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"Good Artists Borrow; Great Artists Steal": How the Fair Use Doctrine Can Bring Harmony to the Federal Circuits on Digital Music Sampling

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**“GOOD ARTISTS BORROW; GREAT ARTISTS
STEAL”: HOW THE FAIR USE DOCTRINE CAN
BRING HARMONY TO THE FEDERAL
CIRCUITS ON DIGITAL MUSIC SAMPLING***¹

INTRODUCTION	1086
I. PROMOTING THE PROGRESSION OF SCIENCE AND THE USEFUL ARTS	1088
A. <i>Feist and the Development of the Originality Doctrine</i> ...	1089
B. <i>Substantial Similarity and the De Minimis Analysis</i>	1092
C. <i>The Audience Test</i>	1094
II. COPYRIGHT LAW AND DIGITAL SAMPLING	1096
A. “ <i>Thou Shalt Not Steal</i> ”—Grand Upright Music, Ltd. v. Warner Bros. Records	1097
B. <i>The Bridgeport District Court Decision</i>	1098
III. THE ONGOING CIRCUIT SPLIT	1100
A. <i>The Sixth Circuit’s Bright-Line Ban: “Get a License or Do Not Sample”</i>	1100
B. <i>The Ninth Circuit’s Resurrection of the De Minimis Analysis</i>	1102
IV. HARMONIZING THE <i>BRIDGEPORT</i> AND <i>CICCONE</i> OPINIONS	1104
A. <i>Why a De Minimis Analysis Should Apply</i>	1104
B. <i>Why a De Minimis Analysis of a Sound Recording Should Not Include the Audience Test</i>	1109

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1. Pablo Picasso is often credited with coining the phrase, “Good artists borrow; great artists steal,” though some argue that it actually originated with T.S. Eliot, who wrote, “Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different.” T.S. ELIOT, *Philip Massinger*, in *THE SACRED WOOD* 123, 125 (Methuen & Co., 1948) (1920); see also Dan Farber, *What Steve Jobs Really Meant When He Said “Good Artists Copy; Great Artists Steal”*, CNET (Jan. 28, 2014, 8:04 AM), <https://www.cnet.com/news/what-steve-jobs-really-meant-when-he-said-good-artists-copy-great-artists-steal/> [<https://perma.cc/R8J4-WE3X>] (examining Steve Jobs’ statement in a 1996 interview that “Picasso had a saying—‘good artists copy; great artists steal’”); Bill Hammack, *Goodbye VHS, Farewell Fair Use*, MARKETPLACE (Dec. 19, 2006), <https://www.marketplace.org/2006/12/19/life/goodbye-vhs-farewell-fair-use> [<https://perma.cc/2SZP-HDHE>] (attributing the quote “Good artists borrow; great artists steal” to T.S. Eliot).

C. <i>How the Fair Use Doctrine Strikes the Right Chord Between the Ninth and Sixth Circuits' Opinions</i>	1113
1. The First Factor: The Purpose and Character of the Use.....	1115
a. <i>The Transformative Use Analysis</i>	1116
b. <i>The Commercial Use Analysis</i>	1118
2. The Second Factor: The Nature of the Copyrighted Work	1119
3. The Third Factor: The Amount and Substantiality of the Portion Used	1120
4. The Fourth Factor: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work	1121
D. <i>How the Fair Use Doctrine Serves the Goals of Copyright Law</i>	1122
CONCLUSION	1124

INTRODUCTION

In 1985, Slick Rick and Doug E. Fresh released “La Di Da Di,” a beatbox and rap duet that has since been referred to as “the national anthem or alphabet song of hip-hop.”² Though the song enjoyed significant commercial success of its own, in the years following its release, “La Di Da Di” was borrowed by artists “from The Notorious B.I.G. to Miley Cyrus to Spoon” and incorporated into works that became some of the most recognized works in music history.³ This form of “borrowing”—or more specifically, digital sampling—is “the act of appropriating ‘sounds’ from a previous sound recording and mixing the previously taken sounds into a completely new musical work.”⁴ As is evidenced by the fact that “La Di Da Di” alone has now been sampled almost 900 times,⁵ the popularity of sampling within the music industry has only continued to increase since its emergence in

2. NPR/TED Staff, *Why Would More Than 500 Artists Sample the Same Song?*, NPR (June 27, 2014, 9:57 AM), <https://www.npr.org/2014/06/27/322721353/why-would-more-than-500-artists-sample-the-same-song> [<https://perma.cc/KH5F-ET66> (dark archive)] (quoting Mark Ronson, a DJ and producer known for music sampling).

3. *Id.*

4. 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, 221 (2015).

5. *La Di Da Di*, WHOSAMPLED, <https://www.whosampled.com/Doug-E.-Fresh/La-Di-Da-Di/> [<https://perma.cc/6MVB-JXMS>].

the 1980s.⁶ Yet while many samplers insist that “people that sample have the utmost reverence for the people who created the music that came before,” many artists whose works are being repeatedly sampled and incorporated into new works find the practice to be more akin to stealing than a form of flattery.⁷

The legality of sampling remained relatively undeveloped until the United States Court of Appeals for the Sixth Circuit issued a decision in *Bridgeport Music, Inc. v. Dimension Films*⁸ in 2005. The case centered around N.W.A.’s song, “100 Miles and Runnin’,” which allegedly included sampled portions of George Clinton, Jr. and the Funkadelics’ song, “Get Off Your Ass and Jam.”⁹ Though N.W.A. argued that the practice of sampling had become standard within the music industry and that the amount of appropriated material was *de minimis*, the Sixth Circuit ultimately held that any amount of sampling of a copyright-protected work would result in liability.¹⁰ “Get a license or do not sample,” the court succinctly stated.¹¹ “We do not see this as stifling creativity in any significant way.”¹²

Despite the Sixth Circuit’s assurance that its ruling would not stifle creativity, “[f]or many, the groundbreaking aspects of *Bridgeport* were problematic . . . and the ruling has been strongly criticized ever since it came down both from a legal perspective and a policy perspective.”¹³ Yet until June of 2016, when the United States Court of Appeals for the Ninth Circuit came down with *VMG Salsoul, LLC v. Ciccone*,¹⁴ “*Bridgeport* had remained the only on-point circuit-level ruling since it came out.”¹⁵ The sampling at issue in *Ciccone* was a less-than-a-second-long “horn blast” taken from Salsoul Orchestra’s 1977 song, “Love Break,” and mixed into Madonna’s multi-platinum hit, “Vogue.”¹⁶ Perhaps assuming that the Ninth Circuit would adhere to *Bridgeport*, VMG Salsoul, LLC, which owned the rights to “Love Break,” argued that Madonna should be held liable for copyright infringement even if her sampling was *de*

6. Cox, *supra* note 4, at 227.

7. See NPR/TED Staff, *supra* note 2.

8. 410 F.3d 792 (6th Cir. 2005).

9. *Id.* at 795.

10. *Id.* at 801.

11. *Id.*

12. *Id.*

13. Bill Donahue, *9th Circ. Throws Down the Gauntlet on Music Sampling*, LAW360 (June 4, 2016, 5:11 PM), <https://www.law360.com/articles/803236/9th-circ-throws-down-the-gauntlet-on-music-sampling> [<https://perma.cc/58VA-4WFX> (dark archive)].

14. 824 F.3d 871 (9th Cir. 2016).

15. Donahue, *supra* note 13.

16. *Ciccone*, 824 F.3d at 875.

minimis.¹⁷ Unfortunately for VMG, the Ninth Circuit instead “took the unusual step” of creating a circuit split, holding that, contrary to the assertions of its sister circuit, the *de minimis* analysis was a crucial aspect of any copyright infringement claim.¹⁸ Thus, with the *Ciccone* opinion, “two of the centers of the American music industry [were put] at odds with each other: Nashville, where the *Bridgeport* case arose, and Los Angeles (and the West Coast generally) [with *Ciccone*].”¹⁹

This Comment argues that a *de minimis* analysis should apply when evaluating a copyright infringement claim in the music sampling context, but only as one facet within the larger framework of the fair use doctrine. Specifically, courts faced with a digital sampling infringement claim should apply the four fair use factors at the summary judgment stage to determine whether an original work is substantially similar to a new work so as to warrant a finding of infringement, or alternatively, whether the use may be deemed fair. Analysis proceeds in four parts. Part I outlines the goals of copyright law generally and what will be referred to as “the infringement threshold.” Part II examines the role of copyright within the realm of music, specifically as it pertains to the act of digital sampling. Part III analyzes the intricacies of the existing split between the Sixth and Ninth Circuits and each circuit’s take on the applicability of the *de minimis* analysis within a copyright infringement claim. Part IV explains the origins of the fair use doctrine and advocates for its contemporary applicability to cases involving digital sampling. Part IV also details the ways in which the fair use doctrine strikes the requisite balance between the *Bridgeport* and *Ciccone* decisions so as to ultimately further the goals of copyright law generally.

I. PROMOTING THE PROGRESSION OF SCIENCE AND THE USEFUL ARTS: THE GOALS OF COPYRIGHT LAW GENERALLY AND THE INFRINGEMENT THRESHOLD

The federal power to enact both copyright and patent legislation, taken from the Intellectual Property Clause of the United States Constitution, is intended to allow Congress to “promote the Progress

17. *Id.* at 880.

18. *Id.* at 886.

19. Mark Wittow & Eliza Hall, *9th Circ. and German High Court Weigh in on Music Sampling*, LAW360 (Aug. 9, 2016, 11:21 AM), <https://www.law360.com/articles/824098/9th-circ-and-german-high-court-weigh-in-on-music-sampling> [https://perma.cc/66N4-FKJ5 (dark archive)].

of Science and useful Arts.”²⁰ This promotion is to be achieved “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²¹ Despite the clause’s clearly stated purpose, a misguided conception of copyright law as a mechanism designed exclusively to protect authors and inventors has developed over time. This misconception is perhaps largely based on the list of rights granted only to authors in the Copyright Act of 1976,²² which include: (1) the right to reproduce the original work; (2) the right to create derivative works of the original work; (3) the right to sell, lease, rent, or lend copies of the work to the public; (4) the right to perform the work publicly; (5) the right to display the work publicly; and (6) the right to perform a sound recording using a digital audio transmission.²³ Artists may also sell, transfer, or license the copyright, in addition to any of these exclusive rights.²⁴

As is evidenced by the existing split between the Sixth and Ninth Circuits, courts have struggled to strike the requisite balance between affording artists these specific rights, while only doing so in a way that works to stimulate the progression of the arts. The following sections will discuss what this Comment refers to as “the infringement threshold”—or the elusive point at which the copying of an original work becomes actionable—developed by the Supreme Court in *Feist Publications, Inc. v. Rural Television Service Co.*²⁵ Additionally, this Part will discuss the ways in which lower courts have attempted to flesh out this threshold, specifically with the concepts of substantial similarity, the *de minimis* analysis, and the audience test.

A. *Feist Publications, Inc. v. Rural Television Service Co. and the Development of the Originality Doctrine*

Though the Copyright Act does indeed grant rights exclusively to authors and inventors, the Supreme Court has unequivocally emphasized that the “*primary* objective of copyright is not to reward the labor of authors, but [is instead] to ‘promote the Progress of

20. U.S. CONST. art. I, § 8, cl. 8.

21. *Id.*

22. Pub. L. No. 94–553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C. (2016)).

23. 17 U.S.C. § 106 (2012).

24. § 201(d); *see also* § 114 (providing the scope and limitations of exclusive rights and licenses in sound recordings).

25. 499 U.S. 340 (1991).

Science and useful Arts.”²⁶ These enumerated rights within the Copyright Act are thus granted to authors and inventors based not primarily on a desire to protect their works, but rather on the belief that, by protecting those works, the “Progress of Science and the useful Arts” will be promoted.²⁷ The goal of copyright law generally is thus nuanced: to protect the works of authors and inventors, but only insofar as it stimulates the natural progression of science and the arts.²⁸

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court held that this careful balance lies in the concept of originality.²⁹ At issue in that case was a telephone directory, which the defendant, Feist Publications, Inc., admitted included over a thousand copied listings from the plaintiff’s, Rural Telephone Service Company, own directory.³⁰ Explaining that copyrighting a work does not, in itself, entitle every element of the work to protection, the Court stated that “copyright protection may extend only to those components of a work that are original to the author.”³¹ It defined “original” as a work “independently created by the author (as opposed to copied from other words), and . . . possess[ing] at least some minimal degree of creativity.”³²

Based on this requirement of “at least some minimal degree of creativity,” the Court articulated that a work comprised almost entirely of preexisting material—otherwise known as “a factual compilation”—may be entitled to a “thin” amount of copyright protection if the relevant copyright statutes cover factual

26. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8) (emphasis added).

27. U.S. CONST. art. I, § 8, cl. 8.

28. See *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002) (“[A] balance must be struck between protecting an artist’s interests, and depriving other artists of the building blocks of future works.”), *rev’d*, 401 F.3d 647 (6th Cir. 2004); Laurie Tomassian, *Transforming the Fair Use Landscape by Defining the Transformative Factor*, 90 S. CAL. L. REV. 1329, 1331 (2017) (“The control that authors, inventors, and innovators are given over their work serves a purpose greater than merely rewarding their efforts; control rights are given as a means to an end. These rights are conferred to incentivize the continued production of novel and pioneering sciences and useful arts.”); Jeannine M. Marques, Note, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 331 (2007) (“On the one hand, copyright encourages the creation of artistic works through a limited monopoly that ensures creators can profit from their labors. On the other hand, a strict monopoly discourages the production of new art that builds from these existing copyrighted works.”).

29. 499 U.S. at 345 (“The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.”).

30. *Id.* at 344.

31. *Id.* at 348.

32. *Id.* at 345.

compilations.³³ This necessarily follows, the Court stated, as the author had no part in “independently creat[ing]” the facts used; rather, the author only expended his own creativity in compiling or arranging the facts in a certain way.³⁴ Thus, while the specific arrangement of facts may be entitled to copyright protection, the preexisting material may not be copyrighted since “the facts themselves do not become original through association.”³⁵ For a factual compilation to merit copyright protection then, the compilation must be organized in “such a way as to render the work as a whole original,” meaning that “some ‘ways’ will trigger copyright, but that others will not.”³⁶

By drawing this distinction between facts and factual compilations—the latter being eligible for copyright protection, while the former is not—the Supreme Court sought to abolish what had been referred to as the “sweat of the brow doctrine,” which suggested that “copyright was a reward for the hard work that went into compiling facts.”³⁷ The Court stated that this doctrine, which was based on a misinterpretation of the technical language of § 5 of the 1909 Copyright Act, had led lower courts to erroneously infer that factual compilations were per se copyrightable.³⁸ This approach was fundamentally flawed, the Court explained, in that it extended copyright protection beyond the compiler’s original contributions to the facts themselves.³⁹ Based on this conception, the only possible defense to infringement was independent creation, meaning that “a subsequent compiler was ‘not entitled to take one word of information previously published,’ but rather had to ‘independently work out the matter for himself.’”⁴⁰ The Court explicitly stated that, in following the “sweat of the brow” doctrine, lower courts “eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.”⁴¹

Feist, then, makes evident that even a point-blank admission of copying will not necessarily result in a successful copyright

33. *Id.* at 349.

34. *Id.* at 345, 348.

35. *Id.* at 349.

36. *Id.* at 358.

37. *Id.* at 352–54 (citing *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922)).

38. *Id.* at 352.

39. *Id.*

40. *Id.* at 353 (quoting *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922)).

41. *Id.*

infringement claim.⁴² On the contrary, in addition to establishing the ownership of a valid copyright, to bring an infringement claim a plaintiff needs to establish that the defendant copied “constituent elements of the work that are original.”⁴³ In so stating, the Court in *Feist* implicitly referred to a threshold under which a defendant’s use of copyrighted material will not be deemed “unlawful” or “illicit”;⁴⁴ yet the Court failed to explicitly articulate where this line should be drawn. Instead, the Court simply explained that “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”⁴⁵

B. *Substantial Similarity and the De Minimis Analysis*

In an attempt to flesh out this elusive threshold that the Court implicitly referred to in *Feist*, many lower courts have homed in on this notion of a “*de minimis* quantum of creativity.”⁴⁶ The concept of *de minimis* is based on the legal maxim *de minimis non curat lex*, or “the law does not concern itself with trifles.”⁴⁷ Within the context of copyright law, courts have defined this concept to mean that copyright protection will extend only to copying that is considered non-trifling, or substantial, in the belief that doing so will strike the requisite balance between the protection of artists’ labors and the constitutional intention of promoting artistic creativity.⁴⁸

42. *Id.* at 361 (“Not all copying, however, is copyright infringement.”).

43. *Id.*

44. *See* *Arnstein v. Porter*, 154 F.2d 464, 472–73 (2d Cir. 1946) (articulating the test in a music copyright violation as “whether 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 popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff”).

45. *Feist Publ’ns, Inc.*, 499 U.S. at 363.

46. *Id.*

47. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877 (9th Cir. 2016) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)).

48. *Id.* at 881 (“[C]ourts consistently have applied [the *de minimis* analysis] in *all* cases alleging copyright infringement. Indeed, we stated in dictum in *Newton* that the rule ‘applies *throughout the law of copyright*, including cases of music sampling.’”) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004)); Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 98–99 (2006) (“The principle that trivial copying does not constitute actionable copying has long been a central tenet of copyright law.”); Joshua Crum, Comment, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. Rev. 943, 956 (“*De minimis*, therefore, functions as a defense to copyright infringement by showing that the amount taken was not substantial enough to merit protection. In making such a determination, a court must balance the economic interests protected by copyright

In this way, the *de minimis* analysis has developed into a key facet of what has been deemed a “substantial similarity” analysis.⁴⁹ In the leading treatise on copyright infringement, Professor David Nimmer states, “Just as copying is an essential element of copyright infringement, so substantial similarity between the plaintiff’s and defendant’s work is an essential element of actionable copying.”⁵⁰ In referring to “actionable copying,” Nimmer reiterates what the *Feist* Court made clear: “[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.”⁵¹ Yet even this seemingly simple maxim leaves unresolved exactly what degree of copying will qualify as substantial enough to result in infringement.⁵²

laws while preventing overly rigid applications of these laws that may stifle artistic creativity and decrease the development of new works.”).

49. *Ciccone*, 824 F.3d at 880–81 (“The rule that infringement occurs only when a substantial portion is copied is firmly established in the law.”); *see also* *Perris v. Hexamer*, 99 U.S. 674, 675–76 (1878) (“Copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced.”); *Ringgold v. Black Entm’t. Tel., Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (stating that *de minimis* applies to copying at “such a trivial extent as to fall below the quantitative threshold of substantial similarity”); *Warner Bros., Inc., v. Am. Broad. Co.*, 720 F.2d 231, 242 (2d Cir. 1983) (explaining that when determining if copying amounts to recoverable infringement under the substantial similarity test, “a *de minimis* rule has been applied, allowing the literal copying of a small and usually insignificant portion of the plaintiff’s work”); *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 839–40 (M.D. Tenn. 2002) (“The Sixth Circuit has recognized that the principle of *de minimis non curat lex* (‘the law cares not for trifles’) can be applied as a defense to copyright infringement if it can be shown that a substantial amount of the copyrighted work was not taken.”); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) (“If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.”); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (Matthew Bender rev. ed. 2017) (LEXIS).

50. NIMMER & NIMMER, *supra* note 49, at § 13.03[A]; *see Ringgold*, 126 F.3d at 74 (“[S]ubstantial similarity . . . is always a required element of actionable copying.”); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943) (“Among criteria for ascertaining infringement . . . are whether so much has been taken as would sensibly diminish the value of the original; and whether the labors of the party entitled to copyright are substantially to an injurious extent appropriated by another.”).

51. NIMMER & NIMMER, *supra* note 49, at § 13.03[A] (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)); *see also* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360 (1991) (“Copyright protection does not extend to the facts themselves, and the mere use of information contained in a directory without a substantial copying of the format does not constitute infringement.”) (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369–1370 (5th Cir. 1981)).

52. *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 840 (“Further complicating the process is the lack of a clear road map for *de minimis* analyses from the circuit courts or the Supreme Court.”); NIMMER & NIMMER, *supra* note 49, at § 13.03[A] (“The determination of the extent of similarity that will constitute *substantial*, and hence infringing, similarity

In determining whether two works are substantially similar enough to constitute infringement, the analysis will necessarily require a “value judgment.”⁵³ This value judgment begins by acknowledging that something has been taken from the original work, but still asks whether “the value of the original is sensibly diminished . . . [in a way] that is sufficient in point of law to constitute a piracy *pro tanto*.”⁵⁴ Determining whether the value of the original has been sufficiently diminished, in turn, involves both a quantitative and qualitative analysis.⁵⁵ The quantitative portion of the analysis, unsurprisingly, “concerns the amount of copyrighted work that is copied.”⁵⁶ The qualitative portion, on the other hand, deals with the “copying of expression.”⁵⁷ This qualitative analysis of whether two works are substantially similar enough to constitute infringement is, at its core, subjective.

C. *The Audience Test*

Attempting to standardize this naturally subjective component of the analysis, many courts have turned to the “audience test,” otherwise known as the “average lay observer test.”⁵⁸ In determining whether substantial similarity is present, the audience test asks “whether an average lay observer would recognize the alleged copy as

presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.”).

53. NIMMER & NIMMER, *supra* note 49, at § 13.03[A][2][a].

54. *Id.* (quoting *Folsom*, 9 F. Cas. at 348).

55. *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 841 (“Those courts that have addressed a *de minimis* defense in cases of digital sampling have focused on ‘whether the defendant appropriated, either quantitatively or qualitatively, constituent elements of the work that are original.’”) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1257 (9th Cir. 2004)); Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 208 (2012) (“Although no doubt a factual determination, this step operates as a subjective evaluation of the different parts of the two works and of their relative contributions to the overall significance of the work, both as a quantitative and qualitative matter, in order to assess whether the copying amounted to a ‘wrong.’”).

56. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (quoting *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d. Cir. 1997)).

57. Jeremy Scott Sykes, Note, *Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 761 (2006).

58. *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 840 (“One of the most common tests for substantial similarity is ‘whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.’”) (quoting *Tuff ‘N’ Rumble Mgmt., Inc. v. Profile Records, Inc.*, No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *4 (S.D.N.Y. Apr. 2, 1997)); NIMMER & NIMMER, *supra* note 49, at § 13.03[E][1][a].

having been appropriated from the copyrighted work.”⁵⁹ Moreover, according to the traditional test, for there to be substantial similarity, the average lay observer should be able to “detect that fact without any aid or suggestion or critical analysis by others,” meaning that “[t]he reaction of the public to the matter should be spontaneous and immediate.”⁶⁰

Courts differ on who precisely this average lay observer is, some referring to him as a layperson, while others consider him to be either a member of the work’s intended audience or even a member of a reasonable jury.⁶¹ Yet regardless of which iteration of the test is applied,⁶² the purpose of the audience test remains the same: to “ascertain the effect of the alleged infringing [work] upon the public.”⁶³ If a reasonable man, as the representative of the general public, is unable to recognize that copying has occurred “spontaneous[ly] and immediate[ly]” without the aid of expert analysis, then courts interpret this to mean that the use is *de minimis* under the audience test. Consequently, the copying is not sufficient to be considered actionable.⁶⁴

59. *Tuff ‘N’ Rumble Mgmt., Inc. v. Profile Records, Inc.*, No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *4 (S.D.N.Y. Apr. 2, 1997) (quoting *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966)).

60. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933); *see also* *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 398 (5th Cir. 2001); *Mills v. Ayala*, No. CIV.A. 08-5168, 2010 WL 420556, at *3 (E.D. La. Jan. 29, 2010); *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 450 (S.D.N.Y. 1976), *aff’d and modified*, 677 F.2d 180 (2d Cir. 1981); Sykes, *supra* note 57, at 762 (“Put succinctly, the relevant question . . . is whether the average audience would find that the portion copied is a quantitatively or qualitatively significant portion of the original work as a whole.”).

61. *Compare Concrete Mach. Co. v. Classic Law Ornaments, Inc.*, 843 F.2d 600, 608–09 (1st Cir. 1988) (citing *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)) (“[T]he trier of fact applies the ‘ordinary observer’ test, unaided by dissection or expert testimony, to determine whether the copying resulted in substantial similarity between the works.”), *with* *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1257 (11th Cir. 1999) (citing *Beal v. Paramount Pictures*, 806 F. Supp. 963, 967 (N.D. Ga. 1992)) (“A court may grant summary judgment for defendant as a matter of law . . . if no reasonable jury would find that the two works are substantially similar.”); *see also* *Balganesh*, *supra* note 55, at 219 (“[C]ourts tend to fluctuate in determining who the ‘ordinary’ person is—the hypothetical individual through whose eyes the analysis is to be carried out. One approach adopts a layperson standard, seemingly agnostic to any purpose underlying the formulation. Another approach treats the ordinary person as a member of the ‘intended audience.’”).

62. *Balganesh*, *supra* note 55, at 220 (“All the same, adopting an intended-audience approach instead of the default ordinary-observer one does not seem to actually alter the underlying content of the inquiry in any significant manner.”).

63. *Harold Lloyd Corp.*, 65 F.2d at 18.

64. Sykes, *supra* note 57, at 761–62. *See infra* Section II.B for a full discussion of the test and its shortcomings.

Thus, to mount a successful copyright infringement claim, the plaintiff must prove that the defendant copied a copyright-protected work. Yet merely proving that the defendant had access to the work and actually copied portions of it is insufficient by itself to establish infringement. Instead, the plaintiff must additionally convince the trier of fact that the defendant's copying was enough to be deemed actionable copying. To determine whether an amount of copying is enough to be actionable, a court will focus on the "significance of the similarity between the plaintiff's and the defendant's works," which in turn "inevitably entails the conscious introduction of a large normative/evaluative dimension into the analysis of the entitlement."⁶⁵ In other words, the more "quantitatively and qualitatively significant the borrowing by the defendant, the more likely it is that the copying will be considered improper, and hence actionable."⁶⁶

II. COPYRIGHT LAW AND DIGITAL SAMPLING

Many music copyright cases,⁶⁷ including *Bridgeport* and *Ciccone*, involve a specific kind of copying known as "sampling,"⁶⁸ which refers to "the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo."⁶⁹ Two separate components of a copyrighted song may be potentially sampled—either the musical composition, which is typically copyrighted by the songwriter, or the actual sound recording, which is usually copyrighted by the artist performing the song or the recording

65. Balganes, *supra* note 55, at 206.

66. *Id.*

67. See, e.g., *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1246 (C.D. Cal. 2002) (no infringement); *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *2 (S.D.N.Y. Aug. 27, 2001) (genuine issues of fact existed as to substantial similarity of works); *Fantasy, Inc. v. La Face Records*, No. C 96-4384 SC ENE, 1997 WL 627544, at *1 (N.D. Cal. June 24, 1997); *Tuff 'N' Rumble Mgmt. v. Profile Records*, No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *2 (S.D.N.Y. Apr. 2, 1997) (summary judgment for defendant where plaintiff did not prove copying or substantial similarity); *Jarvis v. A&M Records*, 827 F. Supp. 282, 286 (D.N.J. 1993) (summary judgment for defendant where facts existed as to substantial similarity); *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (no substantial similarity analysis conducted before finding infringement).

68. Cox, *supra* note 4, at 221.

69. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 875 (9th Cir. 2016); see also John Schietinger, Note and Comment, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 211 (2005) ("Music sampling is the incorporation of portions of an existing song into a new song. Musicians sample by using technological devices known as 'samplers.'").

company that releases it. Therefore, an artist wishing to sample must theoretically obtain permission from two separate entities.⁷⁰ Obtaining permission from not only one, but two, entities can be an expensive process,⁷¹ meaning that “[f]or those who c[a]n’t afford it, they either d[o]n’t sample or risk[] a lawsuit.”⁷²

This Part discusses the different ways in which courts have come to view the act of sampling, whether it be as a necessary practice in the interest of progressing music as a general art form or as a despicable act akin to stealing. The Part will begin by analyzing *Grand Upright Music, Ltd. v. Warner Brothers Records*,⁷³ one of the first cases to analogize the act of sampling to technological stealing, before moving into a discussion of the district court opinion in *Bridgeport*, which set the stage for the eventual split over the legality of sampling between the Sixth and Ninth Circuits.

A. “*Thou Shalt Not Steal*”—*Grand Upright Music, Ltd. v. Warner Bros. Records*

Sampling controversially burst onto the legal scene in 1991 with *Grand Upright Music, Ltd. v. Warner Bros. Records*, in which Judge Duffy of the Southern District of New York quoted the Bible’s instruction of “thou shalt not steal”⁷⁴ to denounce the practice of sampling as a whole.⁷⁵ In that case, rapper Biz Markie admitted to incorporating three words and a portion of music from George O’Sullivan’s song, “Alone Again (Naturally),” into his own song, “Alone Again.”⁷⁶ Though Markie argued that such a practice had become standard within the music realm, Judge Duffy scathingly referred to his actions as “stealing,” and in “violat[ion] not only [of] the Seventh Commandment, but also the copyright laws of this

70. See Crum, *supra* note 48, at 950.

71. See Schietinger, *supra* note 69, at 221 (“Normally, the artist will pay a flat fee for the sample, usually ranging from \$100 to \$10,000. The amount of the fee or royalty paid depends ‘on quantitative and qualitative analyses of the use and whether the sample was cleared before it was used.’”) (quoting Michael L. Baroni, Comment, *A Pirate’s Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. Miami Ent. & Sports L. Rev. 65, 91 (1993)).

72. Donahue, *supra* note 13; see also Schietinger, *supra* note 69 (“Artists usually do not get clearance for drum samples, very short samples, and samples that are altered unrecognizably since such samples are usually rhythmic, indistinct, and ‘easily distinguished.’”).

73. 780 F. Supp. 182 (S.D.N.Y. 1991).

74. *Id.* at 183 (quoting *Exodus* 20:15).

75. *Id.* at 185 (stating that sampling amounts to a “callous disregard for the law and for the rights of others”).

76. *Id.* at 183.

country.”⁷⁷ In a slim four-page opinion, the judge decided that Markie was aware that he was violating O’Sullivan’s rights when he sampled from “Alone Again (Naturally),” and that this admission was, in itself, sufficient to sustain a finding of copyright infringement. Notably, Judge Duffy failed to provide any “guidance [on how] to ascertain the quantitative and qualitative threshold level for future sampling cases,” and was instead content to simply assert that “copyright infringement automatically results once the plaintiff proves copyright ownership and unauthorized sampling.”⁷⁸

Perhaps in large part based on the *Grand Upright* decision, digital sampling thus came to be characterized by the courts as “the most ‘brazen stealing of music’ possible.”⁷⁹ In subsequent years, very few sampling cases actually made it to litigation, and those that did were mostly settled out of court.⁸⁰ This is unsurprising considering Judge Duffy’s suggestion in *Grand Upright* that Markie should not only be subject to a preliminary injunction, but more ominously, that he risked the imposition of “sterner measures”⁸¹—i.e., criminal sanctions.⁸²

B. *The Bridgeport District Court Decision*

In the wake of *Grand Upright*, in 2002, Bridgeport Music, Inc.⁸³ and Westbound Records filed suit in the United States District Court

77. *Id.* In response to Judge Duffy’s succinctly scathing opinion, Markie’s next album was entitled “All Samples Cleared!” and featured cover art with Markie “playing both judge and defendant, restaging the Duffy courtroom with a smirk.” Oliver Wang, *20 Years Ago Biz Markie Got the Last Laugh*, NPR (May 6, 2013, 12:50 PM), <https://www.npr.org/sections/therecord/2013/05/01/180375856/20-years-ago-biz-markie-got-the-last-laugh> [<https://perma.cc/PVQ9-XRNS> (dark archive)].

78. Schietinger, *supra* note 69, at 222.

79. Crum, *supra* note 48, at 952–53 (quoting *Jarvis v. A&M Records*, 827 F. Supp. 282, 295 (D.N.J. 1993)).

80. *Id.* at 953; *see also* Donahue, *supra* note 13 (“The [*Bridgeport*] ruling has led to far more conservative sampling in the music industry. Seeking a license for samples, even very tiny ones, became an industry standard. For those who couldn’t afford it, they either didn’t sample or risked a lawsuit.”).

81. *Grand Upright Music, Ltd.*, 780 F. Supp. at 185.

82. Crum, *supra* note 48, at 953.

83. It is interesting to note that Bridgeport Music, Inc. is not actually a music producer; instead, it is a company that operates “like a patent troll” by acquiring the rights to a large catalog of compositions and sound recordings and profiting by suing artists who sample from the catalog, “no matter how minor or indistinguishable the sample.” When an artist pays to sample from one of Bridgeport’s recordings, Bridgeport often requires that it be granted a percentage of an ownership within the newly created work, thereby always adding to its catalog of works from which others might imprudently sample. Crum, *supra* note 48, at 953; *see also* 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.

for the Middle District of Tennessee against No Limit Films for copyright infringement.⁸⁴ Bridgeport and Westbound claimed to own the musical composition and sound recording copyrights to “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics, which they alleged was sampled and incorporated into the song “100 Miles.”⁸⁵ No Limit Films did not dispute that “Get Off Your Ass and Jam” had been digitally sampled or that portions of the song had been incorporated into “100 Miles”; instead, it moved for summary judgment, arguing that the sampling was *de minimis* and, for this reason, not subject to protection.⁸⁶

The district court ultimately agreed. Noting that the Sixth Circuit had previously validated a substantial similarity analysis, its analysis centered around an examination of the quantitative and qualitative components of the two works to determine whether their similarities were significant enough to deem No Limit Films’s copying actionable.⁸⁷ For the quantitative analysis, the court focused on the amount of the copyrighted work that was copied.⁸⁸ In doing so, it found that the sample was comprised of a two-second portion of the chord that was then “looped”⁸⁹ between fourteen and sixteen times, and appeared at five different points within the song.⁹⁰ As the court stated, the “total length of all copied segments [was] therefore at the most 40 seconds,” which, in itself, would seem to be quantitatively insignificant; yet, the court was also careful to note that, because “100 Miles” had a total running time of about four and a half minutes, and “Get Off” had a total running time of about two and half minutes,

261, 268 (2009) (“A particularly vicious predator is the ‘sample troll’; unlike offended composers or performers, such as O’Sullivan, for whom the matter is personal, the troll strategically stockpiles musical rights (sometimes through unscrupulous means). Using first threats and then lawsuits, it shakes musicians and labels down for suspected sampling ‘no matter how minimal or unnoticeable.’”) (quoting Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006), http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html [<https://perma.cc/R78W-LKSM>]).

84. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 833 (M.D. Tenn. 2002).

85. *Id.*

86. *Id.* at 839.

87. *Id.* at 839–40 (“The Sixth Circuit has recognized that the principle of *de minimis non curat lex* (‘the law cares not for trifles’) can be applied as a defense to copyright infringement if it can be shown that a substantial amount of the copyrighted work was not taken.”) (citing *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943)).

88. *See id.* at 841.

89. “Looping” a sample means “the portion of music consisting of the copied chord is repeated several times over.” *Id.*

90. *Id.* at 841.

“[t]he quantitative use of the plaintiffs’ work [was] a mere fraction of the whole, but constitute[d] a more significant portion of the work into which it [was] copied.”⁹¹ In other words, though forty seconds in itself is not a significant amount of time, when viewed in the context of two relatively short songs, it indisputably becomes more quantitatively notable. Notwithstanding that fact, the court concluded that this in itself was not enough to qualify No Limit Films’s copying as actionable, commenting that “the quantitative use of the plaintiffs’ work is only one factor in either a *de minimis* or substantial similarity analysis.”⁹²

Next, it conducted the qualitative analysis by focusing on the sensorial effects of the original and sample within the works as a whole. “‘100 Miles’ is a song about four black men on the run from the F.B.I. who appear to be wrongfully pursued for some unmentioned crime,” the court stated, and “the effect of the sample is to create tension and apprehension at the sound of pursuing law enforcement.”⁹³ “Get Off,” on the other hand, is a “celebratory song—it is essentially about dancing.”⁹⁴ The essence or “expression” of the two works was thus, in the court’s view, not significantly similar. Considering its findings from both analyses, the court ultimately concluded that the large amount of quantitative similarity was superseded by the drastically different qualitative effect in the two works, qualifying the sampling at issue for the *de minimis* defense. Based on this conclusion, it held that No Limit Films was entitled to summary judgment.⁹⁵

III. THE ONGOING CIRCUIT SPLIT

A. *The Sixth Circuit’s Bright-Line Ban: “Get a License or Do Not Sample”*

In a move anticipated by neither the music nor legal communities,⁹⁶ the Sixth Circuit reversed the district court, holding instead that a *de minimis* analysis had no place in cases involving a defendant’s outright admission of copying. As the court itself

91. *Id.*

92. *Id.*

93. *Id.* at 841–42.

94. *Id.* at 842.

95. *Id.* at 842–43.

96. Donahue, *supra* note 13 (noting that the *Bridgeport* decision “sent shock waves through the [music] industry,” and that “most copyright lawyers who don’t have a dog in the fight would agree”).

admitted, the *Bridgeport* analysis “beg[an] and largely end[ed] with the applicable statute.”⁹⁷ Section 114(b) of the statute provides:

The exclusive right of the owner of copyright in a sound recording . . . is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. . . . The exclusive rights of the owner of copyright in a sound recording . . . 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.⁹⁸

The court’s reasoning rested almost completely on the addition of the word “entirely” into the statute by the Copyright Act of 1976.⁹⁹ From the inclusion of this single word, the court concluded that Congress intended to grant the owner of a sound recording “the exclusive right to ‘sample’ his own recording.”¹⁰⁰

The Sixth Circuit argued that such a bright-line rule would be desirable for many reasons, the first of which being the ease of enforcement.¹⁰¹ Reminiscent of Judge Duffy’s equally brief maxim,¹⁰² the court stated that the rule boiled down to “[g]et a license or do not sample.”¹⁰³ Such simplicity, the court claimed, would save future courts from 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.”¹⁰⁴ For though the court commended the district court on navigating through the “troubled waters” of a *de minimis*/substantial similarity analysis, it noted that it would have been unable to do so “without a dint of great effort,” which the *Bridgeport* court presumably wished to avoid.¹⁰⁵

Also, like the decision in *Grand Upright*, the Sixth Circuit found persuasive the fact that “sampling is never accidental,” for “when you

97. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799 (6th Cir. 2005). “Finally, and unfortunately, there is no Rosetta stone for the interpretation of the copyright statute. We have taken a ‘literal reading’ approach.” *Id.* at 805.

98. 17 U.S.C. § 114(b) (2012).

99. *Bridgeport Music, Inc.*, 410 F.3d at 800–01.

100. *Id.* at 801 (“In other words, a sound recording owner has the exclusive right to ‘sample’ his own recording.”).

101. *Id.*

102. I refer here to Judge Duffy’s quotation of the Bible: “Thou shalt not steal.” *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15).

103. *Bridgeport Music, Inc.*, 410 F.3d at 801.

104. *Id.* at 802.

105. *Id.*

sample a sound recording you know you are taking another's work product."¹⁰⁶ In turn, the court claimed that when one samples another's work product, one is taking something of value, as is evidenced by the fact that one samples in the first place to either save money or add something to one's own work.¹⁰⁷ Sampling, in the Sixth Circuit's opinion, constitutes "a physical taking rather than an intellectual one."¹⁰⁸

The *Bridgeport* decision was thus largely motivated by a dual desire to simplify the process of determining what constitutes infringement, while at the same time, protecting artists from having their work taken by another. Perhaps anticipating the backlash the opinion would receive, the Sixth Circuit defended its position by arguing that "its bright-line rule would not stifle creativity because musicians could still incorporate samples from another work by duplicating the sample in the studio."¹⁰⁹ Though this would admittedly slow the process of creating new musical works, the court viewed this as a necessary consequence because a sample is "valuable to the sound recording copyright owner, who values the sounds fixed in the recording rather than the song itself."¹¹⁰

B. *The Ninth Circuit's Resurrection of the De Minimis Analysis*

Though few courts outside the Sixth Circuit adhered to the *Bridgeport* ruling,¹¹¹ none actually took the controversial step¹¹² of

106. *Id.* at 801.

107. *Id.* at 802.

108. *Id.*

109. Schietinger, *supra* note 69, at 229. The Sixth Circuit's assertion that no artistic creativity is being stifled with its bright-line ban depends on "how you view creative processes." Eric Goldman, *De Minimis Music Sampling Isn't Infringement—Salsoul v. Madonna*, TECH. & MKTG. L. BLOG (June 3, 2016), <http://blog.ericgoldman.org/archives/2016/06/de-minimis-music-sampling-isnt-infringement-salsoul-v-madonna.htm> [<https://perma.cc/UT4T-3UPT>].

110. Schietinger, *supra* note 69, at 229.

111. *Batiste v. Najm*, 28 F. Supp. 3d 595, 625–26 (E.D. La. 2014); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338–39 (S.D. Fla. 2009); *EMI Records Ltd. v. Premise Media Corp. L.P.*, No. 601209/08, 2008 N.Y. Misc. LEXIS 7485, at *5–6 (N.Y. Sup. Ct. Aug. 8, 2008).

112. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016) (noting that a circuit split will be "particularly troublesome in the realm of copyright," as it will necessarily lead to varying levels of copyright protection depending on which circuit one is in, even if dealing with the exact same instance of infringement); Bill Donahue, *The Top 10 Copyright Rulings of 2016*, LAW360 (Dec. 21, 2016, 2:21 PM), <https://www.law360.com/articles/874934> [<https://perma.cc/D5EY-N92G> (dark archive)] ("The Ninth Circuit's June decision to toss out a lawsuit over Madonna's use of an obscure 0.23-second sample in her 1990 hit 'Vogue' dramatically and intentionally altered the legal landscape on music sampling."); Bill Donahue, *The Top 7 Copyright Rulings of 2016: A Midyear Review*,

creating a circuit split until June of 2016, when the Ninth Circuit came down with *VMG Salsoul, LLC v. Ciccone*.¹¹³ Though circuit splits are typically considered to be controversial in themselves, the Ninth Circuit's departure from *Bridgeport* was particularly noteworthy in that it meant that "the most important copyright circuit in the country [was throwing] its support behind the critics and district courts that ha[d] already been complaining for the last decade that *Bridgeport* was bad law that need[ed] to be overturned."¹¹⁴

In that case, the plaintiff, VMG Salsoul, alleged that the defendants, Shep Pettibone and Madonna Louise Ciccone,¹¹⁵ violated its copyrights to both the composition and sound recording of the song "Ooh I Love It (Love Break)."¹¹⁶ The plaintiff claimed that the violation occurred when the defendants incorporated a sampled .23-second "horn hit" from "Love Break" into Madonna's hit song, "Vogue."¹¹⁷

The Ninth Circuit wasted no time in explaining that it would not adhere to the Sixth Circuit's ban against a *de minimis* analysis in a case of copyright infringement of a sound recording. "The rule that infringement occurs only when a substantial portion is copied," the court stated, "is firmly established in the law."¹¹⁸ Yet instead of moving into a quantitative and qualitative analysis, as did the district court in *Bridgeport* when conducting its substantial similarity examination,¹¹⁹ the Ninth Circuit instead moved into its own version of the audience test. It simply stated that "if the public does not recognize the appropriation, then the copier has not benefitted from

LAW360 (June 30, 2016, 4:49 PM), <https://www.law360.com/articles/938698> [<https://perma.cc/YVX7-4K6Q> (dark archive)] ("The [*Ciccone* decision] was the first by a federal appeals court to directly reject the sixth circuit's controversial 2005 decision in *Bridgeport Music*, which effectively turned any amount of sampling into copyright infringement.").

113. Lesley Grossberg, *A Circuit Split at Last: Ninth Circuit Recognizes De Minimis Exception to Copyright Infringement of Sound Recordings*, BAKERHOSTETLER: COPYRIGHT, CONTENT, & PLATFORMS (June 21, 2016), <https://www.copyrightcontentplatforms.com/2016/06/a-circuit-split-at-last-ninth-circuit-recognizes-de-minimis-exception-to-copyright-infringement-of-sound-recordings/> [<https://perma.cc/4Q33-NNSD>].

114. Donahue, *supra* note 13.

115. The plaintiff is known within the music industry by just her first name, Madonna. *Ciccone*, 824 F.3d at 871.

116. *Id.* at 874.

117. *Id.* at 875.

118. *Id.* at 880.

119. See *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841–42 (M.D. Tenn. 2002) (exploring both the number of times a sampled segment was used and the qualitative significance of the sample).

the original artist's expressive content" and "accordingly, there is no infringement."¹²⁰

In rejecting *Bridgeport*, the Ninth Circuit argued that its sister circuit had misconstrued the statutory language on which it so heavily relied,¹²¹ specifically the sentence stating: "The exclusive rights of the owner of a copyright in a sound recording . . . *do not extend* to the making or duplication of another sound recording [with certain qualities]."¹²² While the Sixth Circuit read this sentence as an expansion of a copyright holder's rights—i.e., his rights are expanded to include that only he may sample his own sound recording—the Ninth Circuit claimed that this wording actually functioned as an express *limitation* on the rights of a copyright holder.¹²³ The *Bridgeport* court's reasoning, the Ninth Circuit argued, rests on the "logical fallacy"¹²⁴ that a statement that rights do not extend to a particular purpose means that they therefore extend to all other circumstances.¹²⁵

Moreover, the *Ciccone* court disagreed with the Sixth Circuit's assertion that sampling constitutes a physical, rather than intellectual, taking. "The Supreme Court," it stated, "has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and *not* the 'fruit of the [author's] labor.'"¹²⁶ Acknowledging the potentially troublesome effects of creating a circuit split, the Ninth Circuit concluded it would nonetheless take such an "unusual step" because it could not ignore congressional intent for the sole purpose of avoiding a split.¹²⁷

IV. HARMONIZING THE *BRIDGEPORT* AND *CICCONE* OPINIONS

A. *Why a De Minimis Analysis Should Apply: A Critique of the Sixth Circuit's Bridgeport Opinion*

The main point of tension between the Sixth and Ninth Circuits is whether a *de minimis* analysis has any place whatsoever in a case

120. *Ciccone*, 824 F.3d at 881.

121. *Id.* at 884 ("We reject that interpretation of § 114(b). *Bridgeport* ignored the statutory structure and § 114(b)'s express *limitation* on the rights of a copyright holder.").

122. *Id.* at 883 (quoting 17 U.S.C. § 114(b) (2012)).

123. *Id.*

124. *Id.* at 884 (quoting *NIMMER & NIMMER*, *supra* note 49, at § 13.03[A][2][b]).

125. *Id.* at 885 ("For example, take as a given the proposition that 'if it has rained, then the grass is not dry.' It does not necessarily follow that 'if it has not rained, then the grass is dry.' Someone may have watered the lawn, for instance.")

126. *Id.* (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

127. *Id.* at 886.

involving the alleged copyright infringement of a sound recording.¹²⁸ The *Bridgeport* court created a bright-line rule against the application of the *de minimis* analysis to such cases.¹²⁹ Though it refrained from using the biblically scathing language of *Grand Upright*,¹³⁰ the *Bridgeport* court's reasoning for creating such a rule was similarly rooted in the fact that it viewed sampling as an example of physically taking something of value from another.¹³¹ "For the sound recording copyright holder," it stated, "it is not the 'song' but the sounds that are fixed in the medium of his choice" and "when those sounds are sampled they are taken directly from that fixed medium."¹³² It is this "medium of [the artist's] choice" that the court viewed as a physical entity from which constituent parts are being taken when another artist samples from that medium.

With this in mind, it is easy to see why both the *Grand Upright* and *Bridgeport* courts seemed to be baffled by the idea that sampling could ever be considered legal. As Judge Duffy put it in *Grand Upright*, "[I]ndeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused."¹³³ If sampling is essentially just stealing, as Judge Duffy implied, then the Sixth Circuit would be absolutely correct that a *de minimis* analysis has no place; for the law certainly does not excuse even a *de minimis* amount of stealing in other contexts, such as say, within criminal law.

Yet fundamental to this notion is a misconception of the goals of copyright protections generally. As discussed at length above,¹³⁴ copyright aims first and foremost to "promote the Progress of Science and useful Arts."¹³⁵ The Constitution instructs Congress to achieve this goal in part by granting authors certain rights to their works; yet, as we have seen, granting authors these rights is only a *mechanism* for

128. *Id.* ("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*.").

129. *See supra* Section II.B.

130. *See Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) ("Thou shalt not steal." (quoting *Exodus* 20:15)).

131. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005) (asserting that sampling constitutes a "physical taking rather than an intellectual one").

132. *Id.*

133. *Grand Upright Music, Ltd.*, 780 F. Supp. at 183.

134. *See supra* Part I.

135. U.S. CONST. art. I, § 8, cl. 8.

achieving copyright's primary objective, rather than its being the primary objective itself.

By creating the “get a license or do not sample” maxim, the Sixth Circuit mistook the protection of artists' labors to be the ultimate goal of copyright.¹³⁶ Accordingly, the court's analysis in *Bridgeport* focused almost entirely on the alleged effect of sampling on the artist—specifically, the effect on the artist of having something taken, if not stolen, from him when another artist samples his work¹³⁷—rather than the potential contribution to music as an art form that the act of sampling makes possible.

By championing the protection of artists' labors, the Sixth Circuit implicitly harkened back to the “sweat of the brow doctrine” that the *Feist* Court specifically derided as misconstruing the goals of copyright.¹³⁸ As noted above,¹³⁹ the Court characterized this approach as fundamentally flawed in that it extended copyright protection beyond the compiler's original contributions to the facts themselves. Under this approach, then, the only possible defense to infringement was independent creation, meaning that “a subsequent compiler was ‘not entitled to take one word of information previously published,’ but rather had to ‘independently work out the matter for himself.’”¹⁴⁰ This attempt to protect artists' labors at the expense of nurturing creativity, the Court noted, “eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.”¹⁴¹

Though *Feist* dealt with telephone directories rather than sound recordings, its premise is equally applicable to the case presented in *Bridgeport*. Just as the facts comprising the telephone directories in *Feist* were not copyrightable because the author merely discovered, rather than created, them,¹⁴² so too are the notes and chords that comprise a sound recording equally un-copyrightable.¹⁴³ This is

136. *Bridgeport Music, Inc.*, 410 F.3d at 801.

137. *Id.* at 802 (“When those sounds are sampled they are taken directly from that fixed medium,” which constitutes “a physical taking rather than an intellectual one.”).

138. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–55 (1991).

139. *See supra* Part I.

140. *Feist Publ'ns, Inc.*, 499 U.S. at 353 (quoting *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83, 88 (2d Cir. 1922)).

141. *Id.*

142. *Id.* at 347 (“The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”).

143. *Compare Feist Publ'ns, Inc.*, 499 U.S. at 359 (“The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply an exclusive right in the preexisting material.”), *with Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988)

because both the facts making up a telephone directory and the notes making up a song are considered “preexisting material” that may comprise a copyrightable compilation, but may not be copyrighted themselves.¹⁴⁴ George O’Sullivan, for example, presumably did not purport to discover the chords used in “Get Off”; he just arranged them in an original, copyrightable progression. But, as *Feist* makes clear, this act itself does not extend the copyright protection from the arrangement to the notes and chords that make it up.¹⁴⁵ Moreover, this does not mean that a subsequent artist is not entitled to take one piece of the work without “independently work[ing] out the matter for himself,” as the “sweat of the brow” doctrine, rejected by the *Feist* Court, suggested.¹⁴⁶ In other words, if every artist was forced to independently come up with completely original material, rather than be allowed to use previous works as building blocks in the creation of their new work, this would necessarily stifle the creative progression of the arts. This is especially true considering the “limited number of notes and chords available to composers.”¹⁴⁷ This stifling of the creative progression of the arts would then, in turn, go against the entire point of copyright. Yet this is exactly the concept for which the Sixth Circuit advocated by laying down the maxim, “Get a license or do not sample.”¹⁴⁸

In addition, even if one were to ignore the lessons of *Feist*,¹⁴⁹ the Sixth Circuit’s reasoning in *Bridgeport* rests on an illogical interpretation of § 114(b). As previously mentioned,¹⁵⁰ the *Bridgeport* court interpreted the third sentence of § 114(b)¹⁵¹ to grant the right to sample a sound recording exclusively to the owner of the recording’s

(stating that in assessing the similarities between two musical works, a court must be “mindful of the limited number of notes and chords available to composers”).

144. *Feist Publ’ns, Inc.*, 499 U.S. at 356 (explaining that the facts making up the telephone directories are considered “preexisting material” that may not be copyrighted, but that that preexisting material may be compiled “in such a way” that would allow the work to be copyrighted).

145. *Id.* at 359.

146. *Id.* at 353.

147. *Gaste*, 863 F.2d at 1068.

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

149. It could be argued that the Sixth Circuit did exactly this by entirely failing to cite the leading Supreme Court case on copyright infringement when promulgating a new rule to be applied to that precise field.

150. *See supra* Section III.A.

151. 17 U.S.C. § 114(b) (2012) (“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.”).

copyright.¹⁵² But, as *Ciccone* sardonically pointed out, just because exclusive rights *do not* extend to recordings comprised “entirely of an independent fixation of other sounds” does not automatically mean that they *do* extend to recordings *not* comprised entirely of an independent fixation of other sounds.¹⁵³ As Professor Nimmer has discussed extensively,¹⁵⁴ if the Sixth Circuit had not brushed aside the legislative history of the Copyright Act of 1976,¹⁵⁵ it would have seen that “Congress explicitly noted . . . that ‘infringement takes place whenever all or any *substantial portion* of the actual sounds’ are copied.¹⁵⁶ In stating that infringement will occur if a *substantial* portion of a work is copied, Congress left open the possibility that an *insubstantial* amount of copying will *not* constitute infringement. For if it had intended that any amount of appropriation, no matter how limited, be deemed actionable, it could have easily stated that infringement takes place whenever *any* portion of the actual sounds are copied. Instead, it opened the door for courts to grapple with exactly how much copying will be considered “substantial” (and, conversely, how much will be considered “insubstantial”)—a door the Sixth Circuit effectively slammed shut with its erroneous interpretation of § 114(b) as granting exclusive and all-encompassing rights to the owner of a sound recording.

This statutory interpretation coupled with *Feist* makes evident that, contrary to the *Bridgeport* opinion, the act of sampling should not per se result in infringement. This, however, should not be understood to mean that sampling will *never* rise to the level of infringement. Instead, just as with all other kinds of copyright infringement, an analysis must be conducted to determine whether the copying at issue is enough to be considered infringement. As discussed in Part I, this analysis necessitates a substantial similarity comparison of the two works. To be sure, such a comparison is less judicially efficient than a bright-line ban against sampling. That being

152. *Bridgeport Music, Inc.*, 410 F.3d at 800–01.

153. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016) (“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.”).

154. NIMMER & NIMMER, *supra* note 49, at § 13.03[A][2][b] (“Indeed, had *Bridgeport Music* consulted section 114’s legislative history instead of dismissing that history as irrelevant . . .”).

155. *Bridgeport Music, Inc.*, 410 F.3d at 800. “The legislative history is of little help because digital sampling wasn’t being done in 1971 [when sound recordings became subject to a separate copyright].” *Id.* at 805.

156. NIMMER & NIMMER, *supra* note 49, at § 13.03[A][2][b] (quoting H.R. REP. NO. 94-1476, at 106 (1976) (emphasis in NIMMER & NIMMER)).

said, it is in no way so complicated as to be deemed unworkable or, as the Sixth Circuit put it, “mental, musicological, and technological gymnastics.”¹⁵⁷ Moreover, a desire to simplify an inherently complex field of law like copyright simply as a means of promoting judicial efficiency does not justify an approach that fundamentally misconstrues copyright law’s primary objective.

B. Why a De Minimis Analysis of a Sound Recording Should Not Include the Audience Test: A Critique of the Ninth Circuit’s Ciccone Opinion

As we have seen, the Ninth Circuit considered *Bridgeport’s* outright rejection of a *de minimis* analysis to be antithetical to the goals of copyright law generally.¹⁵⁸ Instead of a complete abolition of a *de minimis* analysis, the court claimed that the audience test was the appropriate tool for determining whether two works were significantly similar to one another:

“If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue, the test is the response of the ordinary lay hearer.” The reason for the 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.¹⁵⁹

The court then moved on to an application of the audience test to the two songs at issue, the Salsoul Orchestra’s “Love Break” and Madonna’s “Vogue.”

The sample taken from “Love Break” was of one quarter-note of a four-note chord, lasting 0.23 seconds, which was then transposed into a different key, truncated, and altered with other sounds and

157. *Bridgeport Music, Inc.*, 410 F.3d at 802. *But see* Francesco Di Cosmo, *Return of the De Minimis Exception in Digital Music Sampling: The Ninth Circuit’s Recent Holding in VMG Salsoul Improves Upon the Sixth Circuit’s Holding in Bridgeport, But Raises Questions of its Own*, 95 WASH. U. L. REV. 227, 235 (2017) (“[T]he Sixth Circuit’s argument that a bright-line rule better serves public policy is not without merit. Indeed, it is a well-established tenet of copyright law that unpredictability should be avoided wherever possible.”).

158. *Ciccone*, 824 F.3d at 886.

159. *Id.* at 881 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164, 1167 (9th Cir. 1977)).

effects.¹⁶⁰ After listening to the recordings of both “Love Break” and “Vogue,” the court found that the average audience would not recognize the appropriation because “[w]ithout careful attention, the horn hits are easy to miss.”¹⁶¹ With this, the court noted that “[e]ven if one grants the dubious proposition that a listener recognized some similarities between the horn hits in the two songs, it is hard to imagine that he or she would conclude that sampling had occurred.”¹⁶² Based on this concise analysis, the court concluded that the sampling was not substantial enough to be considered infringement.

While the Ninth Circuit was correct in its refusal to abolish a *de minimis* analysis entirely, its application of the audience test to “Love Break” and “Vogue” reveals how the test itself does not actually serve to accomplish the goals of a traditional *de minimis* analysis.¹⁶³ As discussed above, the audience test originated in an effort to standardize the subjective component of the substantial similarity examination. In this way, it is “an attempt at applying the ‘reasonable person’ doctrine as found in other areas of the law to copyright.”¹⁶⁴ In other areas of the law, such as criminal or tort law, the reasonable person doctrine asks the trier of fact to step into the shoes of the defendant and decide how the trier itself would have acted in the same or similar circumstances;¹⁶⁵ the audience test, on the other hand, asks the trier of fact to step into the shoes of the “average audience,” rather than the defendant.¹⁶⁶ It next asks the trier to answer “the only question he can answer—does the result of the defendant’s work *give appearances* of having been copied from the plaintiff?”¹⁶⁷ The test, then, is focused not on the actual copying, but on the *appearance* of the copying. Moreover, according to the traditional formulation of the

160. *Id.* at 879–80; see also Wittow & Hall, *supra* note 19 (“A defendant’s digital alteration of the sample is likely to be relevant in many future U.S. sampling cases because, as one musicologist who has served as an expert in such cases observed, ‘samples are rarely used unaltered . . . [an] important ethic for many producers is to “flip” or transform the sample in some way in order to show their own creativity.’”) (quoting Alexander Stewart, “*Been Caught Stealing*”: A Musicologist’s Perspective on Unlicensed Sampling Disputes, 83 UMKC L. REV. 339, 342 (2014)).

161. *Ciccone*, 824 F.3d at 880.

162. *Id.*

163. But see Erik J. Badia, *Split Chords: Addressing the Federal Circuit Split in Music Sampling Copyright Infringement Cases*, 7 PACE INTELL. PROP. SPORTS & ENT. L.F. 131, 181–82 (2017) (arguing that although the audience test “is not perfect,” it still should be applied to music sampling cases because the test has been “used effectively by courts” in the past).

164. NIMMER & NIMMER, *supra* note 49, at § 13.03[E][2].

165. *Id.*

166. *Id.*

167. *Id.* (emphasis added).

audience test, the inquiry is actually even more specific: does the result of the defendant's work give, not just the appearance, but the "spontaneous and immediate" appearance of having been copied from plaintiff?¹⁶⁸ Or, in other words, can the average audience member recognize the appearance of a work having been copied without the aid of expert analysis?¹⁶⁹

At its core, this test thus asserts that copying will never be actionable without feasible recognition by an average audience member. Yet again, this mistakes the lessons of *Feist*, albeit in a different manner than did the *Bridgeport* decision. In its comparison of the two telephone directories at issue in *Feist*, the Supreme Court at no point stated that it was reversing a finding of liability because the average audience (or average telephone directory reader) would surely recognize the appropriation.¹⁷⁰ Nor did it focus its analysis on the appearance of copying, rather than the actual appropriation of the material itself. Instead, the Court ultimately reversed a finding of liability based on its conclusion that "[the plaintiff] expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original."¹⁷¹ The balance, then, between protecting artists' labors and stimulating creativity that copyright attempts to strike is accomplished through an analysis of originality—not an analysis of whether the average audience is able to recognize that parts of something original have been appropriated. It is thus easy to see how there will often be cases—especially when dealing with works such as sound recordings—in which the average audience is "simply not capable of detecting very real appropriation" that copyright would otherwise seek to prevent.¹⁷²

To put it another way, the audience test, in its attempt to standardize an infringement claim analysis, does not sufficiently take into consideration the "value judgment" that is at the heart of a substantial similarity inquiry. Recall that this value judgment arises

168. *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 398 (5th Cir. 2001); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933); *Mills v. Ayala*, No. CIV.A. 08-5168, 2010 WL 420556, at *3 (E.D. La. Jan. 29, 2010); *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 450 (S.D.N.Y. 1976), *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981). Notably, though, the *Ciccone* court did not state that an average audience's recognition had to be "spontaneous and immediate." *See Ciccone*, 824 F.3d at 878.

169. *But see Ciccone*, 824 F.3d at 880 (finding that "after listening to the audio recordings . . . a reasonable juror could *not* conclude that an average audience would recognize the appropriation," and noting that the plaintiff's expert originally misidentified the source of the appropriation, which was "illuminating").

170. *NIMMER & NIMMER*, *supra* note 49, at § 13.03[B][2][b].

171. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361–64 (1991).

172. *NIMMER & NIMMER*, *supra* note 49, at § 13.03[E][2].

when the fact of copying has been conceded, but the question still remains whether “the value of the original is sensibly diminished . . . [in a way] that is sufficient in point of law to constitute a piracy *pro tanto*.”¹⁷³ A determination of whether the copying is sufficient to constitute an unlawful appropriation, in turn, involves both qualitative and quantitative analyses, the quantitative inquiry concerning the amount of material copied, and the qualitative dealing with the “copying of expression.”¹⁷⁴ Both of these components are separate and distinct points of inquiry that make up the overall *de minimis* analysis; yet the audience test actually conflates them into a single, overly-simplified test. In doing so, it fails to achieve the primary purpose of the substantial similarity analysis—namely, to flesh out the elusive infringement threshold under which copying will not be both quantitatively and qualitatively significant enough to be considered actionable.

Take, for example, the telephone directories discussed in *Feist*.¹⁷⁵ If in that case, the Supreme Court had applied the audience test in the same manner as did the Ninth Circuit in *Ciccone*, the outcome would have necessarily been different. Imagine that, just as the Ninth Circuit simply listened to the recordings of “Love Break” and “Vogue” to guide its determination, the *Feist* Court simply read the plaintiff’s and defendant’s telephone directories with an eye for deducing whether the “average audience” could recognize the appropriation. The answer would undoubtedly be in the affirmative. For, as the Supreme Court noted, both directories just listed the names, towns, and telephone numbers of their subscribers in alphabetical order.¹⁷⁶ If the Court, as the self-proclaimed “average audience,” could recognize the exact replication of those entries in each text, as we assume it would be able to, then under the audience test, it would have held the defendant liable for copyright infringement.¹⁷⁷ Yet even recognizing that the defendant in *Feist* had obviously copied from the plaintiff’s work, the Supreme Court *still* did not hold the defendant liable for infringement. This is because, despite the implication of the Ninth Circuit’s opinion in *Ciccone*, “the public’s” ability to recognize the

173. *Id.* § 13.03[A][2][a] (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)).

174. See Sykes, *supra* note 57.

175. *Feist Publ’ns, Inc.*, 499 U.S. at 342–44.

176. *Id.* at 363.

177. I mean to point out here that the Ninth Circuit apparently considered itself to be the “average audience.”

appropriation of a sound recording is not actually the linchpin of a *de minimis* analysis.¹⁷⁸

C. *How the Fair Use Doctrine Strikes the Right Chord Between the Ninth and Sixth Circuits' Opinions*

The question, then, still remains of how exactly a music sampling infringement case should be analyzed by subsequent courts. Though this Comment argues that neither the Sixth nor the Ninth Circuit struck precisely the right chord, there are aspects of both the *Bridgeport* and *Ciccone* opinions worth preserving. As we have seen, the Ninth Circuit's resurrection of a *de minimis* analysis is not only laudable but also entirely necessary if the goals of copyright are to be served; yet its additional inclusion and application of the audience test is somewhat offbeat. The Sixth Circuit's bright-line ban, on the other hand, is too rigid a test for a genre of copyright as amorphous as sound recording, yet its desire to standardize (at least to some extent) how courts should approach such cases is also completely reasonable. A bridge over the "troubled waters" of copyright infringement cases, specifically those dealing with the sampling of sound recordings, is therefore necessary.¹⁷⁹

This bridge, or middle ground, is embodied in the doctrine of fair use. The doctrine was first articulated by Justice Joseph Story in the landmark case, *Folsom v. Marsh*,¹⁸⁰ in which Justice Story asserted that "[p]atents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent."¹⁸¹ Judge Story noted that, within a substantial similarity analysis, two extremes exist—one being the case in which copying has obviously occurred, and the other being the case in which copying has occurred, but the copied portions are being used for obviously distinguishable purposes such as review or criticism of the work—but stated that "[a] wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the court is approaching the dividing middle line which separates the one from

178. *Ciccone*, 824 F.3d at 881 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)).

179. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

180. 9 F. Cas. 342 (C.C.D. Mass 1841) (No. 4, 901).

181. *Id.* at 344.

the other.”¹⁸² The doctrine of fair use was thus created as a mechanism by which courts may attempt to elucidate this dividing middle line, or what this Comment has referred to as the infringement threshold.

Since its inception, fair use has typically played two separate, yet related, roles within copyright infringement litigation.¹⁸³ First, it has acted as an affirmative defense, or worked to characterize a given use of a copyrighted work as “a technical infringement which is nevertheless excused.”¹⁸⁴ Alternatively, fair use may be employed at the summary judgment stage¹⁸⁵ so as to categorize an appropriation as “a use falling outside the orbit of copyright protection and hence never an infringement at all.”¹⁸⁶ It is this latter iteration of the doctrine for which this Comment advocates.

In his discussion of what would eventually become the doctrine of fair use in *Folsom*, Justice Story promoted an analysis of specific factors when attempting to determine whether a given infringement would be deemed justifiable under the law, including:

The balance of the comparative use made in one of the materials of the other; the nature, extent and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.¹⁸⁷

182. *Id.* at 345; *see also* ALAN LATMAN, 12 NIMMER ON COPYRIGHT V, *Copyright Law Revision Study 14: Fair Use of Copyrighted Works* (Matthew Bender rev. ed. 2017) (LEXIS) (referring to the “borderland” that exists “between (1) the insignificant amount of appropriation which could never, regardless of purpose, effect, acknowledgement or intent, amount to infringement and (2) the amount of appropriation which, in every case constitutes infringement”).

183. LATMAN, *supra* note 182.

184. *Id.*

185. *See* *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (affirming finding that the unauthorized use of images was fair use at the summary judgment stage and therefore shielded from liability for copyright infringement); *Badia*, *supra* note 163, at 182–83 (“[B]ecause pre-trial motions for summary judgment and their equivalents play such a large role in the gatekeeping functions of courts, and given the potential for large-scale sampling litigation as seen in *Bridgeport*, a separate, efficient test for summary judgment would aid in sorting cases which are viable from those which are not, while adhering to the goal of copyright law.”).

186. LATMAN, *supra* note 182; *see also* *Bill Graham Archives*, 448 F.3d at 608 (“Although the issue of fair use is a mixed question of law and fact, the court may resolve issues of fair use at the summary judgment stage where there are no genuine issues of material fact as to such issues.”).

187. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

These factors were eventually adopted by the Copyright Act of 1976,¹⁸⁸ which states that in determining whether a given use made of a copyrighted work is fair, a court should consider: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;¹⁸⁹ (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.¹⁹⁰ The Supreme Court has since clarified that these factors should not be treated by courts as bright-line rules or viewed in isolation, but rather “all are to be explored, and the results weighed together, in light of the purposes of copyright” on a case-by-case basis.¹⁹¹

1. The First Factor: The Purpose and Character of the Use

In *Campbell v. Acuff-Rose Music, Inc.*,¹⁹² the leading case on the application of the fair use doctrine to copyright law, which involved a parodic version of a then-popular song, the Supreme Court bifurcated the first fair use factor into a two-part sub-analysis, instructing courts to consider both the transformative and the commercial nature of the secondary use of a copyrighted work.¹⁹³ The point of this two-part analysis, the Court stated, is to determine whether the secondary use “supersede[s] the objects’ of the original creation, or instead adds something new . . . altering the first with new expression, meaning, or message.”¹⁹⁴ If the new work is determined to add something new to the original work, then it will be considered “transformative,” meaning that less significance will be afforded to other factors, such as the commercial nature of the use.¹⁹⁵

188. Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (codified as amended in 17 U.S.C. § 107 (2012)).

189. Congress additionally codified certain kinds of uses of a work that will be considered fair use within the “purpose and character of the use” prong. These include: criticism, comment, news reporting, teaching, scholarship, or research. 17 U.S.C. § 107 (2012).

190. *Id.*

191. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

192. 510 U.S. 569 (1994).

193. Michael Allyn Pote, *Mashed-Up in Between: The Delicate Balance of Artists’ Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 670 (2010) (“[T]he two determinations involved in the analysis for the purpose and character of the work are: (1) whether the use of the original work is transformative and (2) whether the secondary work has a commercial or nonprofit, educational purpose.”).

194. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.D.D. Mass 1841) (No. 4,901)).

195. *Id.*

a. The Transformative Use Analysis

At issue in *Campbell* was the band 2 Live Crew's song "Pretty Woman," which parodied singer Roy Orbison's original work, "Oh, Pretty Woman."¹⁹⁶ The band's parodic rendition began with the original's memorable first line before substituting lyrics with more "shocking ones [that] derisively demonstrat[e] how bland and banal the Orbison song seems."¹⁹⁷ In its discussion of the first fair use factor, the Court explicitly noted that, by "shedding light on an earlier work, and, in the process, creating a new one," a parody such as 2 Live Crew's could be considered transformative and thereby potentially claim fair use.¹⁹⁸ In so stating, the Court suggested that the sticking point of the transformative use analysis was whether the new work, at least to some extent, commented on the original work, as 2 Live Crew's rendition seemed to by emphasizing what they considered to be the banality of Orbison's version.¹⁹⁹ If, however, the new work simply used portions of the prior work "to get attention or to avoid the drudgery in working up something fresh," the claim to fairness would diminish in the face of other relevant factors.²⁰⁰

On its face the *Campbell* Court's insistence that a new work must comment on or criticize the work from which it sampled for the alleged infringer to claim fair use seems problematic in its application to digital sampling. As is made evident by cases such as *Bridgeport* and *Ciccone*, both of which involved unrecognizable samples from their respective original works, sampling is rarely used to comment on or criticize an original work.²⁰¹ Instead, sampling typically involves more of a "re-contextualization"²⁰² of sounds or motifs, in that, although a work is not necessarily commenting or criticizing, it is still using the sampled material to "work[] up something fresh."²⁰³ In this way, sampling is undoubtedly transformative; it is, in fact, arguably even more transformative than the typical parody in that it takes parts of an original work to create something (in the usual case) entirely new, rather than something tied to a specific prior work.

196. *Id.* at 571–72.

197. *Id.* at 582 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991)).

198. *Id.* at 579.

199. *Id.* at 582.

200. *Id.* at 580.

201. Ashtar, *supra* note 83, at 295 ("While [sampling] may involve some sort of comment on past musicians, styles, or cultural motifs, it is more aptly characterized as re-contextualization.").

202. *Id.*

203. *Campbell*, 510 U.S. at 580.

Thankfully, since the Supreme Court decided *Campbell* in 1994, lower courts have worked to widen the definition of “transformative” to include uses of copyrighted works such as sampling.²⁰⁴ One way²⁰⁵ in which the concept of transformation has evolved is in the recognition by courts that “uses of a copyrighted work may be fair if they express a new purpose and meaning.”²⁰⁶ For example, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,²⁰⁷ the Second Circuit found the incorporation of a music group’s concert posters into a biography to be sufficiently transformative to warrant a finding of fair use, despite the fact that the biography did not comment on or criticize the posters.²⁰⁸ Referencing *Campbell*, the court held that if an original work is “used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”²⁰⁹

Accordingly, in a case involving digital sampling, the investigation should focus on whether “the sample is a foundation for a new musical statement or merely an effect.”²¹⁰ In other words, courts should ask: does the new work create a new musical statement that helps to progress the arts and thereby enrich society, or does it simply aid an artist in “avoid[ing] the drudgery in working up

204. Tomassian, *supra* note 28, at 1340.

205. There are arguably three distinct ways in which the understanding of what qualifies as “transformative” has evolved since *Campbell*. See *id.* at 1340–41 (“The scope of *Campbell*’s ‘transformative’ definition has since widened by lower courts’ interpretations in three ways: (1) the scope of the transformative parody has expanded beyond the medium of song; (2) courts have ushered in a new purpose-driven era whereby secondary uses can be fair even though they are not in any way connected to the original work—through either commentary, criticism, or any of the prescribed fair use purposes in § 107’s preamble—so long as the use expresses a new purpose and meaning; and (3) the era of Internet search engines has expanded the fair use doctrine’s boundaries—furthering the novel purpose-driven inquiries—by allowing users to duplicate copyrighted works in their entirety so long as the second use of the work is for a different purpose.”).

206. *Id.* at 1341; see also *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (holding that, contrary to *Campbell*, a new work may still be deemed sufficiently transformative within the meaning of the fair use doctrine without explicitly referring back to the work from which it copied); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 324 (S.D.N.Y. 2008) (“Defendants’ use is nonetheless transformative because they put the song to a different purpose, selected an excerpt containing the ideas they wished to critique, paired the music and lyrics with images that contrast with the song’s utopian expression, and placed the excerpt in the context of a debate . . .”).

207. 448 F.3d 605 (2d Cir. 2006).

208. *Id.* at 615.

209. *Cariou*, 714 F.3d at 706.

210. A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 149 (1993).

something fresh”?²¹¹ This emphasis on the enrichment of society harkens back to the intention of the Supreme Court in both *Feist* and *Campbell*, not to mention the purposes of copyright law generally. For as the Court instructed in *Feist*, this transformative analysis still focuses on originality and “at least some minimal degree of creativity,” without stifling the progression of the arts by prohibiting any and all copying of a copyrighted work.²¹² In this same vein, just as the Court discussed in *Campbell*, it requires lower courts to inquire into whether the new work “alter[s] the first with new expression, meaning, or message.”²¹³

b. The Commercial Use Analysis

This being said, the transformative nature of a secondary work must be taken into account alongside the other sub-analysis rooted within the first fair use factor—the commercial use of the new work. In *Campbell*, the Court was careful to emphasize the fact that the commercial character of a use would not necessarily bar a finding of fairness—a crucial assertion for 2 Live Crew’s admittedly commercial parody of Orbison’s work.²¹⁴ This would seem to logically follow for, as the Court noted, if commerciality was considered a dispositive factor in a fair use analysis, then all of the examples of fair use listed in § 107, such as news reporting, comment, or criticism, would be automatically subsumed.²¹⁵ Instead, the Court held that the commercial use of a given work is to be “weighed along with other[s] in fair use decisions.”²¹⁶

This commercial inquiry is admittedly the most problematic of the fair use factors for samplers in that, with the exception of completely private use, sampling almost always occurs with the ultimate goal of profiting from the new work. It would be unlikely (and unbelievable) that Biz Markie, N.W.A., or Madonna would even attempt to claim that they did not mean to profit off of their songs that included samples from other works. However, the saving grace for samplers lies in *Campbell*’s explicit instruction that commerciality is to be weighed alongside each of the other factors, specifically the

211. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

212. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

213. *Campbell*, 510 U.S. at 579.

214. *Id.* at 584 (“The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”).

215. *Id.*

216. *Id.* at 585.

transformative nature of a given use.²¹⁷ The more transformative a work including sampled material is found to be, then, the less weight may be afforded to the commercial significance of the new work.

2. The Second Factor: The Nature of the Copyrighted Work

Referencing Justice Story's call for "the value of the materials used" to be considered in a fair use formulation, the *Campbell* Court asserted that, in order to determine fair use, courts must recognize that "some works are closer to the core of intended copyright protection than others."²¹⁸ Lower courts have interpreted this assertion to mean that a determinative factor in a fair use analysis is whether an original work may be deemed more creative or factual.²¹⁹ This is a crucial distinction primarily because "original works that are creative in nature will generally receive greater copyright protection."²²⁰ In other words, creative works are closer to "the core of intended copyright protection" than are purely factual works.

Though the *Campbell* Court noted that Orbison's original work would fall within the heart of copyright's protective purposes as a purely creative, rather than factual, work, it asserted that this factor was not very helpful in "separating the fair use sheep from the infringing goats"²²¹ in the case of musical parodies. This was due to the fact that musical parodies, by definition, copy "expressive works,"²²² so they will, in turn, almost always be said to fall within the heart of copyright protection. To put it another way, a musical parody necessarily copies a piece of music, which will always be considered a creative work, so this factor will almost certainly weigh against any given use being deemed fair. In this way, the second factor provides courts with little guidance on how to separate the "fair use sheep"—or the artists who admittedly sample from a creative work, but whose copying nonetheless does not rise to the level of infringement—from the "infringing goats"—or the artists who actually are copying to an actionable degree.

Like the musical parody at issue in *Campbell*, in the case of music sampling, the original work at issue will necessarily be a

217. *Id.* at 578 ("All [of the fair use factors] are to be explored, and the results weighed together, in light of the purposes of copyright."); *see also* Ashtar, *supra* note 83, at 296.

218. *Campbell*, 510 U.S. at 586.

219. *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 330 (S.D.N.Y. 2005).

220. *Id.*

221. *Campbell*, 510 U.S. at 586.

222. *Id.*

creative one, for one would be hard-pressed to find a sample-able musical work that could reasonably be deemed “factual.” This factor will, thus, almost always weigh against a finding of fair use, though it does little to actually elucidate the dividing middle line between fair and unfair copying in the case of music sampling.

3. The Third Factor: The Amount and Substantiality of the Portion Used

The third factor in a fair use analysis requires courts to consider the amount and substantiality of the portion used in relation to the copyrighted work as a whole.²²³ Per *Campbell*, it also involves a qualitative analysis in that it considers not just the amount of the portion copied, but also its quality and importance.²²⁴ In this way, the third factor relates back in part to the first factor; specifically, the fact that a large amount of an original work was copied may “reveal a dearth of transformative character or purpose,” while at the same time, the amount of copying allowed will often vary with the purpose and character of the use in the first place.²²⁵

In *Campbell*, the fact that 2 Live Crew’s parody “[went] to the ‘heart’” of the original by copying the opening line of Orbison’s work did not dissuade the Court from finding that the use was fair.²²⁶ This was because copying the heart of an original is often necessary for the parodic character to be made evident; in other words, if the point of a parody is to reference a prior work and comment on it, then it is often necessary for artists to copy the heart of the original so that an audience will understand exactly what work is being parodied.²²⁷

As has already been noted, sampling differs fundamentally from parodying in that it typically does not reference back to the original work from which it sampled. For this reason, the quantitative portion of the analysis will often be seen to favor samplers since the standard sample, as in *Bridgeport* and *Ciccone*, is incredibly short.²²⁸ Yet even within this seemingly objective standard is a hint of subjectivity—a fact which many courts grappling with a substantial similarity analysis have failed to explicitly acknowledge.

223. 17 U.S.C. § 107(3) (2012).

224. *Campbell*, 510 U.S. at 587.

225. *Id.*

226. *Id.* at 588.

227. *Id.* at 580–81 (“Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination . . .”).

228. Ashtar, *supra* note 83, at 297.

Recall, for example, the district court's decision in *Bridgeport*.²²⁹ Recognizing that the sample in that case totaled about forty seconds, which is admittedly a small amount of time when considered in isolation, the court nonetheless noted that within the context of the two songs at issue—the longest of which had a run time of a mere four and a half minutes—forty seconds was “a more significant portion of the work into which it was copied.”²³⁰ Of course, the court ultimately decided that, when considered in light of the vastly different qualitative aspects of the two songs, the quantitative significance of the sample was not enough to rise to the level of infringement.²³¹ Though this interpretation is not necessarily wrong, it should be noted that a court could have just as reasonably considered forty seconds to be quantitatively significant enough to overshadow even the obvious qualitative differences in the two songs. This is especially true considering the fact that the original work at issue, “Get Off,” had a total running time of about two and half minutes—or about 150 seconds—meaning that forty seconds equates to about a third of the entire song.²³²

Because of this subjectivity within even the most seemingly objective of the fair use factors, it is important for courts to consider, as the *Campbell* Court suggested, not only the amount of the original work that was copied, but also whether that copied portion goes to the heart of the original. Whether or not the qualitative analysis will favor samplers, therefore, will depend on the way in which the sample is used in the new work—i.e., as is the central inquiry under the first factor, whether the sample is used to supersede the original work or whether it is merely used to add something new and fresh. Unless a sample is being used for the specific purpose of parodying another work, as was the case for 2 Live Crew's “Pretty Woman,” then the sample must not “go to the ‘heart’” of the original, but should instead use the original as raw material to create something new.²³³

4. The Fourth Factor: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth factor in a fair use analysis is largely intertwined with the transformative and commercial analysis in the first factor. This is

229. See *supra* Section II.B.

230. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002).

231. *Id.* at 842–43.

232. *Id.* at 841.

233. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

because the question underlying the fourth factor is similarly whether the new work supersedes the original by acting as a market substitute, or whether the use is instead sufficiently transformative to warrant a finding of fair use.²³⁴ Considering the example of a theater review which stifles demand for the original work, but which obviously does not result in an actionable harm within the meaning of the Copyright Act, the Court commented in *Campbell* that “the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’”²³⁵

Contrary to the potential suppression of demand for an original, sampling is likely to have the opposite effect; if anything, it could improve the marketability of the original work. This is due to the fact that, assuming that a sample is even long enough to be recognizable, it will “spark[] an interest in commercially passé songs or artists, generating license fees and increased record sales and exposure for copyright holders.”²³⁶ Moreover, because sampling often occurs across different genres—such as pop artist, Madonna, sampling from the Salsoul Orchestra or rapper, Biz Markie, sampling from George O’Sullivan, Jr. and the Funkadelics—the original work is often recognized by fans of different genres for the first time through musical “cross-pollination.”²³⁷

D. *How the Fair Use Doctrine Serves the Goals of Copyright Law*

Taken as a whole, these four factors operate as a lens under which courts may compare an original and an appropriated work to determine whether they are substantially similar enough to warrant a finding of copyright infringement in a digital sampling case. Significantly, these clearly delineated factors work to serve what the *Feist* Court considered to be the “primary objective of copyright”—to “promote the Progress of Science and useful Arts.”²³⁸ The first factor, in its requirement that an appropriated work not merely replicate the original, but instead use the copied material in a transformative way, clearly prioritizes the progression of the arts as a whole. At the same time, this factor considers the commercial significance of the new work. As has been discussed, the second factor, though relevant in other genres of copyright in which the doctrine of fair use may

234. *Id.* at 590.

235. *Id.* at 592 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

236. Ashtar, *supra* note 83, at 297–98.

237. *Id.* at 298.

238. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

similarly be employed, is not particularly pertinent to digital sampling in that sampling necessarily involves the copying of an original, expressive work.

The third factor, on the other hand, in its analysis of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” clearly emphasizes both the quantitative and qualitative components of a traditional substantial similarity analysis that lies at the heart of copyright law.²³⁹ Finally, the fourth factor’s inquiry into the “effect of the use upon the potential market for or value of the copyrighted work” considers the potentially detrimental effect on the original artist, without giving the artist’s labor complete prioritization, as did the notorious “sweat of the brow” doctrine.²⁴⁰

Of course, some scholars have argued that the degree of discretion the fair use doctrine affords to courts—particularly in their determination of whether a given work is sufficiently transformative—will force “courts to calculate fair use on an outcome driven basis, providing little comfort to secondary users.”²⁴¹ With this, others have claimed that the rulings of the few cases applying fair use to infringement claims thus far “may not actually extend much farther than their factual situations”—i.e., the given works at issue, and the courts’ discussion surrounding those works, were so unique so as to not actually provide much in the way of precedent for subsequent courts.²⁴²

Though these assertions may hold up in the context of cases involving the infringement of other forms of art, they have little merit when applied to digital music sampling. While what qualifies as transformative may vary from case to case when dealing with things such as visual or literary artwork, by definition, digital sampling involves a kind of literal transformation to which courts can look in conducting their fair use analyses. This is demonstrated by the fact that one of the main appeals of sampling for artists is that “once the musician digitally captures the sample, he can manipulate and edit it in a variety of ways,” from looping or truncating it, to adjusting the pitch or tempo, to just repeating it in a new rhythm.²⁴³ Recall that this was, in fact, exactly what No Limit Films did to the sample taken from “Get Off” in *Bridgeport*.²⁴⁴ There is, therefore, an almost built-in

239. Johnson, *supra* note 210, at 151.

240. *Id.* at 154.

241. Marques, *supra* note 28, at 352.

242. *Id.*

243. Schietinger, *supra* note 69, at 211.

244. See *supra* Section II.B.

method of transformation that courts can easily look to when deciding whether a given digital sample was sufficiently transformed to render a secondary use fair.

Moreover, though it is true that each original work and corresponding analysis will theoretically be unique, as courts begin routinely applying the fair use doctrine, a wealth of precedent will necessarily be created, drawing parameters for the kinds of samples that have been deemed fair use and, alternatively, those that have not. In other words, unlike in a case such as *Bill Graham Archives*, which compared two different kinds of works,²⁴⁵ a digital music sampling case will necessarily involve two works of the same medium—music. Courts will therefore have to begin drawing lines regarding what steps secondary users should take to ensure that their use is fair, which will, in turn, provide secondary users with more guidance on what kind of use—and how much—is likely to lead to litigation.

Thus, the fair use doctrine, with its clearly enumerated factors, works as the middle ground between the *Bridgeport* and *Ciccone* decisions. Unlike *Bridgeport*, it does not completely disregard the promotion of the arts in favor of a preferred protection of artists' labors; yet it also does not seek to apply a strict and inapplicable ban on a body of copyrighted work as malleable and complex as digital sampling. Instead, it recognizes the fact that copyright is intended to allow artists to build on the works of artists who came before them in such a way as to promote the progression of the arts generally. At the same time, by clearly spelling out four factors for a court to consider in conducting such an analysis, the fair use doctrine does not relegate samplers to the uncertainty inherent in the *Ciccone* opinion. In other words, it gives samplers more guidance in attempting to understand how a court might interpret a particular act of sampling than just whether an "average audience" will recognize an appropriation, whoever that average audience may be on a given day or in a given circuit.

CONCLUSION

In the wake of the *Bridgeport/Ciccone* split, it remains unclear for courts and artists alike how much copying—if any—a circuit will consider to be too much copying, or enough to constitute infringement. As the act of digital sampling becomes increasingly

245. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (discussing the use of a music group's concert posters in a biography on the music group).

popular within the music industry, this determination has never been more crucial, especially considering that the current split exists between the two centers of the American music industry, Nashville and Los Angeles. Should the Supreme Court grant certiorari, which seems increasingly likely given the amount of copyright infringement actions being filed, it should adopt a standard of fair use, which preserves the *de minimis* analysis while also laying down clearer parameters than those provided for by the audience test. In doing so, it should make evident that copying *per se* will not result in infringement, but that, at the same time, an unchecked amount of appropriation will not be tolerated. The Court should strive to lay down well-delineated factors that will work to flesh out the infringement threshold and provide artists with greater predictability in determining how much copying is too much copying within the realm of music copyright generally, but specifically in the context of digital sampling.

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