115(a)(2), the practical significance for sampling is minimal. See also Ashtar, *supra* note 21, at 271 (“[N]othing in the law compels copyright holders to grant licenses to prospective samplers or users of composition rights (for any quotation other than straightforward covering) . . .”).

form,” and “protects the generic sound that would necessarily result from any performance of the piece.”⁴³ Traditionally, this written form was sheet music, though when songs are recorded without sheet music, the composition is created simultaneously with the recording.⁴⁴ By contrast, the sound recording copyright protects “the actual sounds fixed in the recording.”⁴⁵

The owner of each copyright receives several exclusive rights under 17 U.S.C. § 106. The critical one with regards to sampling is the right “to reproduce the copyrighted work in copies or phonorecords.”⁴⁶ In order to establish a *prima facie* case for violation of this reproduction right, the plaintiff must prove two propositions: “ownership of a valid copyright” and “copying of constituent elements of the work that are original.”⁴⁷ The requirement of copying is itself a two-part inquiry: the plaintiff must establish the fact of copying and also show that the copying is legally actionable.⁴⁸ For copying to be actionable, there must be “substantial similarity” between the two works, meaning the copying must have been “quantitatively and quali-

⁴³ *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003), *opinion amended and superseded on denial of reh'g*, 388 F.3d 1189 (9th Cir. 2004), and *aff'd*, 388 F.3d 1189 (9th Cir. 2004); *accord* *Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 475 n.3 (6th Cir. 2003) (per curiam) (“A musical composition consists of rhythm, harmony, and melody.”). The statute does not define what is meant by a “musical work.” See 17 U.S.C. § 101.

⁴⁴ See *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009) (“The sheet music, however, was created long after the song was composed. . . . [T]he song was composed and recorded in the studio simultaneously and, therefore, . . . the composition was embedded in the sound recording.”).

⁴⁵ 17 U.S.C. § 114(b) (2012); see also 17 U.S.C. § 101 (“‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds . . .”).

⁴⁶ 17 U.S.C. § 106(1). The copyright holder also has the right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2). However, the two cases in the circuit split involve claims for violation of the reproduction right only. Generally, without a violation of reproduction right, there will be no violation of the derivative work right. See 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.09[A][1] (Matthew Bender rev. ed. 2017) (“[I]f the latter work does not incorporate enough of the pre-existing work to constitute an infringement of either the reproduction right or of the performance right, then it likewise will not infringe the right to make derivative works because no derivative work will have resulted.” (footnote omitted)).

⁴⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

⁴⁸ See 4 NIMMER & NIMMER, *supra* note 46, § 13.01[B] (“Two separate components actually underlie proof of copying . . . First, there is the factual question whether the defendant, in creating its work, used the plaintiff’s material as a model, template, or even inspiration. If the answer is ‘yes,’ then one can conclude, as a factual proposition, that copying may have occurred. But the question remains whether such copying is actionable.”) (footnotes omitted). As direct evidence of factual proof of copying is generally unavailable, “copying is ordinarily established indirectly by the plaintiff’s proof of access and ‘substantial’ similarity.” *Id.* (footnote omitted). In sampling cases however, defendants will often simply concede the fact of copying. See *Evans, supra* note 26, at 875 (“In the case of sampling, however, copying in fact is rarely litigated.”).

tatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred.”⁴⁹ While the quantitative inquiry looks to how much has been copied, the qualitative inquiry asks whether the copying is of expression or ideas—if the copyist took only ideas, which copyright does not protect, then there can be no infringement.⁵⁰ This quantitative inquiry, also known as the *de minimis* threshold,⁵¹ will be discussed further in Part I.C, *infra*.

Two of the tests for substantial similarity are especially relevant to sampling. The first holds that “[t]wo works are substantially similar if ‘an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.’”⁵² The second, “fragmented literal similarity,” states that, “the question of substantial similarity is determined by an analysis of ‘whether the copying goes to trivial or substantial elements’ of the original work.”⁵³

If the plaintiff is able to make out a *prima facie* claim for copyright infringement, the defendant can avoid liability via an affirmative defense. Three such defenses are relevant here. First, the defendant

⁴⁹ *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). While courts sometimes refer to “substantial similarity” as part of the prior inquiry of whether defendant in fact copied from plaintiff, these two inquiries are distinct. This possible confusion has led at least one court to adopt different terminology. *See id.* (“The former (probative similarity) requires only the fact that the infringing work copies something from the copyrighted work; the latter (substantial similarity) requires that the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred.”).

⁵⁰ *See id.* (“The qualitative component concerns the copying of expression, rather than ideas The quantitative component generally concerns the amount of the copyrighted work that is copied, a consideration that is especially pertinent to exact copying.” (citation omitted)); *see also* 17 U.S.C. § 102(b) (2012) (“In no case does copyright protection for an original work of authorship extend to any idea”).

⁵¹ *See, e.g., Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (“[I]f the copying is *de minimis* and so ‘trivial’ as to fall below the quantitative threshold of substantial similarity, the copying is not actionable.”).

⁵² *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1337 (S.D. Fla. 2009) (quoting *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000) (applying this test in a case involving sampling of a sound recording), *aff’d*, 635 F.3d 1284 (11th Cir. 2011); *see also* *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) (stating that plaintiffs must “prove that ‘defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such . . . music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff’” (quoting *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946))).

⁵³ *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 598 (S.D.N.Y. 2013) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004)); *accord* 4 NIMMER & NIMMER, *supra* note 46, § 13.03[A][2][a] (“No easy rule of thumb can be stated as to the quantum of fragmented literal similarity permitted without crossing the line of substantial similarity. The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work—not whether such material constitutes a substantial portion of defendant’s work.” (footnote omitted)). This analysis is often used when defendant’s work directly copies some part of plaintiff’s expression. *See id.* at 13.03[A][2].

might have entered into a license with the copyright holder that permits defendant to use the copyrighted work in a given way.⁵⁴ Second, the defendant may have independently created their work rather than copying from the plaintiff.⁵⁵ Third, the defendant's infringement might be protected as fair use.⁵⁶ That inquiry focuses on whether the second work is transformative, that is, whether the work "alter[s] the first with new expression, meaning, or message."⁵⁷ While some scholars have suggested that fair use may protect samplers in some circumstances,⁵⁸ there is little case law.⁵⁹

C. The De Minimis Requirement

As noted above, a de minimis⁶⁰ requirement is built into the copyright's substantial similarity inquiry, meaning that copying will not be

⁵⁴ See 4 NIMMER & NIMMER, *supra* note 46, § 13.01 ("[A]uthorization from the copyright owner is an affirmative defense rather than an element of plaintiff's case.").

⁵⁵ See, e.g., *Repp*, 132 F.3d at 889 ("Independent creation is an affirmative defense, evidence of which may be introduced to rebut a prima facie case of infringement.").

⁵⁶ 17 U.S.C. § 107 (2012). The statute gives four non-exclusive factors for courts to examine:

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. § 107(1)-(4).

⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994) ("The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" (citation omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841))).

⁵⁸ Azran, *supra* note 21, at 106 ("[C]ertain transformative samples do not usurp the original's potential market and should therefore qualify as fair use."); Christopher C. Collie & Eric D. Gorman, *Digital Sampling of Music and Copyrights: Is It Infringement, Fair Use, or Should We Just Flip a Coin?*, B.C. INTELL. PROP. & TECH. F., Dec. 2011, at 1, 3 (concluding that Girl Talk's sampling is likely fair use).

⁵⁹ See Ashtar, *supra* note 21, at 294 n.198 ("*Campbell* remains the sole case to have considered fair use in the sampling context. 2 Live Crew's 'Pretty Woman' sampled portions of Roy Orbison's 'Oh, Pretty Woman,' and the court deemed their song a parody that could constitute a non-infringing fair use."). That could change: recent fair use cases, for example *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), has pointed towards a more expansive definition of transformative fair use that may in time expand to sampling. See Azran, *supra* note 21, at 69-70, 101 (arguing that "Prince stands for the proposition that certain transformative derivative works of appropriation art can qualify as fair use" and that while "legal standards for appropriation art in the visual and musical contexts have diverged," *Prince* "opens the door for courts to correct this disparity").

⁶⁰ Short for "de minimis non curat lex"—"the law does not concern itself with trifles." *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

actionable if it is merely *de minimis*.⁶¹ While referred to as a quantitative threshold,⁶² qualitative factors matter as well—the test does not simply look to the amount of copying but also its character.⁶³

“[A] use is *de minimis* only if the average audience would not recognize the appropriation.”⁶⁴ While “courts agree that sampling of a single note is *de minimis*,”⁶⁵ there is no bright-line rule for when sampling begins to exceed that threshold.⁶⁶ As explained below, however, this lack of a bright-line rule does not mean eliminating the *de minimis* requirement leads to greater predictability or lower litigation

⁶¹ *Ringgold* outlines three different roles that the *de minimis* requirement plays in copyright law—this Note deals with the second. First, *de minimis* can refer to “a technical violation of a right so trivial that the law will not impose legal consequences”; such a violation rarely will be the subject of litigation. *Id.* at 74. “Second, *de minimis* can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.” *Id.* (noting that this is relevant only to the inquiry of whether copying was actionable, and not to the question of whether copying in fact occurred, which also uses the language of substantial similarity). Third, whether a taking is *de minimis* might be relevant to fair use. *Id.* at 75; see also 17 U.S.C. § 107(3) (listing as a factor “the *amount* and substantiality of the portion used in relation to the copyrighted work as a whole” (emphasis added)).

⁶² See *supra* note 51 and accompanying text.

⁶³ For example, in *Ringgold*, the court considered whether the inclusion of a copyrighted poster in the background of a TV program was more than *de minimis*. *Ringgold*, 126 F.3d at 76. In addition to examining the length of time the poster was visible and what proportion of it was in view (quantitative factors), the court also noted that the poster was “in less than perfect focus” and had “sufficient observable detail” to discern the artist’s “style.” *Id.* at 76–77.

⁶⁴ *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). The case involved the Beastie Boys’ sampling “of a six-second, three-note segment” by jazz flutist James Newton. *Id.* at 1190. Because the sound recording was licensed, the court looked only at whether defendants infringed the musical composition. *Id.* at 1193. The court found that “no reasonable juror could find the sampled portion of the composition to be a quantitatively or qualitatively significant portion of the composition as a whole” because the segment appeared only once in the composition and because “this section of the composition is no more significant than any other section.” *Id.* at 1195–96. The taking was thus *de minimis*, and the court affirmed summary judgment for the Beastie Boys. *Id.* at 1196–97.

⁶⁵ *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 607 (S.D.N.Y. 2013).

⁶⁶ *Silberman v. Innovation Luggage, Inc.*, No. 01 Civ. 7109(GEL), 2003 WL 1787123, at *8 (S.D.N.Y. Apr. 3, 2003) (“[W]hile courts often look to the amount of the copyrighted work that was copied in determining whether the allegedly infringing work falls below the quantitative threshold of substantial similarity, there are no bright line rules . . . , and the issue must be decided case by case.”). For example, in *TufAmerica*, one of the samples was a “one-second long, single utterance of the phrase ‘say what,’” which was used only once in the sampling work. *TufAmerica*, 968 F. Supp. 2d at 603. The court rejected the motion to dismiss, noting that this was long enough to not necessarily be *de minimis* as a matter of law and plausibly had qualitative significance because it was the original song’s title phrase. *Id.* By contrast, the court found that the sampling of a three-second long segment which plaintiffs described as “includ[ing] punchy guitar chords backed by percussion under the distinctive shouted lyrics, ‘[n]ow I want y’all to break this down’” was *de minimis* as a matter of law. See *id.* at 607 (“[T]here is nothing from which a juror could conclude that the [sample] is even thematically relevant and there is no repetition.”).

costs, because the result is that a greater proportion of cases would go to the more complicated and less predictable fair use analysis.⁶⁷

While the *de minimis* test is imperfect, it serves an important function: ensuring that our reasonable acts do not subject us to copyright liability. As Judge Leval explains:

Trivial copying is a significant part of modern life. Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of law. We do not hesitate to make a photocopy of a letter from a friend to show to another friend Parents in Central Park photograph their children perched on José de Creeft's Alice in Wonderland sculpture. . . . When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law.⁶⁸

D. How the De Minimis Requirement Furthers Creativity

Sampling of *de minimis* portions of sound recordings is one of these reasonable acts that should not violate the law (without the need for a fair use defense). Indeed, sampling is often referred to as a “building block” of certain types of music, especially hip-hop.⁶⁹ Eliminating the *de minimis* requirement for sound recordings threatens creativity and the production of new works. The reason for this is simple: the *de minimis* requirement provides relief from what would otherwise be the suffocating effect of copyright on creativity.

1. Why Copyright Can Threaten Musical Creativity

While copyright aims to promote the creation of new works by providing economic incentives to artists,⁷⁰ the means by which it does so—the granting of monopoly rights which limit what future artists can do—can also threaten creativity.⁷¹ Sampling enables creativity,⁷² but also can easily infringe the copyrights in the sound recording and

⁶⁷ See *infra* notes 237–42 and accompanying text.

⁶⁸ On *Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001).

⁶⁹ See Zac Shaw, *Compositions with Samples: A Music Discovery Market in Arrested Development*, *MEDIAPOCALYPSE* (May 5, 2013), <http://www.mediapocalypse.com/compositions-with-samples-a-music-discovery-market-in-arrested-development/> (“As any hip hop fan knows, creative appropriation of sound recordings—samples—are a fundamental building block of the genre.”).

⁷⁰ See *infra* Part III.A.

⁷¹ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 58 (2003) (“By discouraging copying, [copyright law] discourages the historically very important form of artistic creativity that consists of taking existing work and improving it.”).

⁷² See *supra* Part I.A.

the musical composition unless the taking is a permissible one, for example because it is licensed, *de minimis*, or fair use.⁷³

The risk that copyright will impede creativity is particularly acute for sampling because of the high potential damages in comparison to the value of the sample to the second artist and the great uncertainty surrounding which actions will lead to infringement. Peter Menell aptly explains the relevant portions of copyright's damages regime:

Copyright law's robust and highly discretionary infringement remedies compound the uncertainties surrounding copyright's limiting doctrines. As a result, cumulative creators must be extremely cautious in their use of copyrighted works. Even a small transgression can trigger injunctive relief barring distribution of the infringing work as well as substantial monetary damages. For works that are registered prior to infringement, copyright owners can seek either actual damages and disgorgement of profits, or statutory damages, which range from \$750 to \$30,000 per infringed work and up to \$150,000 per infringed work in the case of willful infringement. . . . Girl Talk "samples" twenty to thirty separate musical compositions and sound recordings, up to sixty copyrighted works in total, in a single mashup composition. By so doing, Gillis exposes himself to liability for 60 times the statutory damage range The potential liability is staggering. . . . [T]he minimum statutory damage award rises above \$10,000 per mashup composition.⁷⁴

This level of damages might be more appropriate if it was clear what constitutes infringement and fair use. Unfortunately, neither the *de minimis* test⁷⁵ nor the fair use analysis⁷⁶ are shining examples of clarity and predictability. The resulting uncertainty is only compounded by the arbitrary and capricious nature of enforcement by copyright owners.

Some artists can sample extensively without ever being sued. In many ways, Girl Talk—the stage name of Gregg Gillis—would be the dream defendant for copyright holders. He samples—without a license⁷⁷—dozens of works for each of his compositions—often long (minute plus) portions of hit songs—and his fans have even compiled

⁷³ See *supra* Part I.B.

⁷⁴ Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 470–71 (2016) (footnotes omitted).

⁷⁵ See *supra* notes 65–66.

⁷⁶ See *infra* note 240.

⁷⁷ See Luiz Augusto Buff, *Mash-Ups & Fair Use: Girl Talk*, MUSIC BUS. J., Dec. 2010, <http://www.thembj.org/2010/12/mash-ups-fair-use-girl-talk/> (“[Girl Talk], having planned to release the album [*All Day*] for free, decided to move forward without licensing a single track – not even the three-minute use of Black Sabbath’s *War Pigs* – claiming that his creations fit the guidelines of fair use.”).

a helpful list of where and when each sample occurs.⁷⁸ And yet there are no lawsuits against him. While his work is arguably fair use,⁷⁹ colorable claims to fair use provide no firm guarantee against lawsuits.⁸⁰ Rather, it appears that it is Girl Talk's high profile which has protected him from suit: any case against him could be a major public relations issue for the plaintiff and draw out top-notch lawyers willing to represent him for free.⁸¹

Other artists, even though they sampled much less, have not been so lucky. The Notorious B.I.G. song "Ready to Die" included a six-second sample from the Ohio Players' "Singing in the Morning." The jury imposed a punitive damages award of \$3.5 million (based on a state common law copyright claim) on a pre-interest compensatory damages award of \$366,939.⁸² While reduced on appeal,⁸³ the prospect of such damages is likely to have a chilling effect on sampling. Adding

⁷⁸ See *Tracklist / All Day*, ILLEGAL TRACKLIST, <http://www.illegal-tracklist.net/Tracklists/AllDay> (last modified Aug. 24, 2015) [<http://www.webcitation.org/6p1MYHANC>].

⁷⁹ See *supra* note 58 (summarizing arguments that Girl Talk's work is fair use).

⁸⁰ See, e.g., *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013) (upholding an award of attorney's fees to the defendant who prevailed on fair use because the plaintiff "should have known from the outset that its chances of success in this case were slim to none").

⁸¹ Joe Mullin, *Why The Music Industry Isn't Suing Mashup Star 'Girl Talk'*, GIGAOM (Nov. 16, 2010, 7:24 PM), <https://gigaom.com/2010/11/16/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/> (describing Girl Talk as "the most unappealing defendant imaginable"). The alternative explanation that the labels are not suing Girl Talk because he does not make any money—directly or indirectly—from his sampling seems implausible. While I found no reliable sources listing his income, Girl Talk has played hundreds of live shows. *Girl Talk*, SONGKICK, <http://www.songkick.com/artists/414005-girl-talk> (last visited May 10, 2017) (listing 581 past concerts). While it is not clear how much Girl Talk gets paid for these performances, live shows can be very lucrative for DJs. See Josh Eells, *Night Club Royale*, THE NEW YORKER, Sept. 30, 2013, at 41 (noting that some top electronic dance music artists—admittedly all bigger names than Girl Talk—earn between \$40,000 and \$300,000 per show at Steve Wynn's Las Vegas nightclubs). There are also various online retailers who sell Girl Talk branded merchandise such as T-shirts—though it is not obvious what cut, if any, Girl Talk receives from these. See, e.g., *Girl Talk Merchandise: All Products*, BACKSTREETMERCH.COM, <https://www.backstreetmerch.com/artist/girl-talk> (last visited June 26, 2017).

⁸² *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 475, 477 (6th Cir. 2007); Final Brief of Defendants/Appellants Bad Boy Entertainment, Inc. Itself & d/b/a Bad Boy Records, Bad Boy Records LLC, Janice Combs Publishing, Inc. d/b/a Justin Combs Publishing & UMG Recordings, Inc. Itself & Its Division Universal Records, at 18, *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470 (6th Cir. 2007) (No. 06-6294), 2007 WL 2261769.

⁸³ On remand, the district court set punitive damages at \$688,523. *Westbound Records, Inc. v. Justin Combs Pub., Inc.*, No. 3:05-0155, 2009 WL 943516, at *3 (M.D. Tenn. Apr. 3, 2009).

insult to injury, the parties were unable to agree on a license, so the song could no longer lawfully be sold in the form the artist intended.⁸⁴

An additional factor helps explain the negative effect copyright law has had on sampling and creativity: anti-sampling decisions like *Bridgeport*. The most prominent other such decision was *Grand Upright Music Ltd.*, which infamously opened with “[t]hou shalt not steal” and concluded with a referral to the U.S. Attorney for criminal prosecution of the samplers.⁸⁵ After determining that the sampling was unlicensed the court immediately determined that it must be illegal, without even mentioning the de minimis requirement, substantial similarity, or fair use.⁸⁶

Given this uncertainty over whether copyright owners will sue and who will prevail if they do, and given the high potential costs of losing—or even successfully defending⁸⁷—a sampling lawsuit, it is not surprising that many artists and labels have ceased unlicensed sampling. To help put this in context, it is necessary to first examine an earlier period, sometimes referred to as “the golden age of sampling,” which lasted roughly from 1987 to 1992.⁸⁸ This period was one of much greater freedom for samplers; the modern legal and administrative barriers to sampling did not yet exist.⁸⁹ One reason was simply that the broader music industry wasn’t paying much attention, which “gave many hip-hop artists the opportunity to make music exactly as they imagined it, without restrictions.”⁹⁰ Among the albums produced during this golden era is Paul’s Boutique by the Beastie Boys. The

⁸⁴ McLEOD & DiCOLA, *supra* note 1, at 31 (“[T]hus the only way *Ready to Die* could return to the legitimate marketplace was to remove the offending sample and completely remaster the album, an expensive proposition. . . . [T]he reworked version loses something aesthetically.”).

⁸⁵ *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183, 185 (S.D.N.Y. 1991).

⁸⁶ *Id.* at 183, 185 (stating that because defendants admitted sampling, “[t]he only issue, therefore, seems to be who owns the copyright to the [sampled] song”).

⁸⁷ See Menell, *supra* note 74, at 478 (“Copyright litigation is time-consuming, expensive, distracting, and risky.”).

⁸⁸ McLEOD & DiCOLA, *supra* note 1, at 19 (quoting producer and MC Mr. Lif as saying, “[t]he difference between hip-hop production in current times and in the 1980s during the golden era—it just allowed so much more freedom. Like, you didn’t think about, ‘You couldn’t sample this, or you couldn’t sample that.’”); see also Cox, *supra* note 22, at 227 (“This period of sample-intensive music from the late 1980s through 1991 has long been referred to as the Golden Age of sampling in hip-hop. However, this unparalleled age of musical enlightenment in the hip-hop community all screamed to a halt in December of 1991.”) (footnote omitted) (referring to *Grand Upright*).

⁸⁹ See McLEOD & DiCOLA, *supra* note 1, at 19–20 (describing how, in the “golden age,” artists simply sampled songs without asking). These barriers include the insistence on licensing nearly all samples, see *infra* note 101, and the transaction costs associated with this licensing, see *infra* notes 207–08 and accompanying text.

⁹⁰ McLEOD & DiCOLA, *supra* note 1, at 20.

album is notable as much for its critical acclaim—it is ranked #156 on *Rolling Stone*'s list of the greatest albums of all time⁹¹—as for the fact that it couldn't be profitably produced today. The album is presumed to contain between one hundred and three hundred samples, which would cost so much to license that even at a retail price of \$18.98 the artists would lose an estimated \$7.87 per copy sold (assuming just one hundred and twenty-five samples).⁹²

Changes in law and attitudes regarding sampling brought an end to this golden age of sampling and ushered in a new era where far more had to be licensed (especially after *Bridgeport*). Because of this, “sample-laden albums” cannot be made today—at least if they are to be distributed through “legitimate channels.”⁹³ Labels, understandably risk-averse, have been “much more likely to want to get clearances for everything.”⁹⁴ This clearance culture at times borders on the absurd. Posdnuos—a member of the hip hop group De La Soul—describes having a list of people they were not allowed to sample because the copyright holder was known to be litigious or to dislike rap.⁹⁵ Jay-Z's record label made him get clearance not because he sampled David Bowie “but because of the way Jay-Z uttered a single word” (Jay-Z's song “Takeover” included him rapping the word “FAAAAAAAME!” in a way that “imitate[d] the phrasing” of the same word in Bowie's “Fame”).⁹⁶

⁹¹ *500 Greatest Albums of All Time*, ROLLING STONE (May 31, 2012), <http://www.rollingstone.com/music/lists/500-greatest-albums-of-all-time-20120531/the-beastie-boys-pauls-boutique-20120524>.

⁹² McLEOD & DiCOLA, *supra* note 1, at 21, 208; *see also infra* notes 207–10 and accompanying text (describing the prohibitively high transaction costs of licensing).

⁹³ McLEOD & DiCOLA, *supra* note 1, at 28–29 (“By the 1990s, high costs, difficulties negotiating licenses, and outright refusals made it effectively impossible for certain kinds of music to be made legally, especially albums containing hundreds of fragments of sound within one album.”). Girl Talk appears to be a rare exception, owing only to the fact that no one has been willing to sue him so far. *See supra* notes 77–81 and accompanying text.

⁹⁴ *Id.* at 137 (quoting music lawyer Whitney Broussard, who was describing the environment for major labels). McLeod and DiCola attribute this “risk-averse stance” to “the wave of sampling lawsuits.” *Id.* Philo Farnsworth of Girl Talk's label Illegal Art concurs, stating that “[a]s it now stands, only a small number of artists will dare to release an album with uncleared samples.” *Id.* at 242. *See also* Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 125 (2007) (“Because of the lack of clear guidelines as to what must be licensed and what is de minimis or fair use, the current practice is to license any recognizable sample, regardless of how de minimis it is.”).

⁹⁵ McLEOD & DiCOLA, *supra* note 1, at 28; *see also* Brandes, *supra* note 94, at 124–25 (“Some artists, like The Beatles, Jefferson Airplane, and Pink Floyd, have strict no-sampling policies. Others refuse requests for samples because of the perceived controversial subject matter of the new song.” (footnote omitted)).

⁹⁶ McLEOD & DiCOLA, *supra* note 1, at 29.

While some of these changes are due to samplers no longer slipping under the radar like they used to, the key cause has been overly strict interpretations of copyright law.⁹⁷ *Bridgeport* in particular deserves much of the blame for this; the Sixth Circuit's decision allowed for legal challenges to works that previously were considered non-infringing.⁹⁸ Music lawyer Whitney Broussard describes the post-*Bridgeport* rule among major labels as "even if you can't hear a sample of the sound recording, you still have to clear it."⁹⁹ *Bridgeport* has had an "extraordinarily chilling" impact on the use of sampling in music,¹⁰⁰ which has impeded creativity.¹⁰¹

2. *The De Minimis Requirement as a Safety Valve*

Several safety valves help mitigate the threatening impact of copyright on creativity—and free speech more generally. These include the idea/expression dichotomy and fair use, which the Supreme Court has described as "traditional First Amendment safeguards."¹⁰² For musical compositions there is an additional safety valve: § 115's compulsory license allowing cover songs.¹⁰³ The de minimis requirement has a similar effect as these other protections: By removing sufficiently small takings from the scope of copyright, it helps ensure that future authors are able to create expressive works, even when they rely on previous ones, without infringing or undergoing the potentially

⁹⁷ See *id.* at 188 (quoting musicologist Lawrence Ferrara as saying, "[h]istorically, I think we are at a time where we're sampling less, and certainly copyright law had a major part in that").

⁹⁸ See *id.* at 31 ("The floodgates opened after *Bridgeport* with several high-profile lawsuits targeting classic hip-hop albums such as Notorious B.I.G.'s *Ready to Die* and Run-DMC's *Raising Hell*. Both of these albums, important contributors to hip-hop culture, were removed from record store shelves and from online vendors after copyright infringement suits were filed.").

⁹⁹ *Id.* at 142.

¹⁰⁰ *Id.* at 143 (quoting Lawrence Ferrara).

¹⁰¹ *Id.* at 139 (paraphrasing remarks of Eothen Alapatt of the independent label Stones Throw); Menell, *supra* note 74, at 479–80 ("But the reality of the licensing era meant constrained experimentation, higher entry costs (if an artist did not have a major label and a good attorney, it was difficult to get licensing requests answered), and many creative compromises."); Brandes, *supra* note 94, at 120 ("[A]s *Grand Upright* has done over the past fourteen years, the *Bridgeport* rule will inhibit artistic creativity and impede the progress of rap music."). *But see* Reilly, *supra* note 21, at 386–402 (arguing that *Bridgeport* will not impair creativity on the whole because it strengthens incentives to create new works that don't use samples). This counterargument seems weak for two reasons. First, there is no good evidence that the potential of unlicensed de minimis leads authors not to create either because of the foregone revenues from licensing those samples or because the artists have moral or creative objections to such sampling. Second, the Note has collected extensive evidence that the requirement to license all samples, even de minimis ones, has significant negative effects on many forms of musical creativity.

¹⁰² *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

¹⁰³ 17 U.S.C. § 115 (2012) (establishing a compulsory license that allows cover songs).

costly licensing process. In many cases, even a small sample will be enough to serve the purposes of the sampler—be it to conjure up the feeling of another time or artist, to comment on an earlier work, or simply to recontextualize and build on earlier expression.

Sampling has emerged as a fundamental building block of musical creativity.¹⁰⁴ The de minimis requirement protects this basic tool in cases where the taking does no cognizable harm to the interests of the original artist.¹⁰⁵ It would go too far to say that “allowing copyright protection for every note in a sound recording would stifle creativity in music just as much as allowing a writer copyright protection for every letter of the alphabet he uses in writing a novel would stifle creativity in literature.”¹⁰⁶ After all, writing a book without letters would be a much harder task than writing a song without samples. But the analogy does illustrate, even if in an exaggerated fashion, what removing the ability to sample would imply for genres that rely heavily on it. However, for the de minimis requirement to be effective in protecting creativity, it must be a nationwide rule. Otherwise, samplers and associated parties could be at risk of lawsuit in a jurisdiction that does not recognize the de minimis requirement for sound recordings.¹⁰⁷ That is, some plaintiffs could choose to sue in the Sixth Circuit

¹⁰⁴ See *supra* notes 29–34 and accompanying text (describing sampling’s role as a creative tool for musicians).

¹⁰⁵ This idea of a de minimis taking not harming the original artist’s interests is not part of the de minimis test itself. Rather, it emerges as a consequence of what is required for a taking to qualify as de minimis. Takings that are short, especially when they do not go to the core of the original work, are poor substitutes for the original, and so generally will not implicate the economic interests of the original artist. Sampling may even boost the market for the original. See *infra* notes 249–53 and accompanying text. Some take a broader view of an artist’s interests to include control over how their work is used, in line with European ideas of moral rights. But Congress has declined to accept this conception of an artist’s rights as applied to music. See 17 U.S.C. § 106A(a) (2012) (limiting moral rights protections to works of “visual art”); 17 U.S.C. § 115 (allowing cover songs without permission from the copyright holder).

¹⁰⁶ Jennifer R. R. Mueller, Note, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 457 (2006).

¹⁰⁷ See Samantha M. Basso, Note, *When National Law Means Regional Law: A Look at the Non-Uniformity of Copyright Law and How the Federal Circuit Can Help*, 21 FED. CIR. B.J. 355, 380 (2012) (“[A] more cohesive copyright law will discourage costly and inefficient forum shopping, which can easily occur in copyright cases because venue might properly lie in every federal district court in the country.”) (internal quotation omitted). Cf. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016) (“[W]e take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit’s contrary holding in *Bridgeport*. We do so only after careful reflection because . . . ‘the creation of a circuit split would be particularly troublesome in the realm of copyright. Creating inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.’”) (quoting *Seven Arts Filmed Entertainment Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1256 (9th Cir. 2013)).

solely to take advantage of *Bridgeport*'s plaintiff-friendly rule.¹⁰⁸ Thus, samplers potentially subject to suit there must act as if the *Bridgeport* rule was a nationwide one, even though the majority of courts to consider the question have rejected *Bridgeport*.¹⁰⁹

II

CIRCUIT SPLIT

A. Bridgeport

The first case in this circuit split begins—and ends—with overkill. Four related plaintiffs brought suit against approximately 800 defendants, alleging almost 500 counts of copyright infringement and assorted state law claims.¹¹⁰ The district court severed these—thankfully—into 476 separate actions, including *Bridgeport Music, Inc. v. Dimension Films*.¹¹¹

Bridgeport presented a crisp factual setup. Plaintiff Westbound held the sound recording copyright for “Get Off Your Ass and Jam” (“Get Off”), which was written by George Clinton for Funkadelic.¹¹² The song opens with a four-second electric guitar riff made up of three notes—an arpeggiated chord¹¹³—which the district court described as “a high-pitched, whirling sound that captures the listener’s attention and creates anticipation of what is to follow.”¹¹⁴ In a surprising twist, the group never learned who played this riff—the guitarist simply came into the studio and offered to play.¹¹⁵ Impressed by the performance, George Clinton doubled their agreed upon fee to \$50, after which they never saw him again.¹¹⁶ If the Sixth Circuit was aware of this, they made no mention of it in the opinion.

From that four-second riff, N.W.A. sampled two seconds of the sound recording for use in the rap song “100 Miles and Runnin’”

¹⁰⁸ The *Bridgeport* rule is currently confined to the Sixth Circuit. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d at 881.

¹⁰⁹ *Id.* at 886 (“Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to apply *Bridgeport*’s rule.”) (collecting cases).

¹¹⁰ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005).

¹¹¹ *Id.*

¹¹² *Id.* at 796; Jeff Giles, *George Clinton Shares the Mystery Behind One of Funkadelic’s Greatest Guitar Solos*, *ULTIMATE CLASSIC ROCK* (Oct. 20, 2014, 12:27 PM), <http://ultimateclassicrock.com/funkadelic-get-off-your-ass-and-jam-solo/>.

¹¹³ *Bridgeport*, 410 F.3d at 796.

¹¹⁴ *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002), *rev’d*, 383 F.3d 390 (6th Cir. 2004), *republished as modified on reh’g*, 401 F.3d 647 (6th Cir. 2004), *amended on reh’g*, 410 F.3d 792 (6th Cir. 2005), *and rev’d*, 401 F.3d 647 (6th Cir. 2004), *and amended on reh’g*, 410 F.3d 792 (6th Cir. 2005).

¹¹⁵ Giles, *supra* note 112.

¹¹⁶ *Id.* (“I tried to find the guy and put him on another song, but he was gone. He never resurfaced.”) (quoting George Clinton).

(“100 Miles”), which was later included in the sound track for defendant No Limit Films’ movie *I Got the Hook Up*.¹¹⁷ Based on the testimony of plaintiffs’ expert, N.W.A. lowered the pitch of the sample and looped it.¹¹⁸ The resulting sample was about seven seconds long and appeared in “100 Miles” a total of five times.¹¹⁹

The district court found that this copying did “not rise to the level of a legally cognizable appropriation” and granted summary judgment to the defendant.¹²⁰ Because there was “no dispute” that “100 Miles” sampled plaintiffs’ work, and because Bridgeport had licensed the musical composition, the issue on appeal was limited to Westbound’s claim that the de minimis inquiry does not apply when a defendant admits that they sampled a sound recording.¹²¹

The Sixth Circuit agreed with Westbound, finding that “a sound recording owner has the exclusive right to ‘sample’ his own recording.”¹²² Specifically, it held that “no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”¹²³ Under this rule, a defendant is liable as long as plaintiff holds a valid copyright—meaning, among other things, that the recording must be original—in the sound recording and the defendant in fact sampled plaintiff’s work. The court thus reversed the entry of

¹¹⁷ *Bridgeport*, 410 F.3d at 796; *Judge Sides with No Limit Films in Copyright Suit*, BILLBOARD (Oct. 22, 2002), <http://www.billboard.com/articles/news/73750/judge-sides-with-no-limit-films-in-copyright-suit>.

¹¹⁸ *Bridgeport*, 410 F.3d at 796.

¹¹⁹ *Id.*

¹²⁰ *Bridgeport*, 230 F. Supp. 2d at 841 (finding that this was true under both a “quantitative/qualitative de minimis analysis” and the “fragmented literal similarity” analysis). The district court found “no reasonable jury, even one familiar with the works of George Clinton (the author of ‘Get Off’), would recognize the source of the sample without having been told of its source.” *Id.* at 842. Both songs are available at the website WhoSampled, which includes the ability to jump to the location of the original riff and one of the modified samples. N.W.A.’s “100 Miles and Runnin’ Sample of Funkadelic’s ‘Get Off Your Ass and Jam,’” WHOSAMPLED, <http://www.whosampled.com/sample/35629/N.W.A-100-Miles-and-Runnin'-Funkadelic-Get-Off-Your-Ass-and-Jam/> (last visited Feb. 8, 2017). While it is not hard to hear evidence of sampling when listening specifically for it (especially at 1:52 of “100 Miles”), the district court’s conclusion seems accurate.

¹²¹ *Bridgeport*, 410 F.3d at 796, 798. For clarity, it was N.W.A., not the defendant No Limit Films, who did the sampling; No Limit Films was liable because they included “100 Miles” in the sound track for *I Got the Hook Up*. However, the court writes at times as if it was No Limit Films that sampled “Get Off,” a convention I follow here for the sake of conforming with the issues as the court presented them. Nothing in the court’s decision turns on this phrasing.

¹²² *Id.* at 801.

¹²³ *Id.* at 798.

summary judgment and remanded for a consideration of whether defendant's copying was fair use.¹²⁴

While Part III will more fully discuss and critically evaluate the Sixth Circuit's reasoning, it is worth briefly summarizing the key arguments the court made. The main interpretive argument turned on the presence of the word "entirely" in 17 U.S.C. § 114(b):

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.¹²⁵

From this, and because the word "entirely" was added several years after the original statute establishing copyright in sound recordings was passed, the court concluded that any sample automatically violates the exclusive rights of the copyright holder, without reference to a de minimis test or substantial similarity.¹²⁶ The court's statutory argument on this point is relatively conclusory,¹²⁷ but at its core is based on the flawed inference that a failure to meet the § 114(b) exception necessarily means that the exclusive reproduction right of § 106(1) has been violated.¹²⁸ This line of argument presupposes its conclusion: The argument only works if § 114(b) is the sole exception to the reproduction right, which means that § 114(b) must have impliedly eliminated all other limitations on the reproduction right, including the traditional de minimis requirement. As Part III explains, that reading ignores both the statutory structure and the legislative history.

Following this, the court gave a variety of policy arguments in favor of this interpretation. First, the court argued that this rule—"[g]et a license or do not sample"—lends itself to easy enforcement with no need to resort to the "mental, musicological, and technolog-

¹²⁴ *Id.* at 805. The case settled without a decision on fair use.

¹²⁵ 17 U.S.C. § 114(b) (2012) (emphasis added). Subsections 106(1) and 106(2) are the reproduction and the derivative work rights, respectively. *See* 17 U.S.C. § 106.

¹²⁶ *Bridgeport*, 410 F.3d at 798, 800.

¹²⁷ "The balance that was struck was to give sound recording copyright holders the exclusive 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.' 17 U.S.C. § 114(b). This means that the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made. That leads us directly to the issue in this case. If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole. Our answer to that question is in the negative." *Id.* at 800 (footnotes omitted).

¹²⁸ *See infra* notes 169–71 and accompanying text.

ical gymnastics” allegedly required for a de minimis analysis.¹²⁹ The court insisted, though, that this was mainly about making things cheaper for the music industry, not easier for judges.¹³⁰

Second, the court argued that automatically treating samples as infringing would not stifle creative output. The primary rationale for this was market based: The “market will control the license price and keep it within bounds” because they have no incentive to set the license fee higher than the cost of recreating the sound.¹³¹

The court also offered several other reasons for its conclusion. First, it noted that many artists and record companies seek “licenses as a matter of course.”¹³² Second, it noted that the rule would not affect sampling of pre-1972 sound recordings, which are not subject to copyright.¹³³ Third, the court postulated that many artists would simply continue to sample without a license, either because of a theory of “live and let live” under which “today’s sampler is tomorrow’s samplee” or because they will violate the law and “take their chances.”¹³⁴

The court’s third set of arguments for this bright-line rule focused on the nature of the infringing act. This was the part of the decision—other than statutory interpretation—designed to answer a critical question: Why should there be a de minimis requirement for musical compositions (and other types of copyrightable works) but not for sound recordings? The court tries to distinguish sampling from other types of copying by saying that “sampling is never accidental,”¹³⁵ implicitly drawing a contrast with cases where liability was predicated on a theory that one creator subconsciously copied another’s work.¹³⁶

¹²⁹ *Bridgeport*, 410 F.3d at 801–02 (“This case also illustrates the kind of mental, musicological, and technological gymnastics that would have to be employed if one were to adopt a de minimis or substantial similarity analysis.”).

¹³⁰ *Id.* at 802 (“[C]onsiderations of judicial economy are not what drives this opinion. If any consideration of economy is involved it is that of the music industry. . . . [I]t would appear to be cheaper to license than to litigate.”).

¹³¹ *Id.* at 801. Recreating the sound would not violate the sound recording copyright. It could, however, violate the musical composition copyright; even the Sixth Circuit appears to agree that there is a de minimis requirement for that type of work. *Id.* (“This analysis admittedly raises the question of why one should, without infringing, be able to take three notes from a musical composition, for example, but not three notes by way of sampling from a sound recording. Why is there no de minimis taking . . .”).

¹³² *Id.* at 804.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 801 (“When you sample a sound recording you know you are taking another’s work product.”). Infringement might be accidental, however. For example, someone may have a good faith, but mistaken, belief that a sound recording is in the public domain or that they have properly licensed it.

¹³⁶ See *ABKCO Music, Inc. v. Harrison’s Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983) (holding that “copyright infringement can be subconscious”). The case upheld a finding that George Harrison was liable for infringement given the unique nature of the songs, the

It also argues that “even when a small part of a sound recording is sampled, the part taken is something of value.”¹³⁷ And because sampling takes the sounds themselves rather than some more abstracted idea of the song, sampling “is a physical taking rather than an intellectual one.”¹³⁸ As discussed in Part III, none of these arguments are sufficiently persuasive.

B. VMG Salsoul

While the two seconds sampled in *Bridgeport*¹³⁹ seems small, that sample is an order of magnitude larger than the amount sampled in *VMG Salsoul, LLC v. Ciccone*: 0.23 seconds.¹⁴⁰ That snippet of sound was a “horn hit”—specifically a four-note chord with a quarter-note duration—played mostly by trombones and trumpets.¹⁴¹ The horn hit originated in “Ooh I Love It (Love Break)” (“Love Break”), a disco-rap song by The Salsoul Orchestra, which was recorded by Shep Pettibone.¹⁴² Pettibone later produced Madonna’s dance hit “Vogue.”¹⁴³ Plaintiff VMG Salsoul sued Pettibone, Madonna, and others, alleging defendants sampled this horn hit.¹⁴⁴

Based on testimony by VMG Salsoul’s expert, the version of the horn hit used in “Vogue” was higher pitch, truncated, and overlaid with other effects.¹⁴⁵ The court noted that the “horn hits are not isolated sounds,” indeed, “[m]any other instruments are playing at the same time in both” songs.¹⁴⁶ Two main versions of the horn hit occur in each song: a single horn hit lasting one quarter-note, and a double horn hit, in which the horn hit is played first for an eighth-note and

“striking” similarity, and Harrison’s acknowledgment that he had heard plaintiff’s song several times. *Id.* at 998–99.

¹³⁷ *Bridgeport*, 410 F.3d at 801–02 (“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.”).

¹³⁸ *Id.* at 802.

¹³⁹ *Id.* at 796.

¹⁴⁰ 824 F.3d 871, 874 (9th Cir. 2016).

¹⁴¹ *Id.* at 875.

¹⁴² *Id.*; Robbie Daw, *Madonna, Producer Shep Pettibone Off the Hook with “Vogue” Copyright Lawsuit*, IDOLATOR (June 2, 2016, 2:34 PM), <http://www.idolator.com/7635486/madonna-producer-shep-pettibone-vogue-copyright-lawsuit>.

¹⁴³ *VMG Salsoul*, 824 F.3d at 874.

¹⁴⁴ While defendants disputed that sampling occurred, because the Ninth Circuit was ruling on their motion for summary judgment, the court assumed that defendants sampled “Love Break.” *Id.* at 877.

¹⁴⁵ *Id.* at 879–80.

¹⁴⁶ *Id.* at 879.

immediately after for a quarter-note.¹⁴⁷ Both appear frequently throughout each song.¹⁴⁸

The district court granted defendants' motion for summary judgment on two grounds. First, it held that the sound recording—and the underlying musical composition—allegedly sampled was not original.¹⁴⁹ In the alternative, it held that any copying was *de minimis*.¹⁵⁰

On appeal, the Ninth Circuit affirmed the district court and held that any alleged sampling was *de minimis*.¹⁵¹ In doing so, it noted that “[p]laintiff’s primary expert originally misidentified the source of the sampled double horn hit.”¹⁵² The expert’s original report said that both the single and double horn hits were sampled from “Love Break.”¹⁵³ Only after finding the original tracks and listening to the horn hits in isolation did the expert realize his mistake and conclude that defendant sampled only the single horn hit and then used that to create the double horn hit.¹⁵⁴ As the court noted, if “a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied” and was unable to do so accurately, then surely an “average audience” could do no better.¹⁵⁵

¹⁴⁷ *Id.* at 875–76. There is also a “breakdown” version in “Vogue.” *Id.* at 876 & n.4 (“The record does not appear to disclose the meaning of a ‘breakdown’ version of the horn hit, and neither party attributes any significance to this form of the horn hit.”).

¹⁴⁸ The sampling was allegedly from the “instrumental” version of “Love Break,” which contains twenty-seven single horn hits and twenty-three double horn hits in a pattern. *Id.* at 875. There are two versions of “Vogue.” In the “radio edit” version, the single horn hit occurs five times, the double horn hit occurs fifteen times, and the breakdown version appears five times. In the “compilation version,” the single horn hit occurs five times and the double horn hit occurs twenty-five times. *Id.* at 876. Both versions of “Vogue” use a different pattern of horn hits than does “Love Break.” *Compare id.* at 875, *with id.* at 876.

¹⁴⁹ *VMG Salsoul, LLC v. Ciccone*, No. CV 12-05967, 2013 WL 8600435, at *5 (C.D. Cal. Nov. 18, 2013), *aff’d in part, vacated in part*, 824 F.3d 871 (9th Cir. 2016).

¹⁵⁰ *Id.* at *12 (“[N]o reasonable audience would find the sampled portions qualitatively or quantitatively significant in relation to the infringing work, nor would they recognize the appropriation.”). Both recordings, with the locations of some of the horn hits marked, are available on WhoSampled. *Madonna’s “Vogue” Sample of The Salsoul Orchestra’s “Ooh, I Love It (Love Break)”*, WHO SAMPLED, [http://www.whosampled.com/sample/26512/Madonna-Vogue-The-Salsoul-Orchestra-Ooh-I-Love-It-\(Love-Break\)/](http://www.whosampled.com/sample/26512/Madonna-Vogue-The-Salsoul-Orchestra-Ooh-I-Love-It-(Love-Break)/) (last visited June 18, 2017). The horn hits in “Vogue” sound noticeably different from the ones in “Love Break.” Neither is particularly distinctive.

¹⁵¹ *VMG Salsoul*, 824 F.3d at 880. The court also found that any infringement of the musical composition copyright was *de minimis*. *Id.* at 879 (“[A] reasonable jury could not conclude that an average audience would recognize the appropriation of the composition.”). The court did not reach the issue of originality. *Id.* at 878 n.6.

¹⁵² *Id.* at 880.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

The court turned next to plaintiff's argument that infringement automatically occurs whenever someone copies, without authorization, a copyrighted sound recording. Because I agree with the important parts of the court's reasoning, I reference it below in Part III rather than reproduce it here.

III

THE DE MINIMIS REQUIREMENT SHOULD APPLY TO THE SAMPLING OF SOUND RECORDINGS

The Ninth Circuit's reading of the statute—that “the ‘de minimis’ exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions”¹⁵⁶—is the correct interpretation for three reasons. First, it better comports with the language and structure of the Copyright Act than does the Sixth Circuit's holding that “no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”¹⁵⁷ Second, the legislative history favors the Ninth Circuit's reading. And third, preserving the de minimis requirement will better promote creativity and the other goals of copyright than the Sixth Circuit's interpretation would.

A. *Why Do We Have Copyright?*

The Copyright Act, like other statutes, should be interpreted in light of its purposes.¹⁵⁸ That is particularly relevant here for two reasons. First, rather than giving an unqualified grant of power to establish copyright law, the Constitution gives Congress that power “[t]o promote the Progress of Science and useful Arts.”¹⁵⁹ Second, copyright regulates rapidly evolving areas of society—technology and culture—which supports placing more weight on its general purposes when text written decades ago fails to provide clear answers.¹⁶⁰ Therefore, it is necessary to briefly examine the purposes of copyright law.

¹⁵⁶ *Id.* at 874.

¹⁵⁷ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005).

¹⁵⁸ See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (“As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.”).

¹⁵⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁶⁰ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”). The last major revision to the Copyright Act was in 1976. See *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RESEARCH LIBRARIES, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline> (last visited June 18, 2017).

“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”¹⁶¹ Under this utilitarian approach, copyright protections are justified only to the extent that they promote the creation of new works. If copyright is too weak, then there may be insufficient economic incentive to create new works.¹⁶² But when copyright protection is excessive, the result is the suppression of creativity: The greater the extent of copyright, the less later artists are allowed to do.¹⁶³ Copyright law thus aims to strike a balance between these two risks.¹⁶⁴

When it comes to the sampling of relatively minor portions of sound recordings,¹⁶⁵ however, the danger of insufficient copyright has far less weight. The core justification for copyright is that without it, copies will drive originals from the market by undercutting them on price. This is possible because the copyist does not bear the fixed costs of the initial creation and so can price the copy closer to the marginal cost (the cost of producing one additional copy) than the original cre-

¹⁶¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8); *accord Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“[T]he primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors.”).

¹⁶² See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 292–93 (1996) (footnote omitted) (“[W]ithout copyright, only authors unconcerned with monetary remuneration would produce creative expression and only publishers with no need for financial return would invest in selecting, packaging, marketing, and making such expression available to the public. Without copyright, creative expression would likely be both underproduced and, no less importantly, underdisseminated.”). There are, of course, many reasons to create music and other works besides monetary rewards, such as a desire to communicate ideas or to share your art.

¹⁶³ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) (“Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective.”); Netanel, *supra* note 162, at 294 (noting that excessive copyright risks “chilling discourse and cultural advancement, thus defeating copyright’s essential democratic purpose”).

¹⁶⁴ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (noting that copyright requires balancing “the interests of authors . . . in the control and exploitation of their writings . . . on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand”).

¹⁶⁵ Because this Note focuses on the de minimis requirement, it is not necessary to consider the impact of sampling that is clearly not de minimis. This sometimes occurs in the mashup genre. Mashups “rely entirely on sampled sources to construct musical collages,” for example by “superimposing a vocal track from one recording onto the instrumental track of another.” Menell, *supra* note 74, at 452–53 (“[Girl Talk’s] sample of Beyoncé’s ‘Single Ladies (Put a Ring on It)’ in ‘That’s Right’ is even more cavalier. The section beginning at 2:44 and running for 70 seconds appropriates the heart of Beyoncé’s hit song with relatively little embellishment.”). Such a sample may be fair use because of its transformative nature, see *supra* note 58 and accompanying text, but there is no colorable claim that the taking is a de minimis one.

ator can.¹⁶⁶ However, this is a threat only when the copy can *substitute* for the original. When song B samples plausibly *de minimis* portions from song A, it is unlikely to be a substitute for song A,¹⁶⁷ especially in cases of cross-genre sampling. As a result, the other half of the copyright balance—the risk that excessive copyright protection will impede the creation of new works—takes on much greater relative importance.

B. Statutory Text and Structure

The Ninth Circuit's reading of the Copyright Act—that the *de minimis* requirement applies to sound recordings as to other types of works—better reflects the text and structure of the Copyright Act than does the Sixth Circuit's literal reading. The Sixth Circuit's statutory argument hinges on the word “entirely” in § 114(b), which states that the reproduction and derivative work rights “do not extend to the making or duplication of another sound recording that consists

¹⁶⁶ See Netanel, *supra* note 162, at 292 (footnote omitted) (“Copyright protection is necessary because, in its absence, unbridled competition from free riders who are able to copy and distribute the work without paying copyright royalties would drive the price for user access to its near-zero marginal cost. This free rider problem, in turn, would greatly impair author and publisher ability to recover their fixed production costs.”).

¹⁶⁷ Such samples will necessarily only take a small amount of the original and so are unlikely to cause any noticeable market harm to the primary market (the market for the original sound recording itself). *Cf.* Authors Guild v. Google, Inc., 804 F.3d 202, 224 (2d Cir. 2015) (“Snippet view . . . produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.”). There is one complication. Even if unlicensed *de minimis* sampling causes no harm to the primary market for the original sound recording, it could potentially harm the derivative market—that is, the market for licensed samples. The importance of this depends on what proportion of the expected revenue from a sound recording comes from licensing of plausibly *de minimis* samples. This harm can exist even though the underlying sampling may be fair use, because the current scope of sample licensing likely goes beyond what is strictly legally required. *See supra* notes 93–101 and accompanying text. However, it is unclear to what degree courts would treat this as a legitimate harm—the Second Circuit, in particular, has found that in some contexts, harm to the copyright owner because of an inability to license works for transformative purposes (which includes at least some sampling) does not count in the market harm analysis of fair use's fourth factor. “Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (“In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.’” (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 n.11 (2d Cir. 1998))). However, this may not have much weight when it comes to sampling because of the existence of a market—problematic as it may be—for samples. *See Castle Rock*, 150 F.3d at 146 n.11 (“[C]opyright owners may not preempt exploitation of transformative markets, which they would not in general develop or license others to develop” (internal quotation marks omitted)).

entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”¹⁶⁸ While the statutory structure further belies this argument, no more than a straightforward reading is necessary to reveal the Sixth Circuit’s error.

The court reasoned that the failure to meet the exception in § 114(b) necessarily means that the copyright was infringed.¹⁶⁹ Stated this way, the court’s error becomes apparent. There are plenty of reasons why a given taking would not infringe the copyright—for example because the taking is a *de minimis* one or the resulting work is not substantially similar. The issue is thus whether § 114(b) *eliminates* the traditional prerequisites to a finding of copyright infringement, including the *de minimis* requirement which “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.”¹⁷⁰ That Congress created a *new* exception for sound recordings is not evidence that it intended to eliminate the *existing* one.¹⁷¹ As that intent is not evident in the text,¹⁷² it must come from elsewhere for the Sixth Circuit to be correct.

¹⁶⁸ 17 U.S.C. § 114(b) (2012) (emphasis added).

¹⁶⁹ See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016) (“In effect, *Bridgeport* inferred from the fact that ‘exclusive rights . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds,’ the conclusion that exclusive rights do extend to the making of another sound recording that does not consist entirely of an independent fixation of other sounds.”) (citation omitted) (alteration in original).

¹⁷⁰ *Wis. Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

¹⁷¹ See *VMG Salsoul*, 824 F.3d at 884 (“A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional.”).

¹⁷² See 4 NIMMER & NIMMER, *supra* note 46, § 13.03 (“[T]he quoted sentence contains no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law—which, for decades prior to adoption of the 1976 Act and unceasingly in the decades since, has included the requirement of substantial similarity.”). Section 101’s definition of sound recordings also gives no indication that Congress intended to eliminate the *de minimis* requirement. See 17 U.S.C. § 101 (2012) (“‘Sound recordings’ are works that result 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.”); *VMG Salsoul*, 824 F.3d at 882 (“[N]othing in the neutrally worded statutory definition of ‘sound recordings’ suggests that Congress intended to eliminate the *de minimis* exception.”). Likewise, nothing in 17 U.S.C. § 106, which defines the types of exclusive rights held by the copyright holder, “suggests differential treatment of *de minimis* copying of sound recordings.” *Id.* While § 106(6) does single out sound recordings for special treatment as regards

Neither the statutory structure nor the legislative history support that inference. First, § 102, which lists the types of works eligible for copyright protection, gives no indication that sound recordings are to be treated differently.¹⁷³ Second, the very provision the Sixth Circuit uses to expand the exclusive rights of copyright owners (the result of eliminating the *de minimis* requirement) is part of a group of *limitations* of those rights. Each sentence in § 114(b) expressly limits the copyright owner's rights, which makes reading an implicit expansion of those rights into that provision quite a stretch.¹⁷⁴ The legislative history confirms this structural point that § 114 is intended to limit, not expand, the copyright owner's rights.¹⁷⁵

A natural question then is whether the word “entirely” adds anything to § 114(b) or instead is mere surplusage. If the Ninth Circuit's interpretation did in fact render the word “entirely” redundant, that would be a strike—though not by any means a dispositive one—against that interpretation.¹⁷⁶ But without the word “entirely,” § 114(b) is ambiguous:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists [] of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.¹⁷⁷

This variation on the statute is subject to a pair of possible readings. The first is the same as the Ninth Circuit's reading of the actual statute (with the word “entirely”): A sound recording that is composed of

performance “by means of a digital audio transmission,” 17 U.S.C. § 106(6), “nothing in its text bears on *de minimis* copying.” *VMG Salsoul*, 824 F.3d at 882.

¹⁷³ See 17 U.S.C. § 102 (a simple list of categories); see also *VMG Salsoul*, 824 F.3d at 881–82 (stating that this provision “treats sound recordings identically to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works”).

¹⁷⁴ See *id.* at 883 (“Like all the other sentences in § 114(b), the third sentence imposes an express *limitation* on the rights of a copyright holder . . . We ordinarily would hesitate to read an implicit expansion of rights into Congress's statement of an express limitation on rights. Given the considerable background of consistent application of the *de minimis* exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule.”).

¹⁷⁵ See H.R. REP. NO. 94-1476, at 61 (1976) (“The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow.”).

¹⁷⁶ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) (“While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.”); see also *Begay v. United States*, 553 U.S. 137, 153 (2008) (Scalia, J., concurring) (“In any event, the canon against surplusage merely helps decide between competing permissible interpretations of an ambiguous statute; it does not sanction writing in a requirement that Congress neglected to think of.”).

¹⁷⁷ 17 U.S.C. § 114(b) (2012) (replacing “entirely” with brackets).

nothing but “independent fixation[s] of other sounds” does not infringe the copyright of a sound recording it merely imitates.¹⁷⁸ The second, and admittedly less persuasive, reading is that a sound recording that combines samples of a copyrighted sound recording with the “independent fixation of other sounds” necessarily does not infringe.¹⁷⁹ While it is not particularly likely that a court would have adopted this second interpretation, adding the word “entirely” helps to clarify Congress’s intent, and thus it is not mere surplusage.

And even if this second reading is not plausible, the surplusage argument still provides no support for the Sixth Circuit’s interpretation. If, following the first reading above, the word “entirely” is to be read into the statute on the basis that it is implied by the word “consists,” the Sixth Circuit’s argument is equally (un)persuasive with or without the word “entirely” being in the text. That is, the Sixth Circuit’s argument does not really build off of the word “entirely” itself, but rather off of the supposed inference that a failure to qualify for an exception per se indicates a violation of the underlying rule.¹⁸⁰ As a result, the canon against surplusage provides no substantial support for the Sixth Circuit’s interpretation.

Thus, based on the statutory text and structure, the correct reading of § 114(b) is that mimicking a copyrighted sound recording does not infringe the sound recording copyright¹⁸¹ and *only* that, i.e. it does not impliedly eliminate the de minimis requirement for sound recordings. Of course, that mimicking may infringe the copyright in the musical composition.

C. *Legislative History*

If the Copyright Act is ambiguous regarding whether the de minimis requirement applies to sound recordings, then a court may

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* notes 169–71 and accompanying text.

¹⁸¹ Both the Sixth Circuit and the Ninth Circuit agree that mimicking a copyright sound recording does not infringe the copyright in the sound recording (though it may infringe the copyright in the musical composition). Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 & n.8 (6th Cir. 2005) (noting that “the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made” subject to the caveat that “in the case of a recording of a musical composition the imitator would have to clear with the holder of the composition copyright”), with *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016) (“A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying.”). *Bridgeport’s* caveat is overstated, the use might be de minimis or qualify as fair use—even the Sixth Circuit appears to concede that the de minimis requirement applies to musical compositions. See *supra* note 131.

consult legislative history in interpreting the Act.¹⁸² The Sixth Circuit was quick to dismiss the use of legislative history here on the grounds that it would be “of little help because digital sampling wasn’t being done in 1971,”¹⁸³ the year that Congress adopted federal copyright protection for sound recordings.¹⁸⁴ That assertion is of questionable relevance¹⁸⁵: There was at least some sampling—just not digital—being done by that point.¹⁸⁶ Indeed, what is arguably the first sampling lawsuit occurred in 1956.¹⁸⁷ In any case, the argument is by no means a knockout blow against using legislative history, though it may caution against over reliance.¹⁸⁸ While it does not appear that Congress specifically considered musical sampling, its general goals can shed light on how courts should interpret the statute. Congress’s purpose was clear: not to prevent unlicensed sampling but rather to prevent the “widespread unauthorized reproduction of phonograph

¹⁸² See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”).

¹⁸³ *Bridgeport*, 410 F.3d at 805. To the extent that this is true, it argues for placing greater weight on policy reasoning. See *supra* note 160 and accompanying text.

¹⁸⁴ See Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

¹⁸⁵ See 4 NIMMER & NIMMER, *supra* note 46, § 13.03, at n.114.16 (“Although the panel was obviously correct that digital sampling was not practiced in the 1970s, it overlooked the fact there was no bar under contemporaneous technology from choosing either to recapture an entire sound recording or only a portion. Accordingly, it is eminently sensible to consult the legislative history . . .”).

¹⁸⁶ The Mellotron, which appears to be the first tool for sampling, was invented in the late 1940s. *History*, THE MAGICAL MELLOTRON, <http://paris.cs.wayne.edu/~ay8235/works.html> (last modified Aug. 22, 2013) (“Essentially, the Mellotron is a giant tape playback machine.”) [<https://web.archive.org/web/20121218161807/>]. By allowing musicians to incorporate pre-recorded sounds into their works, it was “in effect, an early sampler.” JEFFREY SPAULDING & SAHARA GISNASH, CAREER BUILDING THROUGH DIGITAL SAMPLING AND REMIXING 5 (2008); see also THE MAGICAL MELLOTRON, *supra* (“These recordings can be of anything, from individual instruments to sections to people singing to rhythms—the only limitation is that each sample may only last between seven and eight seconds.”).

¹⁸⁷ “Within popular music, the earliest example of quoting directly from a sound recording was Bill Buchanan and Dickie Goodman’s 1956 hit ‘The Flying Saucer’” which featured a “fake radio announcer who is interrupted by short fragments from pop songs” written by stars like Fats Domino and Elvis. McLEOD & DiCOLA, *supra* note 1, at 38–39 (noting that “[t]he record sold over a million copies” and led to multiple copyright lawsuits); see also Michael Jack Kirby, *Buchanan and Goodman*, WAY BACK ATTACK, <http://www.waybackattack.com/buchananandgoodman.html> (last visited June 23, 2017) (identifying both legal threats leading to settlement and a lawsuit as occurring in 1956).

¹⁸⁸ Cf. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016) (“[T]he state of technology is irrelevant to interpreting Congress’ intent as to statutory structure.”).

records and tapes” by “so-called ‘record pirates.’”¹⁸⁹ The effects of wholesale commercial piracy are at best minimally relevant to the debate over de minimis sampling: Congress’s key concern—preventing artists from losing revenue due to competition with record pirates¹⁹⁰—does not apply to plausibly de minimis sampling because the sampling works do not compete with the original.¹⁹¹

While the legislative history for the 1971 amendment does not specifically mention the de minimis requirement, there is evidence that Congress intended for this standard threshold test to apply for sound recordings. The House Report for the general revision of copyright law in 1976 states that “infringement takes place whenever *all or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced.”¹⁹² This fits with Congress being concerned about wholesale piracy, not sampling. This “all or any substantial portion of” language is inconsistent with a supposed Congressional intent of protecting artists from unlicensed sampling, especially unlicensed de minimis sampling.

Nor does Congress’s failure to explicitly overturn *Bridgeport* provide much support for the Sixth Circuit’s holding.¹⁹³ This is doubly so given that numerous district courts have rejected *Bridgeport*, which makes Congressional silence somewhat ambiguous.¹⁹⁴

¹⁸⁹ H.R. REP. NO. 92-487, at 2 (1971). The focus on wholesale piracy as opposed to sampling is clear. *See id.* (“While it is difficult to establish the exact volume or dollar value of current piracy activity, it is estimated by reliable trade sources that the annual volume of such piracy is now in excess of \$100 million.”); Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. REV. 261, 278 (2006) (“[T]he legislative history of section 114 . . . suggests that the purpose behind the section was to prevent compilers from creating pirated music albums or ‘greatest hits’ compilations without the consent of the initial recorder.”).

¹⁹⁰ *See* H.R. REP. NO. 92-487, at 2 (“The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties . . .”).

¹⁹¹ *See infra* notes 248–54 and accompanying text.

¹⁹² H.R. REP. NO. 94-1476, at 106 (1976) (emphasis added); *see also* *VMG Salsoul*, 824 F.3d at 884 (“[W]hen enacting [§ 114(b)], Congress clearly understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works. In sum, the statutory text, confirmed by the legislative history, reveals that Congress intended to maintain the de minimis exception for copyrighted sound recordings.”).

¹⁹³ The plaintiff in *VMG Salsoul* raised this argument. The Ninth Circuit quickly dismissed it, noting that “congressional inaction in the face of a judicial statutory interpretation, even with respect to the Supreme Court’s own decisions affecting the entire nation, carries almost no weight.” *VMG Salsoul*, 824 F.3d at 886. For this proposition the court cited *Alexander v. Sandoval*, which stated that “[i]t is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the Court’s statutory interpretation.” 532 U.S. 275, 292 (2001) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

¹⁹⁴ *VMG Salsoul*, 824 F.3d at 887.

Lastly, as a general matter, the impact of the *Bridgeport* rule is to grant broader protection—with respect to the reproduction right—to holders of copyrights in sound recordings as opposed to other types of works, which are not protected against de minimis copying. This result is inconsistent with Congress’s desire to “not grant [sound recordings] any broader rights than are accorded to other copyright proprietors.”¹⁹⁵ While the proper weight to be given to legislative history can be debated, it is clear that Congress did not intend to eliminate the de minimis requirement for sound recordings. The Sixth Circuit’s decision is thus particularly troubling because the de minimis requirement, as noted above, “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.”¹⁹⁶

D. Policy

The rule adopted in *VMG Salsoul*—that the de minimis requirement applies to sound recordings, just as it does for other types of copyrightable works—is also the superior outcome on policy grounds. Most importantly, it is more likely to promote musical creativity and the production of new works than *Bridgeport*’s harsh alternative. The general reasons for this are addressed in Part I.D above. This section elaborates on that argument by showing why the alternatives to the unlicensed sampling of de minimis portions of sound recordings are insufficient. It then addresses arguments supporting *Bridgeport*’s rule and finds them ultimately unpersuasive.

1. Alternatives to Unlicensed Sampling Fall Short

Bridgeport’s strict rule—“[g]et a license or do not sample”¹⁹⁷—would not pose a significant barrier to creativity¹⁹⁸ and the production of new works if the alternatives were sufficient. Unfortunately, in many cases, none of the other options—recreating the sound, licensing the sound recording, or using samples from public domain or pre-1972 sound recordings—are adequate substitutes to unlicensed de minimis sampling of copyrighted sound recordings.

¹⁹⁵ H.R. REP. NO. 92-487, at 7 (1971) (noting that Act creates a “limited copyright”).

¹⁹⁶ *Wis. Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992); *see also VMG Salsoul*, 824 F.3d at 883 (“Given the considerable background of consistent application of the de minimis exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule.”).

¹⁹⁷ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

¹⁹⁸ As discussed in Part I.A, sampling is often an important part of musical creativity; making sampling harder means reducing the number of avenues for creative expression.

a. Recreating the Sound

Sometimes it will be true that, as the Sixth Circuit wrote, “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.”¹⁹⁹ But that will often be impractical or insufficient. Recreating sounds in a studio can be very expensive compared to sampling software, which can run from free to several hundred dollars.²⁰⁰ By contrast, “generating a single sample could cost some \$2000 for just two session musicians,”²⁰¹ restricting the creativity of less-established artists.²⁰²

Even for artists who can afford to recreate the original, there is no guarantee that this will be an adequate substitute for the sample. The sound of a well-known guitar riff is not just the sound of a generic guitar playing certain notes; the impact on the listener—especially the ability to conjure up the original—depends on the particular instru-

¹⁹⁹ *Bridgeport*, 410 F.3d at 801. While any such recreation of the sound would potentially violate the copyright in the musical composition, that is true of sampling as well. Thus, in either case there would need to be some reason the recreation does not infringe the musical composition copyright. That might be because: the composition is not original (even if the sound recording is); the infringement is de minimis; the second author licensed the composition; or the taking is fair use. Because the musical composition copyright and sound record copyright are often held by different owners, see *supra* note 41 and accompanying text, this does not affect the transaction costs argument, see *infra* notes 207–10 and accompanying text, as there is likely to be little overlap between the transaction costs incurred licensing the musical composition and those incurred licensing the sound recording.

²⁰⁰ See *The Best Music Sampling Software*, BEST SOFTWARE REVIEW (Sept. 23, 2016), <https://www.bestsoftwarereview.org/best-sampling-software/> (listing six options from \$99 to \$599); Mark V, *15 Free Music Production Software Programs*, HIPHOPMAKERS (Aug. 19, 2014), <http://hiphopmakers.com/free-music-production-software> (listing several free software programs capable of sampling).

²⁰¹ Ashtar, *supra* note 21, at 308 (noting that “[p]rofessional studio rates range from between \$50–80 per hour and musicians require \$600 per session”). Given that artists may want to use more than one recreation in a song, and that any one recreation may involve multiple instruments, the costs can easily go far beyond what many amateur and lower-budget professionals can afford. This may be true even if the specific estimate Ashtar uses is too high. See, e.g., *Drum Tracks by Nate Barnes (Rose Hill Drive, Mary Chapin Carpenter, Ryan Bingham) for \$110*, AIRGIGS, <https://www.airgigs.com/online-drum-sessions/4476/Drum-Tracks-By-Nate-Barnes> [<http://www.webcitation.org/6oUk07avh>] (offering three takes plus two revisions for a drum track for \$110).

²⁰² See Chris Richards, Opinion, *The Court Case That Changed Hip-hop—From Public Enemy to Kanye—Forever*, WASH. POST (July 6, 2012), https://www.washingtonpost.com/opinions/the-court-case-that-changed-hip-hop—from-public-enemy-to-kanye—forever/2012/07/06/gJQAVWr0RW_story.html (“Jay-Z and Kanye can afford to pay the sample rates, but not the kids starting out in their own little home studio in their house And that, to me, is what’s holding back creativity.”) (quoting Hank Shocklee, producer for Public Enemy).

ment, gear, and acoustics of the recording space.²⁰³ And “recreating” lyrics by singing them is a poor substitute for sampling.²⁰⁴

Even if the sound recording can be reproduced with sufficient fidelity to sound like the original, reproducing the sound means losing the artistic value of appropriation.²⁰⁵ Even wealthy artists then may be unable to achieve through reproduction what they could through sampling. And for artists of all resource levels, the greater difficulty of reproducing sounds rather than sampling them impairs the creative process and deprives the public of works they could have had but for unjustified limitations on sampling.

b. Licensing

Unable to recreate the sound with sufficient fidelity and cost efficiency, the second artist might try to license the sound recording instead. The Sixth Circuit endorsed this, saying it would be viable because “the market will control the license price and keep it within bounds.”²⁰⁶ This optimism is, unfortunately, misplaced. Because of high transaction costs and the lack of meaningful competition, the market for sample licenses does not function well.

Transaction costs make licensing samples far more expensive than it would be otherwise and call into question the efficiency of the

²⁰³ See Ashtar, *supra* note 21, at 307 (“Interpolating is a demanding process, as the right musicians and equipment must be attained for each sound involved. . . . Furthermore, the gear needs to correspond to the particular sound for faithful renditions, such as period microphones, outboards, amplifiers, and instruments. Beyond these crucial components, the acoustics of the physical recording space are often difficult to recreate—Stax Records sessions, for instance, were held in a modestly-converted abandoned movie theatre.” (footnote omitted); see also Azran, *supra* note 21, at 79 (“Unfortunately, the replayed, non-sampling version often fails to achieve the aesthetics of the original, sampling version.”).

²⁰⁴ See Ashtar, *supra* note 21, at 307 (asking “how are distinctive voices to be convincingly replicated?”).

²⁰⁵ See *id.* at 308 (“[T]here is artistic value to the act of incorporating the original recording, akin to Picasso’s and Braque’s use of contemporary newspapers in their collages.”); Azran, *supra* note 21, at 79 (“Because hip-hop began as an appropriative art form, the sample aesthetic is likely to enhance the work’s cultural cachet, thus increasing its expressive value. In other words, there is value in the subversive quality intrinsic in a work which borrows from another.”); cf. McLEOD & DiCOLA, *supra* note 1, at 101 (arguing that the claim that samplers should instead just recreate the sound “misses the point, because many feel that there is aesthetic value and shared cultural resonance in using a particular sound recording”); McLEOD & DiCOLA, *supra* note 1, at 191 (“[W]hen you can’t sample, I think it definitely loses a big part of what hip-hop is.”) (quoting Trugoy of De La Soul).

²⁰⁶ *Bridgeport*, 410 F.3d at 801 (“The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample . . .”).

market for samples.²⁰⁷ Licensing requires navigating an “ad hoc network of artists, music attorneys, sample clearinghouses . . . , and record labels” “oriented toward sample-by-sample negotiations” in order to track down the owners of the two copyrights for each sample, and then negotiating with each one.²⁰⁸ The transaction costs alone can run “a few thousand dollars” per license per sample,²⁰⁹ which may be far higher than the costs of actually creating the album.²¹⁰

The second problem with the market for samples licenses is the monopoly issue—for any given sample, there is only one seller. Samples are generally not interchangeable. If you want to conjure up “Oh, Pretty Woman,” you won’t have much success with another rock ballad; you need the actual source material.²¹¹ And because “[i]t is typically necessary for artists to create the sampled works before buying licenses for the samples used,” it isn’t practical for an artist to shop around for the cheapest sample of X type.²¹² Once the artist has

²⁰⁷ See Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1608 (1982) (“When the transaction costs outweigh the net benefits that the parties would otherwise anticipate from a transfer, then the presence of the transaction costs may block an otherwise desirable shift in resource use.”); cf. McLEOD & DiCOLA, *supra* note 1, at 160 (“[I]n a relatively small market like the market for samples, prices might not be reasonable or economically efficient. It’s possible that distortions, such as the concentration of record-label ownership, allow copyright owners to overcharge for samples.”) (footnote omitted).

²⁰⁸ See Drew B. Hollander, Note, “Why Can’t We Be Friends?: How Congress Can Work with the Private Sector to Solve the “Digital Sampling Conundrum,” 18 VA. J.L. & TECH. 229, 250 (2014) (“Licensing therefore involves locating multiple rights holders, any one of which possesses unilateral veto power over clearance.”); see *infra* note 213 and accompanying text. On top of these are the costs of hiring attorneys or a sample clearance agency. See McLEOD & DiCOLA, *supra* note 1, at 165 (citing one such professional as charging \$500 for each clearance involved in simple cases, and thousands in more difficult ones).

²⁰⁹ McLEOD & DiCOLA, *supra* note 1, at 182 (quoting music lawyer Whitney Broussard). Licensing each sample requires at least a license for the sound recording and the musical composition. But when the sampled work itself samples earlier works, industry norms say that those earlier works must be licensed too, even if they aren’t included in the portion sampled. See *id.* at 182 (“But if one counts the songs within songs embedded in the full version of the Deee-lite song—as the current licensing system requires one to do—the already-absurd number of licenses that Gillis and his label have to acquire would multiply further beyond reason.”).

²¹⁰ See *The Un-Authorized, Un-Official Story*, 2MANYDJS, <http://web.archive.org/web/20061030122456/http://www.2manydjs.com/v2/story.htm> (last visited Feb. 25, 2017) (describing how an album that took seven days to make required “more than six months of hard labour, 865 e-mails, 160 faxes and hundreds of phone calls” to attempt to license “187 different tracks[,] from which 114 got approved, 62 refused and 11 were un-trackable”).

²¹¹ Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994) (“When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”).

²¹² See Azran, *supra* note 21, at 77 (“It does not make sense for the appropriation musician to pay for a license before knowing how the finished song will sound. In addition, for licensors to assess how much they will charge, they need to hear the finished song in

written the song with a given sample, they have little bargaining power and few options: They can pay whatever the copyright holder demands; risk a lawsuit; or abandon or rewrite the song.²¹³

The result should not be surprising. Market failures—combined with an insistence on licensing far more samples than artists used to²¹⁴—have led to excessive costs that curtail creativity and artistic expression. As one scholar puts it: “[S]ample licensing across the rap, hip hop, and mashup genres reveals tremendous transaction costs and market distortions.”²¹⁵ These costs can make it unviable to commercially release certain forms of music—forcing musicians to choose between: dropping the sample (possibly hurting the finished product); disguising the sample and/or taking the chance that they won’t be sued; or releasing non-commercially, through underground outlets, or by doing only live performances.²¹⁶ And because advances are often required to sample,²¹⁷ “only larger organizations with more cash on hand can afford them.”²¹⁸

The case of *Paul’s Boutique*, the critically acclaimed Beastie Boys album containing an estimated 100 to 300 samples,²¹⁹ helps illustrate this. Due to the high costs of licensing and the insistence on licensing even the most minor samples, the album would not be commercially viable today. With the help of a music lawyer, McLeod and DiCola made a table of the estimated costs to license sound recordings and

order to determine how much of the original sample is incorporated into the new work. Thus, appropriation musicians first find the samples that they want to use and then compose the new song.”); accord McLEOD & DiCOLA, *supra* note 1, at 119 (“[M]ost licensors want to hear the song before they grant permission, because they understandably want to have some input.”).

²¹³ See Azran, *supra* note 21, at 77 (“This situation places the licensee at a disadvantage . . . [T]he licensee has already invested time and money into creating a new song. The prospect of losing out on those sunk costs gives the licensor greater bargaining power, and allows him to extract a higher fee than he otherwise might have secured.”). Some artists are unwilling to allow samples of their works, or refuse to license for use in certain types of music, see *supra* note 95 and accompanying text, in which case the artist’s options are even more limited.

²¹⁴ See *supra* notes 97–100 and accompanying text.

²¹⁵ Menell, *supra* note 74, at 504.

²¹⁶ See McLEOD & DiCOLA, *supra* note 1, at 194–98. “Creating a sample-based work live in concert (i.e., mixing the music live, in real time) without sample licenses implicates” the public performance right of the musical composition (the public performance right for sound recordings is limited to digital audio transmissions) and potentially the derivative work right. See *id.* at 298 n.8. These licenses may be cheaper, and some venues have blanket licenses that would cover this. See *id.* at 198, 298 n.9.

²¹⁷ See *id.* at 159 (“[M]any sample licenses require an advance—instead of, or even in addition to, a royalty payment . . .”).

²¹⁸ *Id.* at 159 (“It has literally knocked the smaller artists out of the game altogether. Only the ones who are very, very well off can afford to sample anymore.”) (quoting sample clearance expert Pat Shanahan).

²¹⁹ See *supra* notes 91–92 and accompanying text.

musical compositions based on the popularity of the sampled artist and how extensively the sampling work uses the sample.²²⁰ For example, licensing a sound recording from a medium-profile artist would cost \$2500, or \$.01/copy, if the sample's role in the new work was small. If the sampled artist was a superstar, that would be \$100,000, or \$.15/copy.²²¹

McLeod and DiCola started with 125 identifiable samples on the album and classified each based on their table (using the royalty rate rather than a flat fee).²²² The resulting “conservative estimate” shows that the Beastie Boys would, given the actual sales of the album, end up losing \$19.8 million.²²³ Nor would selling more solve this. In fact, each sale would throw the artists deeper into debt. Given a retail price of \$18.98, McLeod and DiCola estimate the authors would receive \$2.10 per copy sold, before licensing costs.²²⁴ Licensing the sound recording copyrights alone would cost \$5.92 per album, while licensing the musical composition copyrights would cost an additional \$4.15 per album, for a total loss per album of \$7.87.²²⁵

The authors reach a similar result for Public Enemy's *Fear of a Black Planet*. They estimate this album uses eighty-one samples and would result in a net loss to the artist per album sold, before transaction costs, of \$4.47.²²⁶ Indeed, the “long-planned reissue[]” of *Fear of a Black Planet* is “sitting on the record company's shelf because they couldn't successfully get all the permissions needed for the expanded deluxe editions—which count as ‘new release[s]’” that would need

²²⁰ See McLEOD & DiCOLA, *supra* note 1, at 204–05.

²²¹ *Id.* at 205 tbl.2. For the musical composition, sampling would cost \$4000 or 10% ownership of the musical composition copyright if the sampled artist had a medium-profile and the sampling work made only a minor use of the sample. See *id.* If the sampled artist was a superstar, the typical cost would be 100% ownership of the musical composition. *Id.*

²²² See *id.* at 204–06 (“To turn the royalty share for musical compositions copyrights into dollars, we multiplied by the statutory rate of \$0.091 . . .”).

²²³ *Id.* at 209–10. This figure includes \$125,000 in transaction costs (250 copyrights at \$500 each). The authors give three reasons why the expected costs (and thus loss) in practice would likely be higher. First, they used only “easily identifiable samples”; the artists confirmed that there were others not included. *Id.* at 210–11. Second, they “assumed that all sampled artists were contacted *before* the album's release to achieve the lowest fee possible.” *Id.* at 211. And third, they “assumed a minimum of transaction costs by simply applying a \$500 fee per license as might be charged by a sample clearance house rather than factor in all the costs incurred when copyright holders are difficult to find, when they ‘hold out,’ and so on.” *Id.* While concluding that the estimate was likely to be lower than it would actually cost today, McLeod and DiCola do note that it is possible that some copyright holders would have waived the fee or given a bulk rate, and also that it could have been cheaper (given the album's sales) if some of the licenses had been for a flat fee rather than a per-copy royalty. *Id.*

²²⁴ *Id.* at 208 tbl.4.

²²⁵ *Id.* at 208 tbl.4 (before transaction costs).

²²⁶ *Id.* at 207 tbl.3 (again using an artist's share before licensing costs of \$2.10).

new licenses.²²⁷ The high costs of licensing have thus made an entire type of music commercially unviable,²²⁸ and curtailed the ability of less well-funded musicians to include just a few licensed samples on their albums. While a de minimis requirement is no magic bullet, by removing the need to license some samples, it would help enable this kind of sample-heavy music. It would also shift bargaining power towards samplers to the extent that they could credibly threaten to use only a de minimis part of a sample instead of a greater amount.

Nor has the music industry proven willing to deal with this through blanket or standardized licensing.²²⁹ While such licensing exists in some areas of music licensing—for example in public performance rights²³⁰—that kind of efficient structure does not exist for sampling. Despite the existence of sample clearinghouses, “[a]ll sample clearances are handled on a case-by-case basis and they all have to be negotiated.”²³¹ The resulting negotiations take into account many factors unique to each sample, including its length, importance to the original work and to the new work, and the popularity of the sampler and the original artist.²³² This in turn increases the transaction costs of licensing.

c. Sampling Unprotected Works

Finally, an artist might try to avoid these issues by sampling sound recordings not covered by copyright law. They may use public domain works, or sample snippets lacking sufficient originality to receive copyright protection.²³³ They might also, as the Sixth Circuit suggests, rely solely on pre-1972 sound recordings, which are not cov-

²²⁷ *Id.* at 213.

²²⁸ *Id.* at 212 (“[W]e conclude that various aspects of the licensing system—law, business practices, cost—have made at least some forms of musical collage totally impractical.”); *see also id.* at 28–29 (“By the 1990s, high costs, difficulties negotiating licenses, and outright refusals made it effectively impossible for certain kinds of music to be made legally, especially albums containing hundreds of fragments of sound within one album.”).

²²⁹ One reason for this may be that it would entail copyright holders (who may or may not be the original artist) giving up control over when someone else can use their work.

²³⁰ *See Music in the Marketplace*, AM. SOC’Y OF COMPOSERS, AUTHORS, & PUBLISHERS, <https://www.ascap.com/-/media/BCF785E6949646D7899FC54B7C39F20D.pdf> (last visited Mar. 12, 2017) (“A blanket license permits the license holder to perform any or all the works in the performing rights organization’s repertory.”).

²³¹ McLEOD & DiCOLA, *supra* note 1, at 149 (quoting music attorney Shoshana Zisk).

²³² *Id.* at 149, 154.

²³³ *See* Adrienne K. Goss, *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI.-KENT L. REV. 963, 969 (2007) (“[A]ll ‘original works of authorship fixed in any tangible medium of expression’ are automatically protected [A] creator who wanted to allow public use of a work would have to expressly disclaim rights.”) (footnote omitted) (quoting 17 U.S.C. § 102(a) (2012)).

ered by federal copyright law.²³⁴ This is an insufficient solution to the problems created by requiring licensing of de minimis samples. Such works are likely to represent only a small slice of current popular music. As a result, reliance solely on this option would leave samplers less able to create compelling works that comment on or criticize aspects of contemporary culture, and would also impair the continuing ability of artists to reference or build on other works.²³⁵

2. *The Arguments Supporting Bridgeport Are Unpersuasive*

Bridgeport offers a variety of policy arguments to support its holding that “no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”²³⁶ None of these are sufficiently persuasive to make this rule desirable given its negative impact on creativity.

At first glance, the Sixth Circuit’s argument that its bright-line rule will be more predictable and easier to implement than the de minimis or substantial similarity inquiry appears accurate: holding that an act infringes in 100% of circumstances rather than only some of the time is simpler.²³⁷ But the court fails to consider what happens next. When an act of sampling is found to be de minimis, the analysis ends immediately. However, a finding that a sample is infringing leads not to a conclusion but rather a fair use analysis (assuming defendants raise the issue).²³⁸ Fair use “requires a fact-intensive and context-specific evaluation”²³⁹ and is infamously unpredictable.²⁴⁰ There is thus a

²³⁴ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 (6th Cir. 2005). As the court recognizes, these recordings may still be subject to state copyright regimes or common law protections. See *id.* at 804 n.20.

²³⁵ See *supra* notes 25–34 and accompanying text.

²³⁶ *Bridgeport*, 410 F.3d at 798.

²³⁷ See *supra* notes 129–30 and accompanying text.

²³⁸ See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997) (“[T]he fair use defense involves a careful examination of many factors, often confronting courts with a perplexing task. If the allegedly infringing work makes such a quantitatively insubstantial use of the copyrighted work as to fall below the threshold required for actionable copying, it makes more sense to reject the claim on that basis and find no infringement, rather than undertake an elaborate fair use analysis in order to uphold a defense.”); Azran, *supra* note 21, at 106 (noting that the *Bridgeport* rule means the “court will have to conduct a four-prong fair use analysis instead of applying the much simpler de minimis doctrine”).

²³⁹ *Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325, 330 (S.D.N.Y. 2015).

²⁴⁰ See Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 564 (2016) (“[S]cholars ha[ve] routinely lamented [fair use] as so ‘impossible to predict’ that it was ‘useless.’ As Larry Lessig put it succinctly in 2004, ‘fair use in America simply means the right to hire a lawyer.’ Indeed, one scholar has termed fair use ‘one of the most intractable and complex problems in all of law.’”) (footnote omitted). Adler notes that “[o]ther scholars have pushed back on the claim that fair use is incoherent and unpredictable” but

tradeoff²⁴¹: The *Bridgeport* rule means X fewer de minimis and substantial similarity inquiries, but Y more fair use inquiries (with X>Y). Because fair use appears to be the costlier and less predictable of these inquiries,²⁴² the net result of the *Bridgeport* rule is likely to be higher litigation costs and greater uncertainty.

Nor is fair use—the third factor of which looks at “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”²⁴³—likely to be sufficiently protective of artists’ ability to sample small portions of another’s sound recordings.²⁴⁴ Courts place too little weight on this factor for that to occur.²⁴⁵ As one scholar notes, fair use is “too costly and risky to use” in the sampling context.²⁴⁶ Instead, even a “quantifiably insignificant” sample might

rejects this at least as applied to the visual arts, arguing that the result of recent cases involving “several of the biggest art stars” has been “differing and capricious outcomes.” *Id.* at 564–66.

²⁴¹ This analysis assumes the number of lawsuits remains constant. There are two main influences on that number. First, the *Bridgeport* rule appears to have led to less sampling, and thus fewer possible lawsuits. *See supra* notes 97–100. Second, because the *Bridgeport* rule makes it easier for plaintiffs to prevail, it may increase the number of lawsuits, even if defendants are more willing to settle given the unfavorable change in law. It is not obvious which influence predominates. Sykes identifies another possible tradeoff: Because the *Bridgeport* rule only applies when defendants *concede* the fact of sampling, it is possible that defendants will deny sampling and force a potentially expensive substantial similarity analysis with expert testimony on that issue, rather than conceding the issue. *See* Sykes, *supra* note 38, at 776 (arguing that this would lead to a “more inefficient allocation of resources”).

²⁴² *See supra* notes 238–40. This is not to say that the de minimis inquiry is necessarily a simple one. *See supra* note 66 and accompanying text. Both inquiries are often resolved on motions for summary judgment. *Compare* Cromer, *supra* note 189, at 273 (“Despite isolated decisions to the contrary, the question of de minimis copying can be resolved by the trial court on summary judgment, even though the amount copied is a question of fact.”) (footnote omitted) with Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 485 (2010) (“Today, fair use is nearly always decided on summary judgment.”).

²⁴³ 17 U.S.C. § 107(3) (2012).

²⁴⁴ *See* Cromer, *supra* note 189, at 291 (“[T]his third factor has not been a reliable way to permit second-comers to incorporate a quantifiably insignificant amount of a copyrighted work into a later work.”). *But see* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 611 (2d Cir. 2006) (“In total, the images account for less than one-fifth of one percent of the book. . . . [W]e are aware of no case where such an insignificant taking was found to be an unfair use of original materials.”).

²⁴⁵ *See* Cromer, *supra* note 189, at 291 (“[T]he quadruplicate nature of the fair use defense dissuades a court from considering any one factor alone to negate a finding of infringement. . . . [C]ourts have readily acknowledged that they contribute less significance to the third factor as related to the other three factors of the fair use test.”).

²⁴⁶ Menell, *supra* note 74, at 510. Music lawyer Whitney Broussard concurs, saying that “fair use is a noble concept, but as a business strategy it’s really, really weak. . . . You really can’t rely on that for business purposes.” McLEOD & DiCOLA, *supra* note 1, at 239.

not be fair use if “the portion of the work used is qualitatively significant.”²⁴⁷

It would be easy to defend the *Bridgeport* rule if sampling discouraged creativity by other artists, perhaps because songs containing samples of their works substitute for the original and thus compete with them in the marketplace. The available evidence weighs against this conclusion.²⁴⁸ First, when a plausibly de minimis amount is taken, it is unlikely to substitute for the original simply because it will need to be either quite short or not take the heart of the original.²⁴⁹ Second, cross-genre sampling is especially unlikely to substitute for the original. Third, sampling can increase the popularity of the sampled work, sometimes even putting the older work back on the top of the charts.²⁵⁰ Indeed, a recent empirical study shows that sampling may actually increase sales of the original.²⁵¹ The study compared sales in the year before and the year after the release of Girl Talk’s album *All Day* for 237 of the songs sampled (songs for which data was available that were expected to peak in popularity at least 30 months before the release of *All Day*).²⁵² It found that “the average sampled song sold over 1300 more copies in the year following the release of *All Day* than the year preceding,” an increase of 3.2%.²⁵³ The study provides

²⁴⁷ Cromer, *supra* note 189, at 291.

²⁴⁸ See David Mongillo, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, 9 U. PITT. J. TECH. L. & POL’Y 1, 31 (2009) (“[I]t is unlikely that music consumers who are interested in buying an original song that Girl Talk samples will turn to Girl Talk as a substitute. . . . [C]ustomers do not buy Girl Talk albums because they want to hear any of the particular samples in isolation, but because they want to hear how the samples are combined into a new whole.”).

²⁴⁹ That is, a sample that is both quantitatively and qualitatively significant will not be de minimis.

²⁵⁰ See Melissa Hahn, *Digital Music Sampling and Copyright Policy—A Bittersweet Symphony? Assessing the Continued Legality of Music Sampling in the United Kingdom, the Netherlands, and the United States*, 34 GA. J. INT’L & COMP. L. 713, 716 (2006) (“[T]here are many instances where the use of a sampled song can be instrumental to the success of both artists For example, when Eminem sampled Dido’s song ‘Thank You’—on his single ‘Stan,’ both artists’ albums topped the music charts, and Dido credited Eminem for introducing her album to a much broader audience.”) (footnotes omitted).

²⁵¹ See Schuster, *supra* note 3, at 445.

²⁵² The album contained 374 samples. Schuster was unable to get sales data for some, *id.* at 466, and the others were excluded because they either hit their peak on the Billboard Hot 100 within the 30 months before the release of *All Day* or were otherwise released recently enough that they could be expected to peak within those 30 months. *See id.* at 470 (“It is a near tautology that a song will have its greatest sales when it is highest on the Charts. A song that was high on the Charts at (or shortly before) the time that *All Day* was released would almost necessarily see a drop in sales from the peak Chart entry during the relevant time period of this study. Such a drop in sales is irrelevant to the Market Effect Consideration in this investigation”).

²⁵³ *Id.* at 474. This finding is statistically significant at the 92.5% level. *Id.* (“Restated, if 237 songs (the size of this sample set) were randomly selected and their respective sales

some evidence that sampling is unlikely to harm the market for the original. Indeed, because many of Girl Talk's samples are much longer than what would plausibly be *de minimis*,²⁵⁴ if sampling has a negative effect on the sales of the original, this effect would likely be stronger for Girl Talk's samples than for the plausibly *de minimis* samples—because the greater length makes them more plausible substitutes. Though by the same token, a *de minimis* taking is unlikely to boost the market for the original by much.

The Sixth Circuit's distinguishing between intellectual takings and physical takings—with physical takings necessarily involving the taking of “something of value” because the sounds themselves are sampled—is likewise unpersuasive.²⁵⁵ Physical takings also occur for other types of copyrightable works, and yet the *de minimis* requirement still applies.²⁵⁶ In addition, “something of value” will always be taken when one author uses the expression of another, physical taking or not.²⁵⁷ It is thus hard to find a meaningful reason to distinguish these types of takings besides that in the case of a physical taking the *labor* of the artist was taken—a proposition in tension with *Feist*'s rejection of the “sweat of the brow” theory of copyright.²⁵⁸ And even

numbers for the two one-year time periods studied, an increase in sales of this magnitude, or possibly greater, would only be seen approximately 7.5% of the time.”).

²⁵⁴ See *id.* at 467 (finding that the average length of a sample on *All Day* was thirty-seven seconds, based on the 263 samples for which data was available).

²⁵⁵ *Bridgeport*, 410 F.3d at 801–02 (“[E]ven when a small part of a sound recording is sampled, the part taken is something of value. . . . It is a physical taking rather than an intellectual one.”).

²⁵⁶ *VMG Salsoul*, 824 F.3d at 885 (“[T]he possibility of a ‘physical taking’ exists with respect to other kinds of artistic works as well, such as photographs, as to which the usual *de minimis* rule applies. A computer program can, for instance, ‘sample’ a piece of one photograph and insert it into another photograph or work of art.”).

²⁵⁷ Even without physically taking a part of the copyrighted work, the second author still gains by either “sav[ing] costs”—because they have a pre-existing template—or by “adding something to the new” work—for example, some particularly compelling part of the earlier work's expression or a new layer of meaning through the appropriative act—the same things *Bridgeport* uses to justify its rule for “physical takings.” *Bridgeport*, 410 F.3d at 802. The Ninth Circuit rejects *Bridgeport*'s physical takings for a somewhat opposite reason—not that all takings involve something of value, but rather that truly *de minimis* takings, even when physical, don't:

The reason for the [*de minimis*] rule is that the plaintiff's legally protected interest [is] the potential financial return from his compositions which derive from the lay public's approbation of his efforts. If the public does not recognize the appropriation, then the copier has not benefitted from the original artist's expressive content. Accordingly, there is no infringement.

VMG Salsoul, 824 F.3d at 881 (citation and internal quotation omitted) (second alteration in original).

²⁵⁸ See *VMG Salsoul*, 824 F.3d at 885 (rejecting, on the basis of *Feist*, *Bridgeport*'s distinction between physical and intellectual takings); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–53 (1991) (rejecting the “sweat of the brow” theory which saw copyright as “a reward for . . . hard work”).

if a distinction between physical and intellectual takings is useful and sound, that does not mean Congress actually intended a different rule for physical takings.²⁵⁹

CONCLUSION

The Sixth Circuit's holding in *Bridgeport* that the de minimis requirement does not apply when defendants admit they sampled a copyrighted sound recording has helped to usher in a music industry culture with an obsessive focus on licensing even the smallest fragments of songs. The result has been to stifle musical creativity and to deprive society of valuable works.

If that holding was the correct interpretation of the statute, then recourse could only be had via Congress. But as this Note makes clear, *Bridgeport* rests on a flawed reading of the Copyright Act. And because the Ninth Circuit in *VMG Salsoul* recognized that Congress did not eliminate the de minimis requirement for sound recordings, there is a circuit split which presents an opportunity for the Supreme Court to step in and right *Bridgeport's* wrong.

Doing so would not fix all the problems in the modern world of sample licensing—nor would it remove all the existing unjustified barriers to creativity—but it would help. It would also promote the purposes of copyright by removing an important barrier to musical creativity without noticeably affecting the incentives to create—because works that are even arguably de minimis are no substitute for the original. The de minimis requirement is a powerful safety valve that helps ensure copyright's exclusive monopolies do not unduly constrain later artists. For no other type of work are the protections of copyright unchecked by the de minimis requirement. It is time to restore that state of affairs for sound recordings on a nationwide scale, thus helping to ensure that artists can use this “fundamental building block”²⁶⁰ without an excessively costly and inefficient licensing regime standing in their way.

²⁵⁹ *VMG Salsoul*, 824 F.3d at 885 (“[E]ven accepting the premise that sound recordings differ qualitatively from other copyrighted works and therefore *could warrant* a different infringement rule, that theoretical difference does not mean that Congress *actually adopted* a different rule.”).

²⁶⁰ See *supra* note 69 and accompanying text.