

# CIRCUIT SPLIT: THE RESURRECTION OF THE DE MINIMIS EXCEPTION TO ACTIONABLE COPYRIGHT INFRINGEMENT FOR COPYRIGHTED SOUND RECORDINGS

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## I. INTRODUCTION

On April 5th, 2016, the United States Court of Appeals for the Ninth Circuit issued its decision in *VMG Salsoul, LLC v. Ciccone*, and in so doing, re-ignited a copyright debate that has plagued musicians in varying degrees for the better part of the last two centuries.<sup>1</sup> The central question at the heart of this debate is whether the historic practice of *sampling* (specifically *digital sampling* in the modern context) constitutes a violation of the original musician's copyright or a mere *de minimis* trifle that, for one reason or another, wasn't worth the time and expense of adjudication. The process of digital sampling, put simply, consists of one musician isolating and removing a segment of another's musical recording and then adding it into a new work of their own creation.<sup>2</sup> Most sampled segments are very short, typically just a few notes or a single chord progression, and the sampling musician often makes many modifications to the segment altering speed and pitch to make it their own.<sup>3</sup>

Historically, famous composers such as Bach and Mozart would borrow from their predecessors to inspire their creativity in the name of musical progress.<sup>4</sup> The practice of borrowing melodies and rhythms was considered to be an effective way to build new compositions, and their audiences enjoyed listening to their reinventions.<sup>5</sup> When the practice of "segment borrowing" became the focus of disputes, defendants successfully relied on the *de minimis* exception to copyright infringement.<sup>6</sup> The full

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\* To my wife Shea, whose love and patience have made all of my accomplishments possible.

<sup>1</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

<sup>2</sup> *Digital Sampling*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

<sup>3</sup> See *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, \*9 n.6 (S.D.N.Y. 2001).

<sup>4</sup> See *generally Borrowing*, THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS (2d ed. 2001)

<sup>5</sup> See Sherri Carl Hampel, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 584 (1992).

<sup>6</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][2][b] (Matthew Bender, Rev. Ed., 2016).

maxim, *de minimis non curat lex*, translates roughly to “the law does not concern itself with trifles” and is applicable to all civil lawsuits.<sup>7</sup> Although defendant’s experienced success using this doctrine in the past, there was a great deal of disagreement among the district courts as the application of the *de minimis* doctrine and whether it truly insulated the practice of sampling from copyright infringement.<sup>8</sup> These disagreements likely arose because there are multiple definitions for what a “trifle” is in a legal context. Beginning in the 1990’s, courts began leaning towards much more stringent readings of the *de minimis* doctrine which favored plaintiff musician’s claims and discouraged the practice of sampling.<sup>9</sup> These leanings were eventually ratified in 2005 by the Sixth Circuit Court of Appeals decision in *Bridgeport Music, Inc. v. Dimension Films*.<sup>10</sup> The Court in *Bridgeport* boldly broke away from the “ancient” precedent of the *de minimis* exception and declared a new rule for digital sampling: “get a license or do not sample.”<sup>11</sup> Further, it held all unlicensed sampling of sound recordings was copyright infringement, regardless of the nature of the sample, the modifications made by the sampling musician, or the size of the sample in relation to the new derivative work it was now a part of.<sup>12</sup>

As the highest court to most recently address this issue directly, the Sixth Circuit’s opinion in *Bridgeport* became a golden standard precedent for plaintiffs’ lawyers to use in actions against musicians participating in sampling. However, in early June of this year, the Ninth Circuit’s ruling in *VMG Salsoul, LLC v. Ciccone* expressly disagreed with the reasoning *Bridgeport* and reopened the door, or at least the debate, for musical sampling amongst musicians.<sup>13</sup> The Court stated clearly that “[t]he *de minimis* exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions,” and emphasized the importance of analyzing the size and nature of the segment of music being sampled.<sup>14</sup>

This note argues that the *de minimis* exception to copyright should apply to sampled sound recordings and that the Ninth Circuit was correct in its application of the doctrine. It begins, in Part II, with a general background

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<sup>7</sup> *De minimis non curat lex*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>8</sup> Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 180 (2002) (noting the circular problem that occurs where many sampling cases are settled out of court because lack of precedent makes court unpredictable).

<sup>9</sup> See Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, SYRACUSE SCI. & TECH. L. REP. 1 (2006).

<sup>10</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>11</sup> *Id.* at 801.

<sup>12</sup> *Id.*

<sup>13</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016)

<sup>14</sup> *Id.* at 884.

of the de minimis exception, its place within the traditional legal analysis of copyrighting infringement, and its justification for application in the realm of copyright law. Part III will focus on the *Bridgeport* case and the justifications use by the Sixth Circuit to explain its decision. This will include a description of how the *Bridgeport* decision is a radical break from traditional de minimis applications. Part IV will examine the Ninth Circuit's decision in *VMG* and how the court justified its movement back towards traditional legal principles. Finally, Part V presents an argument for why the Ninth Circuit's application of the de minimis doctrine should be the precedential standard used by all courts evaluating a conflict over sampled sound recordings.

## II. THE DE MINIMIS EXCEPTION

### A. History and Background

The full maxim, *de minimis non curat lex*, translates roughly to “the law does not concern itself with trifles.”<sup>15</sup> Although there has been some debate as to the exact translation of the phrase, the general idea is that while some things may technically be illegal, they are too small and insignificant to waste the time and resources of the court.<sup>16</sup> The use of the de minimis doctrine as a defense to accusation of legal misconduct can be traced back to fifteenth century English civil law,<sup>17</sup> and today it is applicable to a wide array of legal disputes.<sup>18</sup> In fact, it has become so engrained in our modern judicial system that the Supreme Court has said, “the venerable maxim *de minimis non curat lex* . . . is part of the established background of legal principles against which all enactments are adopted, and which all enactments [absent contrary indication] are deemed to accept.”<sup>19</sup>

In the context of copyright, the de minimis doctrine has come to rest as a defense to accusations of copyright infringement.<sup>20</sup> For the better part of the last century, one of the key elements of a prima facie case of copyright infringement is a demonstration that a copyrighted work was, in fact,

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<sup>15</sup> *De minimis non curat lex*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>16</sup> Nemerofsky, *supra* note 9, at 324.

<sup>17</sup> Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 538 (1947).

<sup>18</sup> Nemerofsky, *supra* note 9, at 324.

<sup>19</sup> *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

<sup>20</sup> *See generally* *Toulmin v. Rike-Kumler Co.*, 137 U.S.P.Q. (BNA) 533 (S.D. Ohio 1962), *aff'd*, 316 F.2d 232 (6th Cir. 1963) (copying of a sentence and a half from a book of 142 pages held *de minimis*); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (30 characters out of 50 pages of source code held *de minimis*); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (300 words out of 200,000 clearly substantial, and also too great to justify fair use defense).

copied.<sup>21</sup> However, not all copying constitutes copyright infringement. For a claim of copyright infringement to stand there must be a substantial similarity between the plaintiff's copyrighted work and the work of the defendant in question.<sup>22</sup> Many courts have distinguished two types of substantial similarity.<sup>23</sup> First, there is "comprehensive nonliteral similarity," in which the "fundamental essence or structure" is copied even if specific expression is not.<sup>24</sup> Second, and most commonly applied to cases of digital sampling, is "fragmented literal similarity," in which small bits of specific expression are copied but the overall structure is not.<sup>25</sup> When employing the fragmented literal similarity test, the courts use the de minimis doctrine to measure substantial similarity, holding that substantial similarity is only present if the amount of literal expression copied is not de minimis.<sup>26</sup> In this way, de minimis becomes a defense to copyright infringement. If a copying, or sampling, is de minimis, then a substantial similarity does not exist and a copyright infringement has not taken place.<sup>27</sup>

Evaluating whether a musician's sampling or "use" constitutes a de minimis use or an infringement is, for now, a decision that must be made based on the specific facts of the case because no clear standard for de minimis evaluations has been set by the courts.<sup>28</sup> However, courts have typically looked to factors such as the amount of copying that took place, the nature of the portion that was copied, and the purpose for which the copying took place.<sup>29</sup> Put another way, the courts are evaluating whether the copied material that was sampled is qualitatively and quantitatively important to the plaintiff's work.<sup>30</sup> Thus, a sampling can be very small and yet so significant to the plaintiff's work that it constitutes an infringement and vice versa.<sup>31</sup>

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<sup>21</sup> See *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946) (discussing the elements of copying and unlawful appropriation).

<sup>22</sup> 4 NIMMER, *supra* note 6, § 13.03[A].

<sup>23</sup> See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1195-97 (9th Cir. 2004); *Warner Bros. Inc. v. Am. Broad. Co., Inc.*, 720 F.2d 231, 239-42 (2d Cir. 1983).

<sup>24</sup> 4 NIMMER, *supra* note 6, § 13.03[A][1].

<sup>25</sup> *Id.* § 13.03[A][2].

<sup>26</sup> See *Newton*, 388 F.3d at 1193.

<sup>27</sup> *Id.*

<sup>28</sup> See Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling - A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 139-44 (2003) ("[A] clear standard for de minimis use has not yet been settled upon in the courts").

<sup>29</sup> See, e.g., *Newton*, 388 F.3d at 1193 (holding de minimis a three note sequence and one background note taken from a Beastie Boys song); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 742 (S.D.N.Y. 1980) (holding that four notes for a Saturday Night Live skit from the song "I Love New York," which contained 45 words and 100 measures, was more than a de minimis taking, but copying constituted fair use as a parody);

<sup>30</sup> 4 NIMMER, *supra* note 6, § 13.03[A][2][a].

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

This result compliments the ideals of protecting a plaintiff's economic rights to their creation while not being so restrictive as to discourage future creativity from other artists for fear of copyright infringement.<sup>32</sup> However, disagreements over this legal theology have led to the recent split between the Ninth and Sixth Circuit Courts over the application of the de minimis defense to digital sampling.

### *B. The Traditional Substantial Similarity Analysis and The Concept of Fragmented Literal Similarity*

Before the practice of digital sampling and its place in the realm of copyright law can be evaluated, the traditional approach to evaluating whether or not a copyright infringement has taken place between authors, artists, musicians or otherwise must be understood. In fact, it is crucial to understanding why the Court in *VMG Salsoul, LLC v. Ciccone* came to the conclusion that it did and why their ruling on the practice of digital sampling is far superior to the Sixth Circuit's 2006 ruling in *Bridgeport Music, Inc. v. Dimension Films*.

In general, for a plaintiff to succeed on a claim alleging that a defendant has performed "actionable copying," and in turn committed a copyright infringement against them, they must be able to establish that (1) copying did in fact take place and (2) the copying in question is "substantially similar" to the plaintiff's original work.<sup>33</sup> In fact, it is well established law that "even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial."<sup>34</sup> The Supreme Court's repeated denial of certiorari in cases such as *Newton v. Diamond*, alleging that the substantial similarity analysis is either improper or unnecessary to establish claims of copyright infringement, is just one of many evidences that serves to establish that the substantial similarity element is necessary to copyright infringement claims.<sup>35</sup> However, even with this in mind, the question of what exactly constitutes a "substantial similarity" still remains a semi-vague concept begging further inquiry. The following are some guidelines and general principles have been established that serve to both aid in defining substantial similarity and also make it incredibly difficult.

Generally speaking, there is a bit of common sense involved in defining substantial similarity such as the fact that similarities that are "slight or trivial similarities are not substantial" and therefore do not pass the substantial

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<sup>32</sup> See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (noting that copyright is intended to encourage and incentivize creativity by rewarding the holder, as Congress intended).

<sup>33</sup> 4 NIMMER, *supra* note 6, § 13.03[A].

<sup>34</sup> *Newton*, 388 F.3d at 1193 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

<sup>35</sup> See *id.*

similarity analysis.<sup>36</sup> For example, in *Prunté v. Universal Music Group, Inc.*, the Court explained that the Plaintiff, a hip-hop musician, could not establish a substantial similarity between his and another hip-hop musician's songs simply because the Plaintiff's song repeatedly use the phrase "Fire in Da Hole" while the Defendant's repeatedly used the phrase "Fire in The Hole."<sup>37</sup> This kind of ruling can be hard to grasp for some people because there is almost no difference between the two phrases and almost no difference seems like it would qualify for the definition of "substantially similar." To make the issue even more confusing and difficult, it is also well established law that that two works do not need to be identical to qualify as substantially similar.<sup>38</sup> Finally, to further complicate the issue of substantial similarity, the decades of judicial decisions have given rise to two separate strains of substantial similarity, which *Nimmer on Copyright* refers to as "Comprehensive Non-Literal Similarity", and "Fragmented Literal Similarity."<sup>39</sup> Comprehensive Non-Literal Similarity refers to copying "where the fundamental essence or structure of one work is duplicated in another," regardless of whether or not it is actually identical or merely similar.<sup>40</sup> Fragmented Literal Similarity on the other hand refers to copying where a portion, but not all, of one artist's work, be it a musician or otherwise, is literally copied and used by another artist.<sup>41</sup> Since the concept of Comprehensive Non-Literal Similarity does not apply to digital music sampling and the process for employing the concept of it is, honestly, very convoluted with various tests and opinions for how it is to be evaluated, it will be foregone in this evaluation.<sup>42</sup> Fragmented Literal Similarity, however, is highly applicable because it lies at the very core of digital sampling.<sup>43</sup> Musicians take a literal fragment of one song and use it as their own.<sup>44</sup>

In tracing the development of Fragmented Literal Similarity in copyright infringement cases, *Nimmer* poses an important question concerning this important legal concept's application to the substantial similarity analysis:

[W]here there is literal similarity (virtually, though not necessarily, completely word for word) between plaintiff's

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<sup>36</sup> 4 NIMMER, *supra* note 6, § 13.03[A].

<sup>37</sup> *Prunté v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 25-26 (D.D.C. 2010), *aff'd*, 425 Fed. Appx. 1 (D.C. Cir. 2011).

<sup>38</sup> *See, e.g., Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977) (holding that the two works were substantially similar due to the lay definition of the phrase).

<sup>39</sup> 4 NIMMER, *supra* note 6, § 13.03[A].

<sup>40</sup> *Id.* § 13.03[A][1].

<sup>41</sup> *See id.* § 13.03[A][2].

<sup>42</sup> *See id.* § 13.03[A].

<sup>43</sup> *See id.* § 13.03[A][2][b].

<sup>44</sup> *See* 4 NIMMER, *supra* note 6, § 13.03[A][2][b].

and defendant’s works, the difficult problem discussed in the preceding subsection does not arise. That is, it is not necessary to determine the level of abstraction at which similarity ceases to consist of an “expression of ideas,” because literal similarity by definition is always a similarity as to the expression of ideas. But suppose the similarity, although literal, is not comprehensive—that is, the fundamental substance, or skeleton or overall scheme, of the plaintiff’s work has not been copied; no more than a line, or a paragraph, or a page or chapter of the copyrighted work has been appropriated. At what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement?<sup>45</sup>

*Nimmer* responds to these important questions by stating:

[N]o easy rule of thumb can be stated as to the quantum of fragmented literal similarity permitted without crossing the line of substantial similarity. The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work—not whether such material constitutes a substantial portion of defendant’s work.<sup>46</sup>

The Supreme Court declared their approval of this rule in *Perris v. Hexamer* in 1878.<sup>47</sup> In *Perris*, the Court evaluated a claim of copyright infringement brought by the owner of some copyrighted maps of New York City against a cartographer who created similar maps of the city of Philadelphia.<sup>48</sup> Although the maps were of a different city altogether, the defendant cartographer used “substantially the same system of coloring and signs, and consequently substantially the same key that had been adopted by the complainants.”<sup>49</sup> In evaluating the rights of the copyright holder to the New York maps, the Court stated “a 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.”<sup>50</sup> With this rule in mind, the Court held that the Defendant did not violate the Plaintiffs’ copyright and did nothing more than “to use to some extent their system of arbitrary signs and their key.”<sup>51</sup> While the Court did not use the term “de minimis” to describe their opinion, the resulting

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<sup>45</sup> *Id.* § 13.03[A][2].

<sup>46</sup> *Id.* § 13.03[A][2][a].

<sup>47</sup> *Perris v. Hexamer*, 99 U.S. 674 (1878).

<sup>48</sup> *Id.* at 675.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 675-76.

<sup>51</sup> *Id.* at 676.

application is the same. No reasonable juror would have looked at the two maps and seen the color schemes, arbitrary signs, and interpretive key to be uniquely belonging to one map owner or the other. Thus, the use was de minimis.

Although this effectual chase across the United States legal history may seem possibly redundant, over complicated, or perhaps even over simplified, it establishes this very important point; the evaluation of copyright infringement claims in the United States Judicial System is a long standing and consistently evaluated set of guiding principles. The substantial similarity analysis and the concept that *Nimmer* describes as “Comprehensive Non-Literal Similarity”<sup>52</sup> have been endorsed and employed by U.S. Courts for over 150 years.<sup>53</sup> A long standing history of case law such as this serves to highlight and emphasize the argument set forth in in sections III-V below. Stated simply, the Sixth Circuit’s argument for a new method for evaluating copyright infringement claims in the context of digital sampling by musicians not only doesn’t make sense but it is inappropriate given the traditional method’s long standing use and the Supreme Court’s denial to review it despite numerous opportunities.

### III. THE *BRIDGEPORT* DECISION

#### A. *The Facts*

In the early 2000’s, Bridgeport Music sued Dimension Films for digitally sampling two seconds of a guitar chord from Funkadelic’s “*Get Off Your Ass and Jam*.”<sup>54</sup> Public Enemy altered the recording of the guitar chord by changing the pitch.<sup>55</sup> They then looped the altered recording five times to create a version of the two second recording that extended sixteen beats in length.<sup>56</sup> This new segment of music was then inserted into N.W.A.’s song “*100 Miles and Runnin’*,” which would then go on to be used in the soundtrack for the movie “*Hook Up*.”<sup>57</sup> Unfortunately for Bridgeport Music, the District Court used the traditional application of the de minimis doctrine.<sup>58</sup> The District Court concluded that while the original recording of the notes taken were unique to the artist and thus actionable, the sampling that had taken place did not “rise to the level of legally cognizable appropriation.”<sup>59</sup> In sum, the digital sampling that Public Enemy had participated in was de minimis. The Plaintiffs did not dispute the material

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<sup>52</sup> 4 NIMMER, *supra* note 6, § 13.03[A][2].

<sup>53</sup> *Perris*, 99 U.S. at 674.

<sup>54</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005).

<sup>55</sup> *Id.* at 796.

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

<sup>57</sup> *Id.* at 795.

<sup>58</sup> *Id.*

<sup>59</sup> *Bridgeport*, 410 F.3d at 797.

findings of the District Court.<sup>60</sup> The heart of their argument was that the de minimis exception should have never been available to the defendants because they had intentionally taken sound recordings that belonged to Bridgeport Music for the defendants' own use.<sup>61</sup> Simply put, they wanted the District Court to declare that stealing of any shape or form is stealing.

### *B. A Break From Tradition*

The courts have typically been hesitant to create new bright line rules about copyright law. As the District Court in *Bridgeport* clearly stated, their role has been to “balance the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works.”<sup>62</sup> However, while hearing Bridgeport's claims on appeal, the Sixth Circuit boldly broke away from the traditional balancing role and decisively concluded “get a license or do not sample.”<sup>63</sup> The Court's decision represented a landmark change in the field of copyright law. It simply eliminated the long-standing staple, substantial similarity, from the infringement analysis in the 6<sup>th</sup> Circuit.<sup>64</sup> To be fair, it's important to note that the Court in *Bridgeport* was very careful to limit their holding only to the application of digitally recorded music sampling.<sup>65</sup> The change was made in an attempt to establish a bright line rule that would reduce disputes and litigation among artists in the future, since this kind of sampling was causing more and more disputes and litigation in the music industry.<sup>66</sup>

### *C. The Argument Behind the Case*

Although the Sixth Circuit's holding was a rather drastic one, it wasn't without justification or reason. According to 17 U.S.C. § 114(b) (also known as the Copyright Act), sound recording copyright holders possess the exclusive right “to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are

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<sup>60</sup> *Id.* at 798.

<sup>61</sup> *Id.*

<sup>62</sup> *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002).

<sup>63</sup> *Bridgeport*, 410 F.3d at 801.

<sup>64</sup> 4 NIMMER, *supra* note 6, § 13.03[A] (“[S]ubstantial similarity between the plaintiff's and defendant's works is an essential element of actionable copying.”); see also Andrew Inesi, *A Theory of De Minimis and A Proposal For Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 965 (2006).

<sup>65</sup> *Bridgeport*, 410 F.3d at 798-99.

<sup>66</sup> *Id.*

rearranged, remixed, or otherwise altered in sequence or quality.”<sup>67</sup> The *Bridgeport* Court contended that that the exclusive rights of the owner of any copyright in any sound recording under section 106 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.”<sup>68</sup> Although the interpretation of 17 U.S.C. § 114(b) has been up for debate in the past, the Sixth Circuit adopted a straightforward, black letter reading of the law because the legislative history did not help interpret the Copyright Act.<sup>69</sup> The Court stated, “In other words, a sound recording owner has the exclusive right to “sample” his own recording.”<sup>70</sup>

The Court provided three reasons to justify this black letter reading of 17 U.S.C. § 114(b).<sup>71</sup> The first justification was ease of enforcement for future digital sampling disputes.<sup>72</sup> The Court created a simple rule: “Get a license or do no sample.”<sup>73</sup> By creating this rule, the Court left little room open for interpretation for future artists that may be tempted to take segments of songs to add onto their own. This requirement does not put an undue burden on creativity, and it does not prevent future artists from simply recreating the same set of notes in his own studio rather than making an actual copy of the original artist’s sound recording for his own sampling purposes.<sup>74</sup> In other words, an artist could re-record the exact same set of notes they wish to use rather than taking an electronic copy of those notes from another artist’s song. Because the Court limited their holding to the practice of digital sampling only, it left the door open for an artist to re-record the notes they needed for their derivative work. They could then simply make a claim of “intellectual taking” by coincidence if a dispute arose, rather than actually taking the original artist’s recording and inserting it into a derivative work.<sup>75</sup>

The second reason provided by the Court was an economical one. The Court explained that the market would control the price of licensing recordings and keep it within reasonable bounds.<sup>76</sup> They argued that “the sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording.”<sup>77</sup> Given the profits that a musician

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<sup>67</sup> *Id.* at 800.

<sup>68</sup> *Id.* at 800 (citing 17 U.S.C. §114(2012)).

<sup>69</sup> *Id.* at 805.

<sup>70</sup> *Bridgeport*, 410 F.3d at 801.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*, at 800-801.

<sup>75</sup> *Bridgeport*, 410 F.3d at 802.

<sup>76</sup> *Id.* at 801.

<sup>77</sup> *Id.*

was likely to make from the creation of his derivative work, it did not seem unreasonable for the Court to require that artists pay the original artist a licensing fee if they weren't going to simply re-record the notes they needed in their own studio. Furthermore, it would likely be much cheaper to simply pay for a license to use segments of another artist's song rather than to pay for the litigation if and when a dispute arises from the taking.<sup>78</sup>

The third justification given by the Court is more of a moral reason in that digital sampling is simply "never accidental."<sup>79</sup> The Court explained, "It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before. When you sample a sound recording you know you are taking another's work product."<sup>80</sup> Taken together, these three justifications satisfy the balance that courts constantly juggle between the ownerships rights of the copyright holder and the benefits the general public enjoys from having limited restrictions on creativity.<sup>81</sup> In sum, it would seem that this bright line rule would cut down on the courts' time evaluating each sampling of sound recordings among musicians and it will save the musicians time and money because it is likely cheaper to license sound recordings than to litigate the disputes over them.<sup>82</sup> The Sixth Circuit's holding in *Bridgeport* would remain an unchallenged break from the traditional application of analyzing substantial similarity and the traditional application of the de minimis doctrine for a decade until the Ninth Circuit issued its opinion in *VMG Salsoul*.

#### IV. *VMG SALSOU, LLC v. CICCONE*

##### A. *The Facts*

In June of 2016, the Ninth Circuit Court of Appeals issued its opinion in *VMG Salsoul, LLC v. Ciccone* and called into question the Sixth Circuit's *Bridgeport* decision for the first time in ten years.<sup>83</sup> Appealing from summary judgment entered by the District Court holding that the infringement that took place was *de minimis*, the Plaintiff, VMG Salsoul, claims that Madonna Ciccone violated its copyright to the song "Love Break" through the practice of digital sampling.<sup>84</sup> The sampling that involved a recorded 0.23-second segment of horn blasts that had been used

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<sup>78</sup> *Id.* at 802.

<sup>79</sup> *Id.* at 801.

<sup>80</sup> *Bridgeport*, 410 F.3d at 801.

<sup>81</sup> *Id.* at 801-02; see also Lauren Fontein Brandes, Case Comment, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 112.

<sup>82</sup> *Bridgeport*, 410 F.3d at 802.

<sup>83</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).

<sup>84</sup> *Id.*

in the song “*Love Break*.”<sup>85</sup> The segment was taken by the Defendant and incorporated in her song “*Vogue*,” which met tremendous success.<sup>86</sup> There are two different versions of “*Vogue*” that the horn blast segment was used in.<sup>87</sup> There is a “radio edit” and a compilation version.<sup>88</sup> The horn blasts occur four times in the radio edit version and six times in the compilation version.<sup>89</sup> Similar to *Bridgeport*, the Plaintiff established that the defendant had, in fact, taken the segment intentionally and had thereby participated in digital sampling.<sup>90</sup> Factually speaking, the *Bridgeport* and *VMG* cases are nearly identical in the accusations being made and the length and use of the digitally sampled recording.

### B. The Argument

Despite the similarities between the two cases, the Ninth Circuit took the more traditional approach to interpreting the law of copyright. The approach was in direct conflict with the Sixth Circuit’s interpretation.<sup>91</sup> Instead of holding musicians to a strict “no copying” standard when it comes to digital sampling, the Court reiterated from its past decisions that proof of actual copying is insufficient to establish copyright infringement.<sup>92</sup> The Court explained, “For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is *substantial*.”<sup>93</sup> In other words, the Court did not see it as wise or within their power to alter hundreds of years of traditional copyright law. They chose to instead maintain the traditional substantial use analysis that has been employed in the past when one party brought claims of copyright infringement against another. The Court went on to explain that the “principle that trivial copying does not constitute actionable infringement has long been a part of copyright law.”<sup>94</sup> This is emphasized by the fact that this has been the attitude towards

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

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 875.

<sup>88</sup> *VMG*, 824 F.3d at 876.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 877.

<sup>91</sup> *Id.* at 874.

<sup>92</sup> *Id.* at 877.

<sup>93</sup> *VMG*, 824 F.3d at 877 (emphasis added) (citing *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)) (holding that the de minimis exception applies directly to claims of infringement of a copyrighted composition); *see also Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997); *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992); 4 NIMMER, *supra* note 6, § 13.03[A], at 13-30.2.

<sup>94</sup> *See VMG*, 824 F.3d at 877. (citing *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)).

copyright infringement in the arts for over one hundred years.<sup>95</sup> This is in blatant support of the legal maxim *de minimis non curat lex*. As the Ninth Circuit re-emphasized, “[T]o establish its infringement claim, Plaintiff must show that the copying was greater than *de minimis*.”<sup>96</sup> To reach a level that is greater than *de minimis*, the copying in question must be so great that through “ordinary observations” it is recognizable as the work of another.<sup>97</sup> In other words, if the copying is so small that the average audience would not recognize it, then it is *de minimis* and does not qualify as copyright infringement.<sup>98</sup>

Turning to the specific facts of the *VMG* case, the Ninth Circuit emphasized the fact that the horn blasts that were used by the Defendant were not “copied precisely.”<sup>99</sup> According to the Plaintiff’s own expert witness, the copied portion “was modified by transposing it upward, cleaning up the attack slightly in order to make it punchier [by truncating the horn hit] and overlaying it with other sounds and effects. One such effect mimicked the reverse cymbal crash...the reverb/delay ‘tail’...was prolonged and heightened.”<sup>100</sup> In addition, the horn blasts used by the Defendant were not isolated sounds that were unique to the Plaintiff’s song “*Love Break*.” In both “*Love Break*” and “*Vogue*,” there are other instruments playing at the same time and the horn blasts are blended into the music. After listening to the sound recordings that were submitted by both parties, the Ninth Circuit concluded that “a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit.”<sup>101</sup> This conclusion was ironically supported by the Plaintiff’s primary expert witness when he accidentally misidentified the horn blasts that were sampled from “*Love Break*” in his original report.<sup>102</sup> After taking all of these facts into account, the Court saw no need for anything more than a “dry analysis” to

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<sup>95</sup> *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909) (“Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent”).

<sup>96</sup> *See VMG*, 824 F.3d at 877.

<sup>97</sup> *Id.* at 878 (citing *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986)); *see also Dymow v. Bolton*, 11 F.2d 690, 692 (2d Cir. 1926) (“[C]opying which is infringement must be something which ordinary observations would cause to be recognized as having been taken from the work of another.” (internal quotation marks omitted)); *see also Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986) (“As a rule, a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation.”).

<sup>98</sup> *See Fisher*, 794 F.2d at 435 n.2.

<sup>99</sup> *VMG*, 824 F.3d at 879.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 880.

<sup>102</sup> *Id.*

come to the “common sense conclusion” that the copying in question was *de minimis* and did not constitute copyright infringement.<sup>103</sup>

## V. REBUTTING *BRIDGEPORT*

### A. *Substantial Use*

At the heart of the Court’s decision in the *VMG* case is the idea that because an insignificant portion of the song “Love Break” was digitally sampled, no reasonable person would be able to recognize the sampling that has taken place.<sup>104</sup> That is to say, the Court applied the traditional substantial similarity analysis referenced above and came to the conclusion that no substantial similarity existed, fragmented or otherwise.<sup>105</sup> Therefore, the sampling done by the Defendant was *de minimis* and no copyright infringement had taken place.<sup>106</sup> However, the justification for this position runs deeper than the simplistic notion that nobody can tell something was stolen, so nothing was stolen.

The rule that copying only constitutes copyright infringement when a substantial portion of the work is taken is a doctrine that has been firmly established and accepted in our judicial system for more than a century.<sup>107</sup> In fact, *Nimmer on Copyright*, the leading copyright treatise of our time, traces this legal doctrine back into the mid-nineteenth century.<sup>108</sup>

The reasoning for this rule lies primarily within the economic rights of the copyright holder.<sup>109</sup> In *VMG* the Ninth Circuit explained 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.”<sup>110</sup> However, if public concert audiences and average private music purchasers do not recognize that digital sampling has taken place, then the “sampler” has not actually gained any financial benefit from using the digital sample. Accordingly, the original creator whose work was digitally sampled has not lost any financial benefit because of the sampling. As a result, the creator’s legal interests have not been violated and no infringement can be said to have taken place.

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<sup>103</sup> *Id.*

<sup>104</sup> *VMG*, 824 F.3d at 880.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See generally* 4 NIMMER, *supra* note 6 § 13.03[A][2][a], at n.102 (citing *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841)).

<sup>109</sup> *See VMG*, 824 F.3d at 881 (citing *Sid & Marty Krofft Television Prod., Inc., v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. Cal. 1977)).

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

At this point, it's worth noting that while the *VMG* and *Bridgeport* cases deal with what is referred to as a "fragmented literal similarity," there is another version of this analysis called "comprehensive nonliteral similarity" that also supports the holding of *VMG*.<sup>111</sup> "Comprehensive literal similarity" is described by *Nimmer* as:

[A] similarity not just as to a particular line or paragraph or other minor segment, but where the fundamental essence or structure of one work is duplicated in another. If such duplication is literal or verbatim, then clearly substantial similarity results. The problem here under scrutiny is the situation where there is comprehensive similarity but no word-for-word or other literal similarity.<sup>112</sup>

This is what the Second Circuit has labeled as "inexact copyright infringement."<sup>113</sup> It's important to realize that the "substantial similarity" involved in "comprehensive nonliteral similarity" and also the "fragmented literal similarity" analysis in *VMG* and *Bridgeport* can be reached even if a defendant merely paraphrased a plaintiff's work rather than copying it verbatim.<sup>114</sup> As the infamous Judge Learned Hand has said, copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."<sup>115</sup>

This concept, while seemingly reasonable, is in direct opposition to the longstanding copyright principle that an owner's copyright does not protect against the fair use of abstract ideas contained within a copyrighted work.<sup>116</sup> So, in essence, it is possible to use the abstract ideas employed by the copyright holder of another work without reaching the "substantial similarity" necessary to qualify as actionable copyright infringement.<sup>117</sup> However, this creates a conundrum for the area of copyright law. According to *Nimmer*, "if copyright protection is not limited to literal reproduction but does not prevent the borrowing of ideas, what sort of similarity short of the verbatim will constitute substantial similarity?"<sup>118</sup> Unfortunately, no clear cut

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<sup>111</sup> See 4 NIMMER, *supra* note 6, § 13.03[A][1].

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

<sup>113</sup> *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 133 (2d Cir. 2003).

<sup>114</sup> Compare NIMMER, *supra* note 6, § 13.03[A][1], with *id.* § 13.03[A][2].

<sup>115</sup> 4 NIMMER, *supra* note 6 (citing *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 537 (S.D.N.Y. 2008)).

<sup>116</sup> See *id.* § 13.03[B][2][a].

<sup>117</sup> 4 NIMMER, *supra* note 6, § 13.03[A][1] (citing *Frybarger v. Int'l Bus. Mach. Corp.*, 812 F.2d 525, 529-30 (9th Cir. 1987); *Atari, Inc., v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982) *cert. denied*, 459 U.S. 880 (1982)).

<sup>118</sup> *Id.*

answer has been produced by the courts.<sup>119</sup> However, *Nimmer* explains, “[t]he courts have answered this inquiry with the vague formula that if the defendant’s work copies not merely the idea, but the expression of the idea contained in plaintiff’s work, then the two works are substantially similar and infringement may be found.”<sup>120</sup> In addition, the House Report from the Copyright Act of 1976 “expressly endorses and perpetuates, under the current Act, this ‘idea-expression’ dichotomy, so that it is now statutorily codified. This, however, is but a reformulation not a solution of the problem.”<sup>121</sup> As we can see from both *VMG*’s “fragmented literal similarity” analysis and the “comprehensive literal similarity” analysis, *VMG* took the correct course of action in applying the *de minimis* exception to copyright in the case of digitally sampled sound recordings. However, the House Report from the Copyright Act of 1976, cited by both *VMG* and *Bridgeport*, is the heart of the most controversial argument for the treatment of the *de minimis* doctrine and digitally sampled sound recordings.

### B. Statutory Interpretation

The linchpin at the very center of the *Bridgeport* Court’s break from traditional applications of substantial similarity and the *de minimis* doctrine is their interpretation of section 114(b) of The Copyright Act of 1976 (also known as 17 U.S.C § 114(b)).<sup>122</sup> Section 114(b), “Scope of Exclusive Rights in Sound Recordings”, of the act states in relevant part:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 [17 USCS § 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.<sup>123</sup>

The section 106 that section 114(b) is referring to is titled “Exclusive Rights in Copyrighted Works,” and those exclusive rights are as follows:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (citing *Mazer v. Stein*, 347 U.S. 201 (1954)); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960); *Krofft*, 562 F.2d 1157.

<sup>121</sup> 4 NIMMER, *supra* note 6 §13.03[A][1] (“It has been held that the rules for the determination of substantial similarity are the same under both the 1976 and 1909 Acts.”) (citing H.R. REP. No. 94-1476, at 61 (1976); Reg. Supp. Rep., p. 17); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980)).

<sup>122</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

<sup>123</sup> The Copyright Act of 1976, 17 U.S.C. § 114(b) (2017) (emphasis added).

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>124</sup>

The *Bridgeport* Court rested their entire conclusion on the single word “entirely” in section 114(B) when evaluating the copyright infringement claim in front of them and blatantly stated there was no reason to look beyond that word.<sup>125</sup> They placed their emphasis in this particular area based on legislative history.<sup>126</sup> Prior to the Copyright Act of 1976 there was the Sound Recording Act of 1971.<sup>127</sup> The Copyright Act of 1976 quotes the language of the Sound Recording Act of 1971 verbatim in section 114(B) except for the addition of the word “entirely.”<sup>128</sup> The significance of this word rests on its implication concerning the scope of liability for potential copiers. The function of section 114(b) is to provide an immunizing effect for a creator, in this case a musician, who creates a song that sounds the same as another musician’s song without literally using a recording of the original work in their own music.<sup>129</sup> Or in other words, they created a song without digital sampling that happen to sound like another musician’s work. By inserting the word “entirely” into the sentence, lawmakers clarified that if no sound bites were literally recorded (i.e. no digital sampling took place) and copied in the second musician’s new work then that musician would be exempt from liability to the first musician. The similarity would just be happenstance or coincidence. From this, the *Bridgeport* Court performed a very large logical leap, in fact a logical fallacy, by jumping to the conclusion that if no presence

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<sup>124</sup> 17 U.S.C. § 106.

<sup>125</sup> *Bridgeport*, 410 F.3d at 800-01.

<sup>126</sup> *Id.* at 801.

<sup>127</sup> *Id.*

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

<sup>129</sup> *See id.*

of digital sampling equaled no liability then some presence of digital sampling equaled automatic liability.<sup>130</sup> This logical jump was so severe that after stating that the word “entirely” had been added into the Copyright Act, they simply concluded in their very next sentence, “In other words, a sound recording owner has the exclusive right to ‘sample’ his own recording. We find much to recommend this interpretation.”<sup>131</sup> They then proceeded to list off the three benefits that would come with this approach to evaluating digital sampling among musicians referenced in Part II above.<sup>132</sup> So, in one foul swoop the Sixth Circuit not only invented a new legal analysis for an already well-established process with a stretched out statutory interpretation, but they also did away with the *de minimis* exception to copyright infringement at the same time. By getting rid of it with such a hard, black line rule commanding the public “[g]et a license or do not sample,”<sup>133</sup> the Court ironically was actually saying the opposite of *de minimis non curat lex*. That is to say, it would appear that the Sixth Circuit does in fact concern itself with trifles.

In rebutting the *Bridgeport* Court’s argument that the statutory interpretation revealed that their decision was the will of lawmakers in Congress, the *VMG* Court explained, “nothing in that provision suggests differential treatment of *de minimis* copying of sound recordings compared to, say, sculptures. Although subsection (6) deals exclusively with sound recordings, that subsection concerns public performances; nothing in its text bears on *de minimis* copying.”<sup>134</sup> Not only does the Ninth Circuit quickly dismiss the Sixth Circuit’s fallacious assumptions about sound recordings, but it also highlights the fact that the Sixth Circuit misapprehended the statutory structure of the Copyright Act of 1976 in their application of it to the *Bridgeport* facts.<sup>135</sup> Instead of skipping immediately to section 114(b), the Ninth Circuit began its analysis with section 106 because it is the only section of the Copyright Act that provides copyright holders with rights and protections.<sup>136</sup> From that point forward, sections 107 through 122 are all limitations on those rights and restrictions as to when they can be exercised.<sup>137</sup> With this in mind, the very fact that the Sixth Circuit used a provision that actually limits the rights of copyright holding plaintiffs to create extra rights for those plaintiffs seems kind of absurd on its very face. The Ninth Circuit’s *VMG* decision emphasized the absurdity saying, “[a] straightforward reading of the third sentence in section 114(b) reveals Congress’ intended limitation on the rights of a sound recording copyright

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<sup>130</sup> See *Bridgeport*, 410 F.3d at 801; see also 4 NIMMER, *supra* note 6, § 13.03[A][2][b].

<sup>131</sup> *Bridgeport*, 410 F.3d at 801.

<sup>132</sup> *Id.* at 800; see discussion *infra* Part II.

<sup>133</sup> *Bridgeport*, 410 F.3d at 800.

<sup>134</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882 (9th Cir. 2016).

<sup>135</sup> 4 NIMMER, *supra* note 6, § 13.03[A][2][b].

<sup>136</sup> *VMG*, 824 F.3d at 882.

<sup>137</sup> 17 U.S.C. § 106-122; see also H.R. REP. No. 94-1476, at 61 (1976).

holder: A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying.”<sup>138</sup> If this wasn’t enough, the House Report for section 114(b) reflects Congress’s intent to recognize the de minimis doctrine for sound recordings, which by its very nature makes the Bridgeport decision wrong.<sup>139</sup> The report states, “subsection (b) of section 114 makes clear that . . . infringement [of a sound recording copyright] takes place whenever all or any *substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced” through various recording methods.”<sup>140</sup> And as *Nimmer* points out, because Congress took the time to articulate that “infringement takes place whenever all *or any substantial portion* of the actual sounds . . . are reproduced,” it is clear that they were well aware of the de minimis exception and its function in copyright law.<sup>141</sup>

## VI. CONCLUSION

In sum, the 6th Circuit Court’s decision in the 2006 case *Bridgeport Music, Inc. v. Dimension Films* was incorrectly decided. Over 150 years of case law precedent was in no way on their side as they invented a new analysis for copyright infringement via digital sampling and simultaneously eliminated the de minimis exception. Neither, in fact was general logic. Most undergraduate students taking Philosophy 101 learn the dangers of contrapositive fallacious assumptions but the Sixth Circuit seems to have walked right into one. In addition, the very law they were relying on to support their decision was read in a manner that made little to no sense because they ignored its statutory structure. And finally, the Congress whose role it is to create these laws and whose law-making shoes the Sixth Circuit suddenly stepped into had expressly disagreed with this type of ruling in advance by stating in their house report that substantial similarity had to be present for copyright infringement to be established not merely the presence of copying. The Sixth Circuit simply got this one wrong.

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<sup>138</sup> *VMG*, 824 F.3d at 883.

<sup>139</sup> H.R. REP. No. 94-1476, at 61.

<sup>140</sup> *VMG*, 824 F.3d at 883 (citing H.R. Rep. No. 94-1476, at 61) (emphasis added).

<sup>141</sup> 4 NIMMER, *supra* note 6, § 13.03[A][2][b].

