

# UIC REVIEW OF INTELLECTUAL PROPERTY LAW



## MUSIC SAMPLING AND THE DE MINIMIS DEFENSE: A COPYRIGHT LAW STANDARD

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### ABSTRACT

Did that song sound familiar? Part of it might have been sampled. Music sampling, the process of cutting and inserting part of an older recording into a new one, is a common but controversial practice in the music industry. Young artists without recording equipment of their own, and even big recording studios looking to save time, can easily sample a clip to place in their new song. While some artists obtain licenses for their samples, many do not, much to the ire of copyright holders. The Sixth Circuit has ruled that all unlicensed music sampling is automatic copyright infringement, creating the bright line rule: “Get a license, or do not sample.” However, this rule has not proved popular. The Ninth Circuit recently split with the Sixth Circuit on this issue, holding that traditional copyright analysis of substantial similarity and overcoming a *de minimis* defense applies to music sampling, as it does for any other copyrighted work. This comment examines the two circuit decisions and asserts that the Ninth Circuit took the correct approach. It also suggests an industry solution for obtaining sampling licenses, rather than the standard congressional or judicial resolution.

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ADAM BALDWIN\*

I. INTRODUCTION

During the summer of 2019, “Old Town Road” by Lil Nas X set the Billboard Hot 100 record for longest running number one song in Billboard History.<sup>1</sup> The song was self-produced without a record label, and gained popularity from heavy promotion by the artist through the app TikTok.<sup>2</sup> It has maintained its popularity due to numerous remixes starring other artists such as Billy Ray Cyrus and K-Pop group BTS.<sup>3</sup>

However, Lil Nas X did not create every part of “Old Town Road.”<sup>4</sup> While he wrote the lyrics for the catchy earworm, but he did not develop the beat.<sup>5</sup> Instead, he bought it for thirty dollars from YoungKio, a teenage Swedish music producer who sells beats online through Beatstars.<sup>6</sup> So for all the song’s innovations and records it broke, it still relied on a standard music industry practice of buying music from a producer.

YoungKio did not develop his beat by spending hours sitting at a mixing board, recording different instruments.<sup>7</sup> Instead, he was listening to music on YouTube when he came across Nine Inch Nails’ “34 Ghosts IV.”<sup>8</sup> He downloaded and edited a small section of the music, using his computer to chop and slightly filter it before layering his own drum beat under the sound.<sup>9</sup> He sampled the song to create his own beat without a license.

While YoungKio’s sampling was not uncommon, it did have serious potential legal consequences.<sup>10</sup> Many music artists consider sampling part of their recording to be a

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<sup>1</sup> Carmin Chappell, ‘Old Town Road’ is now the longest-running No. 1 song—and the beat Lil Nas X used only cost \$30, CNBC MAKE IT, <https://www.cnbc.com/2019/07/23/lil-nas-x-bought-the-beat-used-in-old-town-road-for-30-on-beatstars.html> (last updated Jul. 29, 2019, 3:57 PM).

<sup>2</sup> Chappell, *supra* note 1.

<sup>3</sup> ‘Old Town Road’ is a record-breaking, gay-pride-celebrating, America-unifying pop-culture miracle, CHICAGO TRIBUNE (Jul. 27, 2019, 8:34 AM), <https://www.chicagotribune.com/entertainment/music/ct-ent-old-town-road-lil-nas-x-20190727-5wnsnfcuf5dbvpi4kmt7vzg6rq-story.html>.

<sup>4</sup> Deena Zaru, Lil Nas X bought ‘Old Town Road’ beat for \$30: The story and the movement behind the record-breaking hit’s making, ABCNEWS (Aug. 2, 2019, 4:00 AM), <https://abcnews.go.com/Entertainment/lil-nas-bought-town-road-beat-30-story/story?id=64511949>.

<sup>5</sup> Zaru, *supra* note 4.

<sup>6</sup> *Id.* (Beatstars is an Austin-based company that promotes creators’ rights through its digital marketplace).

<sup>7</sup> *Id.*

<sup>8</sup> Max Cea, YoungKio, the Dutch Producer of Lil Nas X’s “Old Town Road,” Is Living His Dreams, GQ (Apr. 23, 2019), <https://www.gq.com/story/youngkio-old-town-road-interview>.

<sup>9</sup> Cea, *supra* note 8.

<sup>10</sup> KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 162 (2012).

copyright violation, and sue for the theft.<sup>11</sup> Trent Reznor, the frontman for Nine Inch Nails, was initially shocked and upset to realize his song had been sampled for “Old Town Road.”<sup>12</sup> Fortunately for Lil Nas X and YoungKio, Reznor overcame his initial shock, and did not want to be a roadblock to the song’s success.<sup>13</sup> So in exchange for a writing credit on “Old Town Road,” Nine Inch Nails cleared the sample taken by YoungKio.<sup>14</sup> However, many instances of sampling do not have such a happy ending.<sup>15</sup> Not everyone agrees that music sampling is an acceptable practice,<sup>16</sup> and neither do the federal courts.<sup>17</sup>

This comment explores the circuit split between the Sixth and Ninth Circuits over music sampling and sound recording copyright, particularly the application of *de minimis* defenses. Part II provides background information on sampling, copyright law, and the two circuit cases. Part III analyzes the flaws in the Sixth Circuit’s approach, the heavy criticisms it has received, and the Ninth Circuit’s ultimate decision to split from the Sixth Circuit. Finally, part IV proposes that the music industry should develop its own system to grant licenses for music sampling, rather than wait for an unlikely federal solution on the issue.

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<sup>11</sup> PARKS, *supra* note 10, at 162.

<sup>12</sup> Kory Grow, *Trent Reznor Breaks Silence on ‘Undeniably Hooky’ ‘Old Town Road,’* ROLLINGSTONE (Oct. 25, 2019, 2:27 PM), <https://www.rollingstone.com/music/music-news/trent-reznor-old-town-road-903889> (stating that “when you hear your stuff turned into something else, it always feels awkward because it’s something that intimately came from you in some way,” as well as feeling violated by the taking).

<sup>13</sup> Grow, *supra* note 12 (describing the phone call with his manager when Reznor first learned his song had been sampled, that Lil Nas X’s manager was panicking about the sample not being cleared first, and Reznor’s reaction that as long as they were admitting to the sampling and looking for permission, he did not want to be a roadblock to the song’s success).

<sup>14</sup> *Id.*

<sup>15</sup> Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), <https://slate.com/culture/2006/11/the-shady-one-man-corporation-that-s-destroying-hip-hop.html> (discussing an unfortunate new trend in music copyright of non-artist rights holders who simply exploit their copyrights to sue any perceived music samplers, real or not).

<sup>16</sup> Charles Holmes, *Fiona Apple Asks Lil Nas X ‘Where’s My Money?’ For Sampling Her Song*, ROLLINGSTONE (Sep. 27, 2019, 2:26 PM), <https://www.rollingstone.com/music/music-news/fiona-apple-lil-nas-x-891584/> (claiming that Lil Nas X, in a no longer available, pre-“Old Town Road” success song, sampled Fiona’s song “Every Single Night” without paying or getting permission for the sample).

<sup>17</sup> *Compare* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005) (holding that any form of music sampling, no matter how trivial, is a form of copyright infringement), *with* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 884 (9th Cir. 2016) (rejecting *Bridgeport’s* analysis, and holding that a *de minimis* defense does apply to music sampling when the sample is a small, insignificant amount).

## II. BACKGROUND

### A. Music Sampling and Copyright Law

Music sampling is not a new practice.<sup>18</sup> Early sampling involved splicing tape or manipulating vinyl records on a turntable to combine sounds.<sup>19</sup> These analog techniques required a good deal of time, effort, and skill, so the practice was limited.<sup>20</sup> With the advent of digital music technology, the process became simpler and cheaper.<sup>21</sup> In the late 1980's, rap and hip-hop artists began sampling songs as a backdrop for their lyrics, increasing sampling's popularity.<sup>22</sup> Today, it is easy to sample using a home computer; and is so commonplace that few people even notice it anymore.<sup>23</sup> A simple program can isolate any part of a song, down to a single note or chord, cut a sample, and insert it into a new song, or even create an entire song using only that sample.<sup>24</sup>

Sampling has faced numerous challenges and losses, the first in *Grand Upright Music Ltd. v. Warner Bros. Records*.<sup>25</sup> Judge Duffy began his opinion “[t]hou shall not steal,” and in three brief pages held that music sampling was piracy, pure and simple.<sup>26</sup> While the defendant sampler argued digital sampling was a prominent practice among rappers and other artists, the claim was called specious and dismissed.<sup>27</sup>

Despite the potential legal consequences, unlicensed sampling continued. The next major sampling case was *Newton v. Diamond*, which took a much more analytical approach to the issue.<sup>28</sup> In this case, the copyrights to the composition and to the recording were held by different entities.<sup>29</sup> The defendant Beastie Boys purchased a

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<sup>18</sup> PARKS, *supra* note 10, at 162. *See also* *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003) (sampling music began in the 1960's and developed in the United States throughout the 1970's using analog methods. New digital technologies in the 1980's allowed for the form of sampling and manipulation that is used today).

<sup>19</sup> PARKS, *supra* note 10, at 162. The classic image of a DJ spinning and scratching records in front of a club is still prevalent today.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> PARKS, *supra* note 10, at 163.

<sup>23</sup> Steve Howell, *The Lost Art of Music Sampling: Part 1*, SOUND ON SOUND (Aug. 2005), <https://www.soundonsound.com/techniques/lost-art-sampling-part-1>.

<sup>24</sup> Howell, *supra* note 23.

<sup>25</sup> *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (finding defendant's unlicensed sampling of a Gilbert O'Sullivan composition to be copyright infringement without any legal analysis beyond it was stealing because the plaintiff held valid copyrights that the defendant used).

<sup>26</sup> *Id.* *See also* PARKS, *supra* note 10, at 163 (discussing how the case cited no prior case law and attempted no infringement analysis. Instead, the judge decided that because the plaintiff clearly held valid copyrights, they had been violated by the defendant's sampling).

<sup>27</sup> *Grand Upright Music*, 780 F. Supp. at 185 n.2.

<sup>28</sup> *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003).

<sup>29</sup> *Id.* at 1191. *See also* PARKS, *supra* note 10, at 103, 158. Musical compositions and sound recordings are separate copyrights because of the way music evolved and still operates today. A composition is the paper containing notes and lyrics that have existed for centuries, and the copyright is usually held by the publisher. Sound recordings did not develop until the late 1800's, and were only granted copyright protection in 1971, with rights held either by the artist or the label, depending on

license to use parts of the sound recording, but not the underlying composition.<sup>30</sup> The Beastie Boys used three notes and a background note for their song.<sup>31</sup> The plaintiff argued it also used other characteristics unique to his score.<sup>32</sup> The Ninth Circuit dismissed the disputed characteristics, holding that the Beastie Boys' use was *de minimis*, and so did not constitute infringement.<sup>33</sup> While sampling a composition without a license still ran the risk of copyright infringement, this holding gave samplers a potential defense of *de minimis* use.

### *B. De Minimis Defenses and Copyright Law*

*De minimis lex non curat* is a legal maxim that translates “the law does not concern itself with trivialities.”<sup>34</sup> Often referred to as a *de minimis* defense, it stands for the principle that some matters are so insignificant they are not worth judicial scrutiny.<sup>35</sup> The *de minimis* defense is allowed against claims of copyright infringement because a claim requires not only some form of copying, but substantial copying.<sup>36</sup> So even when a defendant concedes copying, there are no legal consequences if the copying is not substantial.<sup>37</sup> If the copied amount is trivial or inconsequential, a *de minimis* use defeats a claim of infringement.<sup>38</sup>

Furthermore, substantial copying in music refers to how much of the plaintiff's work was copied, not how much of the defendant's work is composed of it.<sup>39</sup> So an infringing song composed entirely of one note taken from the original could still assert a *de minimis* defense because only the one note was copied.<sup>40</sup> The defense can still be overcome if the note is of such key importance to the piece that a trier of fact could find

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their contract. Today artists must still obtain licenses from both the publisher and label to use a sound recording.

<sup>30</sup> *Newton*, 388 F.3d at 1191.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (Newton asserted that the score instructed the background flute C note be overblown, and that the multiphonics should implicitly be considered part of the composition because they can only be created by reading the score).

<sup>33</sup> *Id.* at 1196-97 (the dissent criticized the court for dismissing disputed issues of material fact. While Judge Gruber agreed that *de minimis* defenses should apply to musical compositions, given the facts in *Newton*, felt the issue should be left to the jury to determine the substantial similarities). It is also interesting to note that, although Judge Gruber wrote the dissent in *Newton*, she wrote the majority opinion upholding *de minimis* defenses in *VMG Salsoul*.

<sup>34</sup> *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003).

<sup>35</sup> *Id.*

<sup>36</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2019).

<sup>37</sup> NIMMER, *supra* note 36, § 13.03[A] (one of the most significant questions in copyright law is what constitutes substantial enough copying to be infringement. However, *de minimis* applies to slight or trivial similarities that could never be considered substantial, and are therefore regarded as noninfringing.).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 13.03[A][2][a].

<sup>40</sup> *Id.* (even if a song were to consist entirely of a single copied note, a *de minimis* defense could still be raised because only a single note from the original had actually been taken. It is immaterial to the substantial similarity test and *de minimis* analysis how much of the infringing work consists of unoriginal material).

the copying qualitatively substantial.<sup>41</sup> Such circumstances are “a classic jury question” of substantial similarity.<sup>42</sup>

### C. Sound Recordings and Copyright Law

The exclusive rights of copyright holders are found at 17 U.S.C. § 106.<sup>43</sup> In § 106, sound recordings are the only medium given its own subsection.<sup>44</sup> Recording rights are further defined by § 114, which states that the rights granted by § 106 do not apply to works of entirely independent creation, even if they are identical to the original.<sup>45</sup> This phrase has been misinterpreted by some courts as extending the rights of copyright holders.<sup>46</sup> The purpose of §§ 107 through 122 is to limit the rights granted by § 106, including this part of § 114.<sup>47</sup>

### D. Music Sampling and the Sixth Circuit

Two years after *Newton*, music sampling returned to court in *Bridgeport Music, Inc. v. Dimension Films*, a Sixth Circuit case about the sampling of a sound recording.<sup>48</sup> The defendant, No Limit Films, had sampled a chord and a two-second riff for a

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<sup>41</sup> *Id.* The key to this issue is how substantial the copied piece is to the work as a whole. Nimmer provides examples of longer pieces where a *de minimis* defense prevailed because the copied materials were nonessential matters. However, *de minimis* defenses failed for some shorter works because they were considered key to the overall work as a whole. *De minimis* analysis cannot be thought of as solely a quantitative exercise of setting how many seconds or minutes can be *de minimis*. It is a qualitative consideration that in many nonobvious cases is best left to the trier of fact.

<sup>42</sup> NIMMER, *supra* note 36, § 13.03[A][2][a].

<sup>43</sup> The relevant language of the statute states the following:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . . (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2019).

<sup>44</sup> 17 U.S.C. § 106(6).

<sup>45</sup> 17 U.S.C. § 114(b) (2019).

<sup>46</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>47</sup> *Id.* (asserting it defies precedent for the Sixth Circuit to disregard the requirement that every right granted by § 106 is subject to a substantial similarity analysis. It is incomprehensible to interpret any section beyond § 106 to expand the rights granted copyright holders, rather than limit them).

<sup>48</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005) (Bridgeport alleged infringement of both the compositions and recordings. The court applied a *de minimis* analysis to the composition, and dismissed that part of the claim. It refused to apply the same analysis to the recordings, enabling it to reach an opposite conclusion).

soundtrack using songs Bridgeport held the rights to.<sup>49</sup> The lower courts held the infringement was *de minimis*, and granted summary judgment to the defendants.<sup>50</sup> The Sixth Circuit reversed, stating that sound recordings are subject to a different analysis than musical compositions.<sup>51</sup> It reasoned that sound recordings are a special class of works because they were not copyrightable until 1971, when they were added to the Act as a separate entity, rather than included with musical compositions.<sup>52</sup> The court also focused on the 1976 Copyright Act's addition of the word "entirely" to § 114.<sup>53</sup> In its view, a work needed to be entirely of independent creation, without any evidence of copying, for it to be substantially similar without infringing the original's copyright.<sup>54</sup> Sampling, as a form of copying, could never meet this standard.<sup>55</sup>

The Sixth Circuit then drew a bright line rule: *de minimis* defenses do not apply to music sampling.<sup>56</sup> In other words, no matter how *de minimis* the use, any music sampling is a form of copyright infringement.<sup>57</sup> It effectively transformed sampling a sound recording into a physical theft, distinct from every other form of copyright infringement.<sup>58</sup>

The Sixth Circuit gave three main justifications for its rule. First, it made enforcement simple.<sup>59</sup> Either get a license, or face legal consequences.<sup>60</sup> Second, market forces would keep license prices reasonable.<sup>61</sup> Finally, all music sampling is

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<sup>49</sup> *Id.* at 795-96 (while Bridgeport holds the rights to the two songs, it is not a record label, nor does it represent the artist. Instead it is a company that has acquired the copyrights to a plethora of songs, including the two at issue here, and makes money by licensing its copyrights or suing any infringers, no matter how small. This case was part of a massive litigation commenced by Bridgeport, alleging nearly 500 counts of infringement against nearly 800 defendants. The action was divided into 476 separate cases, with this being the one to reach the Sixth Circuit.).

<sup>50</sup> *Id.* at 798.

<sup>51</sup> *Id.* at 800.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ("The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word 'entirely' to this language.").

<sup>54</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

<sup>55</sup> *Id.* (under the *Bridgeport* rule, substantial similarity is no longer a relevant test for sound recordings. Once copying of a sound recording is proved, copyright infringement has been established. The elimination of this element from the infringement analysis is a main reason this decision has been so widely criticized by authorities like Nimmer.).

<sup>56</sup> *Id.* at 801.

<sup>57</sup> *Id.* at 800. It is interesting to note that the court later describes the application of a *de minimis* defense as mental and musicological gymnastics in order to consider substantial similarity in the case of any physical taking of sound recordings. Yet this same charge has been levied against the Sixth Circuit for its interpretation of the word "entirely." By twisting the word so that it creates a narrow exception to copyright, it broadened holders' rights, contrary to the statute's purpose of limiting them. Nimmer and others have charged the court with creating a negative right, which applies to all the circumstances not listed, rather than the affirmative one for a circumstance that it was intended.

<sup>58</sup> *Id.* at 802 (distinguishing music sampling as a form of physical theft of sound recordings, rather than an intellectual taking, which is how most courts describe copying other protected works).

<sup>59</sup> *Id.*

<sup>60</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (the phrase most associated with *Bridgeport* is "Get a license, or do not sample").

<sup>61</sup> *Id.* ("The market will control the license price and keep it within bounds." Many critics of *Bridgeport* and current copyright laws feel the opposite, that the market lets licensing fees skyrocket, stifling the creativity of poorer artists who cannot afford who cannot afford licenses, especially not for well-known and higher-production quality music.). *See also* Chappell, *supra* note 1 (part of what

intentional, and never happens by accident.<sup>62</sup> So even when a small part of a song is being sampled, it is the part with value that is being taken, and should be considered theft.<sup>63</sup>

### *E. Music Sampling and the Ninth Circuit*

While *Bridgeport* drew immediate attention with its new bright line rule and unique analysis, garnering immediate scholastic criticism, its impact is questionable.<sup>64</sup> It has not stopped artists, like YoungKio, from sampling without a license.<sup>65</sup> Outside of the Sixth Circuit, it has never been accepted as controlling or persuasive authority.<sup>66</sup> Its greatest effect has been a split with the Ninth Circuit.

In *VMG Salsoul, LLC v. Ciccone*, VMG asserted that a 0.23-second horn blast from its copyright recording had been sampled and modified for Madonna's hit song "Vogue."<sup>67</sup> A production assistant testified that the main producer sampled the song, which proved copying.<sup>68</sup> VMG relied on *Bridgeport* to claim that by proving copying, it had automatically proven copyright infringement.<sup>69</sup>

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makes Little Nas X's success with "Old Town Road" so remarkable is how he licensed the beat for such a minimal amount, and created the rest of it for free on his laptop).

<sup>62</sup> *Bridgeport*, 410 F.3d at 801 (in other words, a sampler does not insert a piece of an artist's song by accident. It requires a deliberate action of listening to a recording, finding a stanza, chord, or even note the sampler likes, and copying it for use in a new song.).

<sup>63</sup> *Id.* at 802.

<sup>64</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016) (noting that, while the court did not wish to create a circuit split, it was not breaking new ground on the issue. Outside of the Sixth Circuit's controlling authority, no district court facing the issue of *de minimis* defenses for sound sampling was willing to apply *Bridgeport's* rule. These district courts stated that the Sixth Circuit's rule had not been adopted by their jurisdictions, or simply rejected it as bad analysis that the court did not wish to apply.). *See also* NIMMER, *supra* note 36, § 13.03[A][2][b] (Nimmer discusses how *Bridgeport* eliminated substantial similarity as an element to copyright infringement. In placing great weight on the word "entirely," the Sixth Circuit completely ignored the legislative history which explicitly noted that infringement only occurs when a substantial portion of the sounds of the copyrighted work are taken.).

<sup>65</sup> Ogden Payne, *Meet YoungKio, The 19-Year-Old Netherlands Producer Behind 'Old Town Road'*, FORBES (May 30, 2019, 10:50 AM), <https://www.forbes.com/sites/ogdenpayne/2019/05/30/meet-youngkio-the-19-year-old-netherlands-producer-behind-old-town-road/#499647065515>. *See also* PARKS, *supra* note 10, at 164 (discussing an artist whose works are entirely composed of sampling. Gregg Gillis has sampled hundreds of songs using only his computer and cheap software to create two critically acclaimed albums. All of these samples were unlicensed, yet Gillis has faced no repercussions.).

<sup>66</sup> *VMG Salsoul*, 824 F.3d at 886.

<sup>67</sup> *Id.* at 874.

<sup>68</sup> *Id.* at 877 (a personal assistant swore as a witness that the lead producer directed a sound engineer to sample parts of the original work and insert them into the song "Vogue." Although a disputed fact within the context of the defendant's motion for summary judgment, the assistant's testimony was taken as true, indicating that actual sampling of the song occurred as probative proof of copying.).

<sup>69</sup> *Id.* (VMG also asserted composition copyright infringement, again trying to rely on *Bridgeport*. The court applied a standard *de minimis* analysis to dismiss this claim, because it had already held *de minimis* applies to compositions in *Newton*, and *Bridgeport* did not challenge the application to compositions, only recordings.).

The Ninth Circuit rejected VMG's argument and *Bridgeport's* rule.<sup>70</sup> It held that § 114 is meant to limit the rights of copyright holders, and disagreed with the Sixth Circuit's logic expanding these rights.<sup>71</sup> The Ninth Circuit said this twisted § 114's meaning beyond the legislative intent.<sup>72</sup> Nor was the Ninth Circuit willing to treat sound recordings differently than other copyright forms by holding that they would be the only medium for which a *de minimis* defense could not apply.<sup>73</sup>

While one dissenting judge agreed with the Sixth Circuit's bright line rule,<sup>74</sup> the Ninth Circuit rejected *Bridgeport* and affirmed the lower court's grant of summary judgement.<sup>75</sup> In doing so, it held that *de minimis* defenses apply to sound recordings just like they do for any other copyrighted work.<sup>76</sup> It also reluctantly created a circuit split, refusing to adopt the Sixth Circuit's bright line rule.<sup>77</sup>

#### F. The Music Modernization Act

The split between the Sixth and Ninth Circuits has yet to be resolved. Yet in the interim, Congress has passed the Music Modernization Act (MMA).<sup>78</sup> It is the most significant update to music copyright law since 1976, addressing numerous technological advances in music.<sup>79</sup> Most significantly, it addresses downloading and streaming music to personal devices.<sup>80</sup> However, it makes no mention of music sampling, nor does it address any of the problematic language of § 114 that the Sixth

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<sup>70</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016).

<sup>71</sup> *Id.* at 884 (referencing Nimmer and standard copyright analysis, that the purpose for all sections of the copyright act after § 106 is to limit the rights given to copyright holders, not expand them. It also referred to the Sixth Circuit's argument as a logical fallacy trap, where it found the inverse of a conditional from the conditional. The Ninth illustrated the problem by demonstrating that the proposition "if it has rained, then the grass is not dry" does not mean "if it is has not rained, then the grass is dry.").

<sup>72</sup> *Id.* at 884 (stating alternatively that, even if a court could find some ambiguity in the statute, the legislative history is clear. "Congress intended § 114 to limit, not to expand, the rights of copyright holders . . .").

<sup>73</sup> *Id.* at 885 (finding that no other cases have created an exception to the substantial similarity requirement to bypass *de minimis* defenses for any other form of copyright, while also noting that "physical takings" are just as applicable to other mediums as sound recordings. For instance, it considered how the sampling of a sound recording to be the same as the physical use of another's copyrighted photograph, for which there is no question the *de minimis* defense applies.).

<sup>74</sup> *Id.* at 888 (arguing that the Sixth Circuit has the straightforward interpretation of the statute, and it is the Ninth Circuit using twisted logic to justify its decision. The dissent did acknowledge that *Newport* was properly decided, and *de minimis* defenses should apply to compositions.).

<sup>75</sup> *Id.* at 887.

<sup>76</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016).

<sup>77</sup> *Id.* at 886 (although reluctant to create a circuit split, the goal of avoiding one cannot override independent duty to determine congressional intent. The policy decisions of *Bridgeport* reflect what Congress could decide, not what it has actually decided.).

<sup>78</sup> Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676 (codified as amended in scattered sections of 17 U.S.C.).

<sup>79</sup> *The Music Modernization Act*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/music-modernization> (last visited Dec. 13, 2019).

<sup>80</sup> Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676 (codified as amended in scattered sections of 17 U.S.C.).

Circuit relied on in its opinion.<sup>81</sup> The most significant update to music copyright fails to address or acknowledge the circuit split.<sup>82</sup>

### III. ANALYSIS

#### *A. Bridgeport Defies Copyright Precedent*

The bright line rule created by the Sixth Circuit's holding in *Bridgeport* has been heavily decried.<sup>83</sup> Rather than follow well-settled analysis for all copyright works, it carved out a special exception for sound recordings.<sup>84</sup> By ruling that any music sampling is automatically copyright infringement of a sound recording, it did more than invalidate *de minimis* defenses.<sup>85</sup> It also eliminated the element of substantial similarity from the plaintiff's burden to prove copyright infringement.<sup>86</sup>

A *de minimis* defense is raised against proof of actual copying to prove the copying does not rise to the level of substantial similarity necessary for infringement.<sup>87</sup> The burden of proving substantial similarity is supposed to lie with the party claiming infringement.<sup>88</sup> With *Bridgeport*, the Sixth Circuit removed the moving party's burden for sound recordings.<sup>89</sup> This means for music sampling, with any proof it actually occurred, the plaintiff has automatically met the necessary burden of proof for copyright infringement.<sup>90</sup>

Furthermore, the level of protection *Bridgeport* gives to sound recordings is unprecedented compared to any other copyrighted work.<sup>91</sup> The Sixth Circuit justified this extra protection by comparing sound recordings to books.<sup>92</sup> Although books are physical objects, the actual property interest is in the words and ideas expressed, not the paper and binding.<sup>93</sup> So infringement occurs when an idea is copied, not when a single page is ripped out.<sup>94</sup>

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<sup>81</sup> *Id.* at Sec. 103 (only making one slight modification to 17 U.S.C. § 114).

<sup>82</sup> *Id.*

<sup>83</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 885 (9th Cir. 2016) (the Ninth Circuit is the first circuit to analyze and reject *Bridgeport*. In coming to its conclusion to steer away from *Bridgeport*, the Ninth Circuit took into account some lower courts' rejection of *Bridgeport's* bright line rule as well as criticism from legal scholars such as Nimmer.).

<sup>84</sup> NIMMER, *supra* note 36, § 13.03[A][2][b] (2019).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (stating that the reason *de minimis* defenses can be raised is because the moving party must prove substantial similarity. In raising a *de minimis* defense, the party that copied, or in this case sampled, is asserting that the copyright holder has not met its burden of showing substantial similarity between the two works, which here are sound recordings.).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* § 13.03[A].

<sup>89</sup> *Id.* § 13.03[A][2][b].

<sup>90</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

<sup>91</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>92</sup> *Bridgeport*, 410 F.3d at 800.

<sup>93</sup> *Id.* ("If one were to analogize to a book, it is not the book, i.e., the paper and binding, that is copyrightable, but its contents.")

<sup>94</sup> *Id.*

However, § 106 refers to the *physical* copying of phonorecords.<sup>95</sup> The Sixth Circuit interpreted this to mean Congress intended something different for sound recordings than other physical mediums like books or even musical compositions.<sup>96</sup> Under the Sixth Circuit's interpretation, a phonorecord is a physical medium that has captured a specific rendition of the composition by an artist.<sup>97</sup> This specific physical medium is what § 106 and § 114 protect.<sup>98</sup> It is a physical object that can be copied and licensed as the owner sees fit.<sup>99</sup> By focusing on the physical aspect of phonorecords, the Sixth Circuit reasoned that whenever a sound recording is copied, even in small parts, it is a physical taking as well as an intellectual one.<sup>100</sup> By reading this meaning into the statute, the court concluded that *de minimis* defenses should not apply when there is actual copying of a sound recording, and created a bright line rule that inadvertently removed the substantial similarity element from the plaintiff's burden of proof.<sup>101</sup>

The Sixth Circuit's interpretation of § 106 and § 114 is entirely of its own creation.<sup>102</sup> It intentionally chose not to consider the legislative history behind the act for its decision.<sup>103</sup> By ignoring its history, the court went against what Congress actually intended.<sup>104</sup> Congress explicitly stated in the House Report on § 114 that for there to be infringement of a phonorecord, a substantial portion of the work must be copied.<sup>105</sup> So it was misleading for the Sixth Circuit to state that the Congressional intent behind the statute is ambiguous when it is so easily ascertainable.<sup>106</sup>

Furthermore, substantial similarity and *de minimis* defenses are not discussed in any part of the Copyright Act.<sup>107</sup> It is illogical, then, for the Sixth Circuit to assert that Congress should have been explicit if it wanted substantial similarity to apply to sound recordings.<sup>108</sup> Substantial similarity is a well-established element in proving

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<sup>95</sup> 17 U.S.C. § 106(6) (phonorecords refers to any medium in which a sound recording is fixed, whether it be a record, cassette tape, MP3 file, etc. This section gives copyright holders the exclusive rights to create copies of their phonorecords.).

<sup>96</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

<sup>97</sup> *Id.* at 799.

<sup>98</sup> *Id.*

<sup>99</sup> 17 U.S.C. §§ 106(6), 114.

<sup>100</sup> *Bridgeport*, 410 F.3d at 802.

<sup>101</sup> *Id.* at 801 (stating that while it may seem contradictory to say the *de minimis* defense and substantial similarity apply when three notes of a music composition are copied but not three notes of a sound recording, the court's rationale in distinguishing the sections of the statute justifies neither being part of the equation for sound recordings).

<sup>102</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

<sup>103</sup> *Id.* (rationalizing that the legislative history would be of little help because when the act was passed in 1971, digital music sampling did not exist).

<sup>104</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>105</sup> H.R. Rep. No. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (“[I]nfringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords . . .”).

<sup>106</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>107</sup> *See generally* 17 U.S.C. § 106 (2019) (providing the exclusive rights given to copyright holders, none of which states a special analysis or protections for any of the listed copyrightable works). *See also* NIMMER, *supra* note 36, § 13.03[A][2][b] (stating that the purpose of every section following § 106, including § 114 on sound recordings, is to limit the rights of copyright holders, not expand them).

<sup>108</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

copyright infringement, despite not being explicitly stated in the Act.<sup>109</sup> By the Sixth Circuit's logic, every section of the Copyright Act should explicitly state that substantial similarity is necessary to prove infringement.<sup>110</sup> Yet in *Bridgeport*, the court contradictorily accepted that this is not the case.<sup>111</sup> It acknowledged that substantial similarity and *de minimis* defenses apply to other works like books or even compositions without being explicitly stated in the statute.<sup>112</sup> Yet for sound recordings, the court insisted Congress needed to explicitly state that substantial similarity is necessary to prove infringement.<sup>113</sup> It is an inconsistent conclusion reached by twisting the Copyright Act to say something it does not. Instead it exacerbates the issue by placing the burden of correcting this misinterpretation back on Congress.<sup>114</sup> For the Sixth Circuit to state that Congress is free to amend the statute if it does not like this conclusion is inappropriate.<sup>115</sup> Congress already stated its intent by adding sound recordings to the Copyright Act in a form consistent with existing works, plus an explanation in the House Report.<sup>116</sup>

The Sixth Circuit further compounded its error by suggesting that the recording industry should petition Congress to clarify the law.<sup>117</sup> This ignores the music industry's long history of petitioning Congress over the past two centuries, often without success, in order to obtain many of the rights it holds today.<sup>118</sup> The court's stance not only blatantly disregards the legislative intent, it dismisses the music industry's efforts to obtain copyright protection. Asserting that the two entities need to work together if they disagree with the court's misinterpretation adds insult to injury.<sup>119</sup>

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<sup>109</sup> *Id.* § 13.03[A] (beginning this section of the treatise that substantial similarity is necessary to prove all forms of actionable copying. Music sampling will receive its own subsection because it is the only form of copyright that has been granted exception from this analysis by a court.).

<sup>110</sup> *Id.*

<sup>111</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (acknowledging that musical compositions are subject to substantial similarity analysis for proving infringement because they are part of a different section and have held copyright protection for a long time).

<sup>112</sup> *Id.* at 800.

<sup>113</sup> *Id.* at 801.

<sup>114</sup> *Id.* (It is worth noting that while the Sixth Circuit justified giving sound recordings special treatment because they are singled out in § 114, it never mentions or reconciles this argument with the fact that other mediums have their own sections of the act as well, such as § 113 for pictures and graphics.).

<sup>115</sup> *Id.* at 805 (claiming that if this is not what Congress intended, the record industry should petition Congress to clarify the law).

<sup>116</sup> H.R. Rep. No. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721. *See also* 17 U.S.C. § 106(6) (while it names sound recordings specifically, there is nothing else to distinguish this section from the rest of the statute).

<sup>117</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005) (claiming that if its interpretation is wrong, the music industry simply needs to petition Congress to change the law as it has done in the past).

<sup>118</sup> *See generally* PARKS, *supra* note 10, at 162 (discussing the numerous and often fruitless efforts of the music industry to convince Congress to improve copyright laws for musical compositions and later sound recordings from 1831 to today. The music industry tended to be included as an afterthought as the act was updated to accommodate evolving technologies and practices in other fields, or only after extensive lobbying from famous musicians and performers on multiple occasions.).

<sup>119</sup> *Bridgeport*, 410 F.3d at 805.

Moreover, the Sixth Circuit committed a logical fallacy in its “literal reading” of the statute.<sup>120</sup> It focused much of its attention on the word “entirely” in § 114(b).<sup>121</sup> Its purpose is to protect an artist who has created a similar sounding recording, but was composed entirely by independent creation.<sup>122</sup> It protects imitation while preventing duplication.<sup>123</sup> The Sixth Circuit inverts this purpose.<sup>124</sup> “Entirely” was improperly interpreted to mean a possibly infringing work must be entirely free of any copying to not be automatically liable for copyright infringement.<sup>125</sup> If any part of the original work is duplicated, regardless of the amount, there is automatic infringement and liability.<sup>126</sup> This is not a plain reading of § 114(b), but a logic exercise to make it say something not on the page.<sup>127</sup> Protection for entirely independent creations does not create automatic liability for any partial sound copying.<sup>128</sup> Nor does one word justify dismissing standard copyright infringement analysis and giving sound recordings unprecedented protections.

Even more generally, the Sixth Circuit went against the purpose of copyright law in *Bridgeport*.<sup>129</sup> While copyright protects an individual’s right to use and profit off one’s work for a set time, it is not an unlimited right.<sup>130</sup> While § 106 lists the rights of copyright holders, §§ 107-122 are limitations and explanations of those rights.<sup>131</sup> Encouraging creativity has been a goal of copyright since the nation’s founding, with a fear that too broad protections would lead to artistic monopolies.<sup>132</sup> The purpose of the

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<sup>120</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 884 (9th Cir. 2016).

<sup>121</sup> *Bridgeport*, 410 F.3d at 800 (claiming the most significant part of § 114(b) is that Congress added the word “entirely” to the language of the Copyright Act).

<sup>122</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>123</sup> *Id.* § 13.03[A][2][b] n.114.12 (using the example of 17 U.S.C. § 108(e), which applies to library books and also contains the word “entire.” If a library were to copy a single sentence from a book in its collection, that is not the entire work. The next step would be substantial similarity analysis, and failing that, a finding that no infringement had occurred by a *de minimis* defense. If substantial similarity applies for books under its statute outlining rights with the word “entire,” there is no reason to give it special meaning for duplications in § 114 for sound recordings to say that substantial similarity does not apply.).

<sup>124</sup> *Id.* § 13.03[A][2][b].

<sup>125</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

<sup>126</sup> *Id.*

<sup>127</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 884 (9th Cir. 2016).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (asserting it is incomprehensible that the Sixth Circuit could use § 114 to expand the copyright protections given in § 106 when the very name of § 114 is limitations on copyright for sound recordings).

<sup>132</sup> PARKS, *supra* note 10, at 57-58, 62-63 (As the Copyright Act of 1909 was being rewritten, musical compositions were set to receive much wider protection after extensive lobbying by the industry in response to the invention of musical rolls that were able to play music without a human performer, an early version of recorded music. Congress was prepared to pass wide protections for musical compositions after a string of failed court cases that acknowledged the music had been stolen, but could not be protected under the current structure of the law. Congress became concerned, though, when it learned that production company Aeolian was accumulating a vast library of song rights for when the law went into effect because it would hold a monopoly on the market. In response Congress added mechanical licensing to the act at the last minute to prevent any monopoly of copyrighted works from controlling the market. These protections against monopolies have been in place for every successive Copyright Act since, and a fear of creating monopolies through copyright restrains Congress from expanding these rights too far still today.).

Copyright Act is to provide limited protections without discouraging the creative arts or preventing anyone from making a living by pursuing them.<sup>133</sup>

By granting sound recordings special treatment, the Sixth Circuit goes against this basic tenant of copyright law.<sup>134</sup> It twisted the language of § 114(b) to expand the rights granted by § 106, rather than limit them.<sup>135</sup> The Sixth Circuit took a phrase intended as a shield for artists who created something entirely new, and transformed it into a weapon for copyright holders to use against any miniscule duplication.<sup>136</sup> It removed the burden of proving substantial similarity, incentivizing rights holders to attack anyone suspected of sampling even a microsecond of a sound recording.<sup>137</sup> The Sixth Circuit ignored every precedent of established copyright law when it placed sound recordings in a special position with more protection than what is granted to any other copyrighted work.<sup>138</sup>

### *B. The Sixth Circuit Stands Alone*

*Bridgeport* remained unchallenged for a decade before the Ninth Circuit refused to adopt it in *VMG Salsoul*.<sup>139</sup> However, this does not mean *Bridgeport* was a precedent-setting case that changed the national approach to sound recording infringement.<sup>140</sup> Outside the Sixth Circuit where *Bridgeport* controls, no other court has adopted its bright line rule.<sup>141</sup> District courts have rejected *Bridgeport* for a variety of reasons from not being adopted by the jurisdiction to criticizing its approach.<sup>142</sup> As the Southern District of Florida noted, the Eleventh Circuit applied substantial similarity analysis to copyright infringement cases, regardless of what the Sixth Circuit did.<sup>143</sup> The actual circuit split created by the Ninth Circuit in *VMG Salsoul* is simply the culmination of various district courts rejecting *Bridgeport*.<sup>144</sup> While the

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<sup>133</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>134</sup> *Id.*

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

<sup>136</sup> *Id.*

<sup>137</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005) (Bridgeport had sued nearly 800 defendants, a lawsuit which was divided into over 400 smaller suits. By finding for Bridgeport in this case, the rest of the cases were bound by this precedent, and encouraged Bridgeport to continue pursuing as many defendants as it could find.).

<sup>138</sup> NIMMER, *supra* note 36, § 13.03[A][2][b] (calling *Bridgeport* an unprecedented collection of cases, which are the only ones to assert that there may be some copyrightable works to which substantial similarity does not apply).

<sup>139</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016).

<sup>140</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>141</sup> *Id.*

<sup>142</sup> *VMG Salsoul*, 824 F.3d at 886.

<sup>143</sup> *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338 (S.D. Fla. 2009) (rejecting the plaintiff's argument to adopt *Bridgeport's* bright-line rule because "the Eleventh Circuit imposes a 'substantial similarity' requirement as a constituent element of *all* infringement claims . . .").

<sup>144</sup> *VMG Salsoul*, 824 F.3d at 886 (listing numerous court cases that have rejected *Bridgeport's* analysis and bright-line rule for a variety of reasons). *See also* NIMMER, *supra* note 36, § 13.03[A][2][b] (describing certain cases that, while pro-plaintiff in allowing claims of minimal copying by sampling to proceed, the courts still followed standard substantial similarity analysis and allowed *de minimis* defenses to be raised. The court just rejected these defenses as applying to the cases at hand without adopting the rule established by *Bridgeport*.).

court was not keen to create a split with its sister circuit, it was willing to do so because, in reality, one already existed.<sup>145</sup> The Sixth Circuit created a bright line rule that only it was bound by, and the Ninth Circuit found no reason to impose such a faulty standard on itself, especially when it had not been adopted by any other circuit.<sup>146</sup> *VMG Salsoul* may have made the circuit split official, but one already existed between the Sixth and the rest of the circuits as soon as *Bridgeport* was decided.<sup>147</sup>

Nor did the Ninth Circuit base its decision to create a split solely on the actions of other courts.<sup>148</sup> It was highly critical of the Sixth Circuit's analysis.<sup>149</sup> The Ninth Circuit took particular exception with the Sixth Circuit's interpretation of the word "entirely" in § 114(b) to imply an expansion of copyright protections rather than a limitation.<sup>150</sup> While the Sixth Circuit claimed to use a plain language approach, it was the Ninth Circuit that truly did. It determined that § 114(b) was meant to protect independent creators, not create automatic liability for any miniscule infringement or enable plaintiffs to bypass the burden of proving substantial similarity.<sup>151</sup> The Ninth Circuit characterized the Sixth Circuit's approach as a logical fallacy which cannot be followed without upsetting many established copyright practices.<sup>152</sup>

Unlike the Sixth Circuit, the Ninth Circuit also examined the legislative history of § 114 to give external support to its plain reading conclusion.<sup>153</sup> It chided the Sixth Circuit for asserting that Congress should clarify the statute if it had been misinterpreted because Congress already made its intentions clear when it passed the original act.<sup>154</sup> The Ninth Circuit concluded that Congress intended for substantial similarity to be an element of copyright infringement, and so long as it is, *de minimis* defenses can apply.<sup>155</sup>

#### IV. PROPOSAL

There are no immediate or permanent solutions available to resolve the split between the Sixth and Ninth circuits. Ideally, the Sixth Circuit would reverse *Bridgeport* due to the heavy criticisms it has received.<sup>156</sup> The Sixth Circuit could also be persuaded by the arguments in *VMG Salsoul*. Neither is likely to happen.<sup>157</sup> A permanent solution will require the Supreme Court or Congress to act, but it is

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<sup>145</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 881.

<sup>149</sup> *Id.*

<sup>150</sup> *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 . . .").

<sup>151</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016).

<sup>152</sup> *Id.* (using a logical problem as an example, which states that: because it rains, the grass is wet, does not mean that because it does not rain, the grass is dry).

<sup>153</sup> *Id.* at 883-84.

<sup>154</sup> *Id.* at 884.

<sup>155</sup> *Id.* at 887.

<sup>156</sup> *NIMMER*, *supra* note 36, § 13.03[A][2][b].

<sup>157</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 888 (9th Cir. 2016) (considering that the dissent favors the bright-line rule created by *Bridgeport* and is not convinced by the majority opinion, it is unlikely that the court which created the rule would be convinced by such arguments).

doubtful that will happen anytime soon. In lieu of federal intervention, the best short term solution is for the music industry to develop its own licensing system for sampling.

### A. *The Supreme Court*

The most effective way to resolve any circuit split is for the Supreme Court to rule on the issue.<sup>158</sup> This would require granting certiorari to a music sampling case involving *de minimis* defenses, and whether or not they apply as the key issue, which is not likely to happen.<sup>159</sup> It is rare for music sampling cases to even reach the circuit level, with over ten years passing between *Bridgeport* and *VMG Salsoul*.<sup>160</sup> While a sampling case will eventually reach the circuit level again, how long it will take is highly uncertain, and could be another decade or more.

Even when such a case arises, there is no guarantee that the Supreme Court will grant certiorari if the case is appealed.<sup>161</sup> The application of *de minimis* defenses for music sampling is a small, specific copyright issue, on which only the Sixth Circuit has taken a controversial stance.<sup>162</sup> The Ninth Circuit is the only circuit to directly challenge the Sixth Circuit's decision, while the other circuits have simply ignored it.<sup>163</sup> For such a small split on such a narrow topic, it seems unlikely the Supreme Court would be willing to hear such a case.<sup>164</sup> So not only is a judicial solution far off, but it seems unlikely to happen at all.<sup>165</sup>

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<sup>158</sup> Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 451 (2019) ("Resolution by the Supreme Court is the most formal way to bring uniformity to a body of law when circuits split.").

<sup>159</sup> Beim, *supra* note 158, at 449 (only about a third of circuit splits are ever granted certiorari, and typically soon after the split is created).

<sup>160</sup> *Compare* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) *with* *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016) (there is over a decade separating the only two circuit level decisions which created this split).

<sup>161</sup> Beim, *supra* note 158, at 451-52 (While a circuit split is one of the few named factors the Supreme Court lists in its rules as a reason to grant certiorari, this is not a guarantee that certiorari will be granted in every circuit split, nor does it often seem to be the case.).

<sup>162</sup> *VMG Salsoul*, 824 F.3d at 886 (justifying its decision not to adopt *Bridgeport's* bright-line rule because no other circuit had done so, and noting the numerous district court cases that were not reviewed which had refused to utilize a rule not adopted by their jurisdictions).

<sup>163</sup> *Id.*

<sup>164</sup> Beim, *supra* note 158, at 452 (the Supreme Court is more likely to resolve "deep" splits involving multiple circuits that are ideologically divergent).

<sup>165</sup> *Id.* at 456 (stating that only a third of all circuit splits are ever resolved by the Supreme Court, typically soon after the split is created, meaning that the longer a circuit split exists, the less likely the Court will ever grant certiorari to resolve it).

### B. Congress

Alternatively, Congress could clarify the language of § 114 as the Sixth Circuit suggested.<sup>166</sup> In other words, specifying what is meant by “entirely,” or explicitly stating that *de minimis* defenses should apply for sound recordings.<sup>167</sup> This is another unlikely solution. No other part of the act proscribes *de minimis* defenses for other copyrighted works such as books or movies.<sup>168</sup> *De minimis* defenses come from the need to prove substantial similarity for actionable copyright infringement.<sup>169</sup> Congress is unlikely to add this distinction for one specific medium simply because a circuit court says it should.

Furthermore, Congress recently implemented the MMA, one of the most significant updates to the Copyright Act in decades.<sup>170</sup> At the time it was passed, the problems caused by *Bridgeport* and the split created by *VMG Salsoul* were well-known. However, the MMA makes no attempt to address *de minimis* defenses for sound recordings, either for music sampling or any other use.<sup>171</sup> The act even modifies § 114, yet “entirely” remains without change or explanation.<sup>172</sup> While the act brings music copyright into the digital age by creating new licenses for modern uses such as internet broadcasting, no such license was made for sampling.<sup>173</sup> Congress had the ideal opportunity to address the circuit split and create some form of licensing for sampling, but did nothing.

### C. An Industry Solution

Without a judicial or legislative fix available in the foreseeable future, the music industry itself can still manage the issue. As music technology continues to evolve, the prevalence of sampling will continue to increase as it becomes cheaper, easier and faster, ingraining itself as an industry standard.<sup>174</sup> Yet industry custom or not, unlicensed music sampling is still copyright infringement, which many artists and

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<sup>166</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005) (stating that if the Sixth Circuit’s interpretation of the statute is not what Congress intended or intends now, then the record industry can easily petition Congress to change the law to clarify its position).

<sup>167</sup> *Id.*

<sup>168</sup> *See, e.g.* 17 U.S.C. § 113 (2019) (detailing the exclusive rights given to pictorial, graphic and sculptural works just as § 114 does for sound recordings, neither of which mentions *de minimis* defenses).

<sup>169</sup> NIMMER, *supra* note 36, § 13.03[A][2].

<sup>170</sup> Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676 (codified as amended in scattered sections of 17 U.S.C.).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at Sec. 103 (only modifying § 114(f) for licenses dealing with digital transmissions of sound recordings by digital broadcasters. The rest of § 114 is left as is).

<sup>173</sup> *Id.*

<sup>174</sup> Zaru, *supra* note 4 (Two teenagers were able to create a song that broke music industry records and remains a popular hit using only their laptops and cheap programs they bought online. How they created the song is not original, with many artists using the same sampling techniques and programs to create music. While many songs created in such a way will not have the same level of success as “Old Town Road,” seeing that song succeed will encourage others to attempt to recreate that success with their own songs, likely using sampled music.).

publishers do not want to see become an accepted practice.<sup>175</sup> These parties will continue to take legal action against what they perceive as theft.

While it is doubtful the music industry could set any *de minimis* standard for music sampling that rights holders would accept, it can create a system for samplers to easily obtain a license or request an artist clear the sample. There are already several licensing systems in place for different types of musical works, and the industry could develop one to obtain a sampling license. While sampling licenses would not have the statutory backing as other licenses,<sup>176</sup> it would provide a way to easily obtain and pay for a recording sample, rather than the current method of finding and negotiating with each artist or record label individually.<sup>177</sup> Rights holders would still be able to sue samplers who choose not to obtain a license under the current law.

The simplest system would be to add sampling licenses to those already offered by SoundExchange. The organization was created to collect fees for § 114 digital licenses, and allocate those fees depending on how much a song is played.<sup>178</sup> Sampling today is done digitally, putting SoundExchange in the best position to add a new system.<sup>179</sup> By completing its existing database of rights holders, and creating an industry standard of sampling licenses, it would not need to rely on the courts to resolve sampling issues.<sup>180</sup>

## V. CONCLUSION

The Sixth Circuit made the wrong decision when it created the bright line rule that *de minimis* defenses do not apply to sound recordings, because it bypasses the substantial similarity analysis required to prove copyright infringement.<sup>181</sup> This

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<sup>175</sup> Wu, *supra* note 15 (stating that one argument companies like Bridgeport Music like to make is that they are simply smaller artists retrieving what they are rightfully owed from bigger artists like Jay-Z who steal from them. The flaw in this logic though, is that in cases such as Bridgeport's, it is not a smaller artist being compensated for his or her work, but a corporate rights' holder who has found a way to make money using dubiously obtained recording rights and the legal system.).

<sup>176</sup> 17 U.S.C. § 115 (2019) (created a mechanical license for musical compositions, enabling artists to create their own recording of a composition by obtaining a license at a statutory rate, and was updated to include digital public performances, i.e. streaming, with the passage of the MMA); *see also* 17 U.S.C. § 114 (2019) (created a statutory license for digital performances of sound recordings, which can be compelled by noninteractive streams, and created SoundExchange to collect the fees and distribute it directly to artists and record labels).

<sup>177</sup> Wu, *supra* note 15 (claiming that if an old rap album which was produced using thousands of *de minimis* samples from other works would cost millions to produce because it would need to obtain a license for every song sampled at no set price. It also suggests that at these increased costs and risk of getting sued over a single identical note, many artists and record labels would no longer try to produce albums or make new songs, which goes against the purpose of copyright.).

<sup>178</sup> SOUNDEXCHANGE, <http://www.soundexchange.com> (last visited Dec. 1, 2019) (stating its primary purpose is to collect fees from digital webcasters such as SiriusXM and distribute those funds to rights holders and artists).

<sup>179</sup> *Id.* (Although the primary purpose of SoundExchange is to collect fees from digital webcasters, it issues different types of licenses and prides itself on being an advocate for music artists on all issues, not just a fee collection agency for a specific type of statutory license.).

<sup>180</sup> *Id.* (SoundExchange already has a working database of sound recording rights holders, and works with both sides of the music industry, from artists and producers to broadcasters and distributors, putting it in the best position to create a complete database of rights holders).

<sup>181</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

created an unofficial split between the Sixth and the rest of the circuits, which have refused to adopt or even acknowledge *Bridgeport* at the district level.<sup>182</sup> The Ninth Circuit formalized a circuit split when it expressly rejected *Bridgeport*, following the district courts and Nimmer in criticizing its rule.<sup>183</sup>

The Sixth Circuit based its decision on a misreading of § 114, reading a meaning into “entirely” that Congress never intended.<sup>184</sup> Then it put the onus of fixing its mistake on the music industry, stating that if its interpretation is wrong, the industry needs to convince Congress to clarify the act.<sup>185</sup>

The Sixth Circuit gave sound recordings a level of copyright protection no other work enjoys.<sup>186</sup> *De minimis* defenses can be raised for every copyrightable work, including musical compositions, as part of substantial similarity, which the Sixth Circuit acknowledged.<sup>187</sup> There is nothing in § 114 to suggest sound recordings should receive special treatment.<sup>188</sup> The Ninth Circuit recognized sound recordings should be subject to the same analysis as every other copyrightable work, including overcoming a *de minimis* defense.<sup>189</sup>

Ultimately, a long term, permanent solution by Congress or the Supreme Court in the near future is unlikely, and the music industry cannot wait. With evolving technologies and the increasing prevalence of sampling, an immediate fix is necessary, even if only temporary. By adding sampling licenses to an existing system, the industry can enable artists to legally sample without exorbitant costs or time spent finding rights holders. Unfortunately, it is not a perfect fix, and for those samplers who choose to do so without permission, they risk subjecting themselves to a copyright infringement suit, the outcome of which will be determined in part by whether the case is brought in the Sixth Circuit, or any other.

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<sup>182</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016).

<sup>183</sup> *Id.* at 887.

<sup>184</sup> H.R. Rep. No. 94-1476, at 106 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5721.

<sup>185</sup> Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005).

<sup>186</sup> NIMMER, *supra* note 36, § 13.03[A][2][b].

<sup>187</sup> *Bridgeport Music*, 410 F.3d at 801 (attempting to justify its decision that because there is a statutory difference between recordings and compositions, it is okay to apply a *de minimis* defense for taking three notes from a composition, but not for taking those same three notes from the recording).

<sup>188</sup> 17 U.S.C. § 114.

<sup>189</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016).