Science and Technology Law Review

Volume 20

2017

VMG Salsoul, L.L.C. v. Ciccone: The Ninth Circuit Strikes a Pose, Applying the De Minimis Exception to Music Sampling

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I. INTRODUCTION

When the principles of "thou shalt not steal" and "the law does not concern itself with trifles"—*de minimis non curat lex*—clash, which should control a court's analysis? The Ninth Circuit confronted the issue in *VMG Salsoul, L.L.C. v. Ciccone*, where the famous singer, Madonna Louise Ciccone, faced a copyright infringement suit claiming she used a copyrighted sound recording without permission in creating the song, *Vogue*.[1] On review of summary judgment in favor of Madonna, the Ninth Circuit held that the unlicensed use of the copyrighted sound recording was not infringement because the average consumer could not recognize the appropriation.[2] *Ciccone* split from the Sixth Circuit's ruling twelve years ago in *Bridgeport Music, Inc. v. Dimension Films*, which held that any unlicensed copying was infringement.[3] While this circuit split has created a dangerous gray-area in copyright law, the Ninth Circuit's approach better agrees with copyright jurisprudence. This agreement is evidenced by the rulings of lower courts throughout the country, proposed legislation in Congress, and popular opinions in the field of copyright law. In applying this exception, the Ninth Circuit cemented support for a growing area of the music industry that makes use of small amounts of sound recordings to create an artistic "collage" that has been growing in popularity since the turn of the century.

II. BACKGROUND

Copyright protection for music can be traced back to the Copyright Act of 1909. The Copyright Act of 1909 covered musical compositions, but this protection only extended to a work's musical score and lyrics, which produce sound when played.[4] Actual recordings of the composition, the composition-produced sound fixed in a phonorecord or other medium, were not protected by copyright until a 1971 amendment to the Copyright Act of 1909, which was later incorporated into the Copyright Act of 1976 (Copyright Act).[5] This protection arose after Congress became concerned with the prevalence of the unauthorized duplication of sound recordings, now easily performed with re-

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1. VMG Salsoul, L.L.C. v. Ciccone, 824 F.3d 871, 875 (9th Cir. 2016).
2. *Id.* at 874.
3. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–01 (6th Cir. 2005).
4. *See* Copyright Act of 1909 § 5, 35 Stat. 1075, 1076–77 (1909).
5. 17 U.S.C. §§ 101, 106 (2010).

cord and tape devices.[6] Congress defined these protectable "sound recordings" as works that result: "from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[7]

While copyrights in musical compositions and sound recordings are similar, they are distinct and can be separately held. The copyright in a musical composition frequently vests with the composer/lyricist and gives that creator the right to reproduce, prepare derivative works, distribute copies, and perform or display the work in public.[8] In contrast, the copyright in a sound recording vests in the party that fixes the music to a phonorecord or other device, which is usually the record company.[9] The rights given to the owner of a copyrighted sound recording are more limited, reserving only the right to reproduce, prepare derivative works, distribute copies, and perform the work publicly by means of a digital audio transmission.[10] The copyright is further limited in scope by Section 114(b) of the Copyright Act, which limits the rights listed in Section 106.[11] Of special relevance in this case is the limitation that the right to reproduce and prepare derivative works does not extend to sound recordings that consist entirely of other sounds, even if those sounds imitate or simulate the copyrighted recording.[12]

Sound recording copyrights became the subject of controversy with the rise of digital sampling, where sounds from a preexisting recording are physically copied for use in a new recording and possibly modified with changes to some sound qualities like pitch and tempo.[13] Sampling took off in the mid-1980s, and it quickly became clear that sampling provided many advantages to new artists, since the price of sampling equipment was far cheaper than the

6. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10(A)(1)(c) (2013).

7. 17 U.S.C. § 101 (2010).

8. *Id.* §§ 106(1)–(5).

9. *Id.* § 106; *see* M. Leah Somoano, Case Note, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289, 291 (2006).

10. 17 U.S.C. § 114(a) (2010) (citing 17 U.S.C. §§ 106(1)–(3), (6) (2002)).

11. *Id.* § 114(b).

12. *Id.* ("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.").

13. VMG Salsoul, L.L.C. v. Ciccone, 824 F.3d 871, 875 (9th Cir. 2016) (citing Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003)).

production costs of hiring musicians or recording in a studio.[14] Litigation soon followed, with owners of sampled recordings arguing that this practice constituted copyright infringement.[15] One of the first cases to address sampling was *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.* The Southern District of New York's opinion was clear from the first sentence: "Thou shalt not steal."[16] While the case primarily dealt with the ownership of a sound recording, the court opined that the defendants knew they were violating plaintiff's right by not acquiring a license.[17] But sampling, both unauthorized and authorized, continued to expand in popular music, with almost a third of the songs on the Billboard 100 in 1999 containing sampled sound recordings in some capacity.[18]

This is where the legal principle of *de minimis non curat lex* (commonly translated as the law does not concern itself with trifles) comes into play.[19] The principle, commonly referred to as the de minimis exception, means that a violation of the law can be so minimal that it does not give rise to a legal consequence.[20] The U.S. Supreme Court has held that all laws, "absent a contrary indication," accept this principle implicitly.[21] As applied to copyright law, the de minimis exception is applied when a court is determining if a case of infringement is actionable.[22] To determine if a protected work has been infringed, a court must determine: (1) that copying did, or could have, taken place; and (2) that the degree of similarity between the protected elements of the original work and the infringing work is substantial enough for

14. *See* Danielle L. Gilmore & Kenneth L. Burry, *Feature: 13th Annual Ent. Law Issue: Healthy Sampling: Digital Music Sampling Creates High-Stakes Challenges to Existing Copyright Law for the Recording Industry*, 20 L.A. LAW. 40, 42 (1997).

15. *Id.*

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

17. *Id.* at 184–85 (alleging that the use of three words and the accompanying background music was actionable infringement).

18. Tonya Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 856–57 (2011) (discussing the history of hip hop and its use of sampling).

19. *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (10th ed. 2014).

20. Ringgold v. Black Entm't Television Inc., 126 F.3d 70, 74 (2d Cir. 1997); *see* Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

21. Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') 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.").

22. *Ringgold*, 126 F.3d at 74–75.

the infringement to be actionable.[23] De minimis applies in the "substantial similarity" step, as a portion copied can be so trivial that the infringing work is not substantially similar to the protected work and thus, not actionable.[24]

In applying the de minimis principle to musical copyrights, the Ninth Circuit addressed the rule with regards to musical compositions in *Newton v. Diamond*. In *Newton*, defendants sampled a six-second, three-note piece from plaintiff's protected song.[25] The court concluded that it was not necessary to obtain a license for the use of the musical composition, embodied in the sound recording, because the portion copied was so minimal that it invoked the de minimis exception.[26] But the court left open the question whether the de minimis exception could be applied to sound recordings.[27]

The Sixth Circuit addressed that question in *Bridgeport v. Dimension Films*, where defendant copied a two-second, three-note guitar riff from the protected work, lowered the pitch, looped the piece to last for seven seconds, and then repeatedly played the copy over the course of the infringing work.[28] In deciding *Bridgeport*, the court construed Sections 106 and 114(b) of the Copyright Act to create the "contrary indication" from Congress that the Supreme Court said was required to reject the de minimis principle.[29] The result was a bright-line infringement rule, where copying of any amount would be considered actionable infringement, absent another defense (e.g. fair use).[30] This rule met resistance from district courts outside the Sixth Circuit but was not scrutinized by another Court of Appeals until the Ninth Circuit decided *VMG Salsoul v. Ciccone* on June 2, 2016.[31]

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23. *Id.* at 75.

24. *Id.*

25. Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2003).

26. *See id.* (finding the defendant had obtained a license for the use of the sound recording, so the court did not address if the same analysis could be applied to infringing on sound recording copyright).

27. VMG Salsoul, L.L.C. v. Ciccone, 824 F.3d 871, 877–78 (9th Cir. 2016)

28. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796 (6th Cir. 2005).

29. *See id.* at 800–01; Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).

30. *Bridgeport Music*, 410 F.3d at 801–02.

31. *See Ciccone*, 824 F.3d at 886; *see also* Batiste v. Najm, 28 F. Supp. 3d 595, 625 (E.D. La. 2014); Pryor v. Warner/Chappell Music, Inc., No. CV13-04344, 2014 WL 2812309, at *1, *7 n.3 (C.D. Cal. June 20, 2014); Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1340–41 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1284 (11th Cir. 2011).

III. *VMG SALSOUL V. CICCONE*

A. Facts

The dispute originated in the production of the song *Ooh I Love It (Love Break)* in the early 1980s.[32] Shep Pettibone, who later produced *Vogue* alongside Madonna, recorded the song.[33] In *Love Break*, there were "horn hits," short blasts from horn instruments (trombones and trumpets), which occurred in single and double forms several times throughout the song.[34] In *Vogue*, a horn hit of similar nature played, but it was truncated, higher in pitch, and in a different key.[35] Notwithstanding that fact, VMG Salsoul (VMG) alleged that Pettibone sampled the horn hits and used them in the recording of *Vogue*.[36] The Central District of California Court, applying the de minimis exception, held that even if VMG proved the allegations of copying, its claim failed because the alleged portion copied was trivial.[37] The court granted summary judgment in favor of Madonna.[38]

On review, the Ninth Circuit found that Pettibone isolated a single horn hit lasting less than a second, copied it, transposed it to a new key, shortened it, then added other sound effects to the chord.[39] Additionally, for the double horn hit, Pettibone duplicated the copy of the single horn hit, then cut one of the duplicates down to create a horn hit that sounded like it had a shorter chord.[40] Pettibone then blended the modified single and double horn hits with other instrumentals to form the music for *Vogue*.[41] The court also noted an event that aided its analysis—when VMG's "primary expert originally misidentified the source of the sampled double horn hit."[42] It was only after the horn hit could be isolated that it was identified as a duplication of the single horn hit in *Love Break* instead of a sampling of the original double horn hit.[43]

B. The Court's Reasoning

In its analysis, the Ninth Circuit assumed that copying occurred for the purposes of reviewing summary judgment since VMG introduced sufficient

32. *Ciccone*, 824 F.3d at 875.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 876.
38. *Ciccone*, 824 F.3d at 876.
39. *Id.* at 879–80.
40. *Id.*
41. *Id.*
42. *Id.* at 880.
43. *Id.*

evidence of actual copying to create a genuine issue of material fact.[44] Then, the court addressed VMG's first argument, whether the horn hit itself was de minimis.[45] The court required more than proof of copying to establish copyright infringement; the copying itself had to be substantial in nature to qualify.[46] To determine if the portion copied was substantial, the court had to determine if the appropriation could be recognized by the average audience.[47] To this end, the court referenced the brief nature of the horn hits, occurring only a few times in *Vogue* and each lasting less than a second.[48] It also referenced the mistake made by VMG's primary expert, concluding that an average audience member could do no better at identifying the sampling than a highly qualified musician who listened to the recordings with the intent of finding out what had been copied.[49] These facts led the court to conclude that the horn hit was de minimis, and thus, under *Newton*, Madonna's musical composition was not actionable infringement.[50]

Next, the court addressed the plaintiff's alternative argument of whether the de minimis exception could apply to the unauthorized use of the copyrighted sound recordings.[51] The Ninth Circuit analyzed the Sixth Circuit's *Bridgeport* decision, VMG's primary authority, and ultimately rejected the attempt to form a bright-line rule.[52] The court began its counterargument to the *Bridgeport* rule by supporting its own rule that copyright infringement only occurs when a substantial portion of the original work is copied.[53] The court provided authorities stretching back to the mid-1800s, including a Supreme Court opinion that held a substantial portion must be copied to find actionable infringement.[54] The court then affirmed the "average audience"

44. *Ciccone*, 824 F.3d at 877. Specifically, "Tony Shimkin has sworn that he, as Pettibone's personal assistant, helped with the creation of *Vogue* and that, in Shimkin's presence, Pettibone directed an engineer to introduce sounds from *Love Break* into the recording of *Vogue*." *Id.* Moreover, VMG "submitted reports from music experts who concluded that the horn hits in *Vogue* were sampled from *Love Break*." *Id.*

45. *Id.* at 878.

46. *Id.* at 880–81.

47. *Id.* at 878 (considering "whether a reasonable juror could conclude that the average audience would recognize the appropriation.").

48. *Id.* at 880.

49. *Id.*

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

51. *Id.*

52. *Id.* at 886.

53. *Id.* at 880–81.

54. *Id.* ("[to] infringe [a copyright] a substantial copy of the whole or of a material part must be produced") (citing Perris v. Hexamer, 99 U.S. 674, 676 (1878)); *see* Daly v. Palmer, 6 F. Cas. 1132, (C.C.S.D.N.Y. 1868); Folsom v. Marsh, 9

test by citing precedent stretching back to 1977.[55] Explaining the reasoning for the test, the court recognized that the plaintiff's injury stemmed from the financial loss it would incur as a result of the infringing work depriving the protected work of its audience.[56] "Therefore, if the public does not recognize the appropriation, the copier has not benefitted from the original artist's expressive content."[57] Concluding this part of the analysis, the court noted that courts outside the Sixth Circuit have consistently applied the de minimis rule in all cases alleging copyright infringement.[58]

The court justified holding contrary to *Bridgeport* by interpreting relevant sections of the Copyright Act in the context of congressional records.[59] Beginning with Section 102, the court concluded that the provision afforded no special treatment to the protection of sound recordings, nor did the statutory definition of sound recordings in Section 101 seem to give any weight to VMG's argument that Congress intended to create a special rule for sound recordings that carved out the de minimis exception.[60] The court then inspected Section 106, defining the exclusive rights of copyright holders and again found nothing that suggested differential treatment of sound recordings that would exclude the use of the de minimis exception.[61] Finally, the court looked at Section 114(b) and refused to follow the Sixth Circuit in reading an implicit expansion of rights from an explicit limitation of rights.[62] Instead, the court naturally read the specific sentence cited by VMG as a limitation that makes duplication of a copyrighted sound recording using independent sounds (e.g. a cover band's imitation of a popular song) not an infringement on the copyright.[63] The court supported its refusal to find an implicit elimination of the "steadfast" de minimis exception with a House Report, which

F. Cas. 342 (C.C.D. Mass. 1841)); *see also* NIMMER & NIMMER, *supra* note 6, § 13.03[A][2][a] (2013).

55. *Ciccone*, 824 F.3d at 880–81 (citing Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977), *superseded in part by statute*, 17 U.S.C. § 504(b) (2002)); *see* Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (describing the concept as "de minimis").

56. *Ciccone*, 824 F.3d at 881 ("[P]laintiff's legally protected interest [is] the potential financial return from his compositions which derive from the lay public's approbation of his efforts.") (quoting *Krofft*, 562 F.2d at 1165).

57. *Id.*

58. *Id.* ("[W]e are aware of no case that has held that the de minimis doctrine does not apply in a copyright infringement case. Instead, courts consistently have applied the rule in all cases alleging copyright infringement.").

59. *Id.* at 881–82.

60. *Id.*

61. *Id.* at 882.

62. *Ciccone*, 824 F.3d at 882–83.

63. *Id.* at 883–84; *see* 17 U.S.C. § 114(b) (2002).

stated that "infringement takes place whenever *all or any substantial portion* of the actual sounds that to make up a copyrighted sound recording are reproduced."[64] This reading led the Ninth Circuit to reject the Sixth Circuit's interpretation of Section 114(b)[65] because the Sixth Circuit ignored the nature of the statutory structure as an express limitation.[66]

Finally, the court exposed the Sixth Circuit's misguided reasoning in *Bridgeport*.[67] The Ninth Circuit rejected the Sixth Circuit's conclusion that exclusive rights extend to the making of another sound recording that does not consist entirely of an independent fixation of other sounds.[68] That is, a statement asserting that exclusive rights are limited in a particular circumstance does not automatically mean that the exclusive rights extend to all other circumstances.[69] Accordingly, even if a purely independent replication of a sound recording was not infringement under Section 114(b), that does not mean that a recording, which is *not* purely independent, would be infringement.[70]

The court further disagreed with the Sixth Circuit's reasoning that sampling of any size physically—as opposed to intellectually—takes something of value for three reasons.[71] First, the fact that the taking is physical did not separate this from other areas of copyright law where the de minimis rule applies.[72] Second, the potential theoretical difference between sound recordings and other copyrighted works did not mean that Congress actually adopted a difference that barred the use of de minimis exception.[73] Finally, the protection afforded by copyright covers "only the expressive aspects" of the artistic work, not the "fruits of the [author's] labor," making the physical taking immaterial.[74]

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64. *Ciccone*, 824 F.3d at 883–84 (quoting H.R. Rep. No. 94-1476, at 106, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721) (emphasis added)).

65. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (noting that "a sound recording owner has the exclusive right to 'sample' his own recording.").

66. *Ciccone*, 824 F.3d at 884.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 885.

71. *Id.*

72. *Ciccone*, 824 F.3d at 885.

73. *Id.*

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

C. *Ciccone*'s Dissenting Opinion

Judge Silverman's dissent supported the Sixth Circuit's *Bridgeport* ruling.[75] Judge Silverman criticized the majority's ruling as a flawed justification of a cumbersome rule that would weaken the rights of copyright holders.[76] Judge Silverman summarized both his and the Sixth Circuit's conclusion as a licensing requirement for sampling.[77] He argued that the proper statutory analysis required reading Sections 106 and 114 together.[78] This reading revealed that only the holder of a sound recording copyright has the exclusive rights to reproduce the work and to prepare derivative works in which the recorded sounds are modified.[79] That is, sound recording owners have the exclusive right to sample their own recordings, but the owners cannot claim copyright infringement if the sound in the recording is replicated by a fixation of purely independent sounds.[80]

The dissent's second reason justifying the Sixth Circuit's conclusion was that sound recordings are different from their compositional counterparts because copying a fixed performance makes a de minimis analysis inapplicable.[81] Contrasting from the use of indiscernible photographs to dress a movie set, the dissent characterized sampling as blatant theft.[82] The act is deliberate and involves the physical taking as the sound is fixed in a tangible medium after it is recorded.[83] Finally, the dissent cited congressional silence on the issue in the wake of *Bridgeport* in the past twelve years as support, claiming that while the congressional silence was not dispositive, such inaction had probative value in showing legislative approval.[84]

IV. SUPPORT FOR THE DE MINIMIS EXCEPTION

A. Comparing *Ciccone*'s Use of De Minimis and *Bridgeport*'s Bright-line Rule

The struggle is which legal principle should control the analysis when someone samples a copyrighted recording: should we draw a bright line and

75. *Id.* at 888 (Silverman, J., dissenting) (citing Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–01 (6th Cir. 2005)).

76. *See id.* at 888, 890.

77. *Id.*

78. *Ciccone*, 824 F.3d at 888–89.

79. *Id.* at 888 ("[I]n which the actual sounds fixed in the recording are rearranged, remixed, or otherwise in sequence or quality.").

80. *Id.* at 889.

81. *Id.*

82. *See id.* at 889.

83. *Id.*

84. *Ciccone*, 824 F.3d at 889–90.

require every party to obtain a license before copying a single note, or should we look at the sampling and determine whether the copying is substantial enough for an actionable claim? The Ninth Circuit chose the latter approach, departing from the Sixth Circuit's use of the former.[85]

In a procedural context, the Ninth Circuit advocates for a more flexible yet inquiry-intensive approach, while the Sixth Circuit advocates a rule that is easy to follow but makes no distinction between sampling a whole recording or a small piece of it.[86] However, the benefit of *Bridgeport*'s bright-line rule is diminished by the fact that it fails to save courts much effort in deciding infringement cases.[87] The fair use exception, characterized by Judge Learned Hand as "the most troublesome in the whole law of copyright,"[88] maintains a wide gray-area in determining when an infringement is actionable.[89] In fact, the *Bridgeport* rule does not save courts from making a fact-intensive inquiry when the fair use defense is raised, as the third statutory factor in determining if a copying is fair use requires an analysis similar to determining if the de minimis principle applies.[90] By contrast, applying the de minimis exception ties into the substantial similarity analysis, and that finding must eventually be made to determine if the copying is actionable infringement.[91]

B. A Case for De Minimis

The use of the de minimis exception is more in line with copyright jurisprudence, as both the *Ciccone* dissent and the Sixth Circuit seem to overlook key aspects of copyright law.[92] To start, the Sixth Circuit's basis for its conclusion, as pointed out by the Ninth Circuit, is flawed on its face.[93] To support this claim, *Bridgeport* cited the following clause in Section 114(b):

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85. *See generally id.* at 879–80 (example of a de minimis analysis).

86. *See id.* at 890.

87. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005) (forming no opinion on the applicability of the fair use exception to these facts).

88. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

89. NIMMER & NIMMER, *supra* note 6, § 13.03(A)(2)(a) (2013).

90. *See id.* at § 13.03(A)(2)(b) n.114.35; *see also* 17 U.S.C. § 107(3) (2002) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . ."); Ringgold v. Black Entm't Television Inc., 126 F.3d 70, 75 (2d Cir. 1997).

91. *See Ringgold*, 126 F.3d at 74–75.

92. *See* NIMMER & NIMMER, *supra* note 6, § 13.03(A)(2)(b) (2013).

93. *See* VMG Salsoul, L.L.C. v. Ciccone, 824 F.3d 871, 884–85 (9th Cir. 2016).

> 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.[94]

The Sixth Circuit relied on the use of "entirely" to conclude that if a copyright holder has no claim of infringement against a sound recording consisting only of independent sounds, even if they sound like the original work, then the holder must have a claim against a recording that does not consist entirely of independent sounds.[95] The Sixth Circuit thus committed an error of interpretation by noting that Section 114(b) creates liability from a partial sampling because Congress limited the liability of parties that create recordings like the copyrighted recording but are composed entirely of non-sampled sounds.[96] Such an interpretation could easily be corrected by looking at the legislative history of that clause.[97] But the Sixth Circuit erroneously ignored that history because digital sampling was rare in copyright disputes about sound recording in 1971 when protection for sound recordings was being considered. However, while the technology was not widely available, the practice existed and Congress considered the possibility of a partial capturing of a sound recording.[98] Congress still decided to retain the requirement that a substantial amount be copied before infringement should be found.[99]

Bridgeport also seems to overstate the injury of sampling the de minimis exception was protecting. An insubstantial sample, which average consumers cannot recognize as appropriated, does not compromise the expressive content of the original work, nor does it deprive the original work of its deserved recognition.[100] For example, it is logical to assume that *Vogue*'s success—topping the charts all over the world in 1990, winning several awards, and becoming a hit dance song—is not attributable to the use of a few horn hits that last less than a second per piece.[101] Nor can it be said that

94. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) (citing 17 U.S.C. § 114(b) (2002)) (emphasis added).

95. *Id.*

96. NIMMER & NIMMER, *supra* note 6, § 13.03(A)(2)(b) (2013).

97. H.R. Rep. No. 94-1476, at 5675 (retaining the need for substantial copying for infringement liability).

98. NIMMER & NIMMER, *supra* note 6, § 13.03(A)(2)(b) n.114.16 (2013).

99. *Id.*

100. *See* VMG Salsoul, L.L.C. v. Ciccone, 824 F.3d 871, 880–81 (9th Cir. 2016).

101. *See id.* at 879–80.

Love Break, having been released close to a decade before *Vogue*, lost any recognition it had garnered by 1990 for the same reason.[102]

The only area in which there is possible injury to be redressed is the copyright holder's efforts in recording the sound, from which sampling allows others to impermissibly profit.[103] However, the Supreme Court has already clarified that copyright law protects only the expressive content of the work.[104] Copyrights were not made to protect "the sweat of the [artist's] brow" but only the worth of the artistic expression found in the content of the work.[105] This leaves the Sixth Circuit without a reason to change the law as it stands, since the court ruled out that it sought a new rule for the sake of judicial economy.[106]

In addition, the *Ciccone*'s dissent argument, that congressional silence on the issue in the wake of *Bridgeport* supported the Sixth Circuit's conclusion, is without merit. When *Ciccone* was being decided, there was proposed legislation in the House of Representatives that would exempt "a non-subscription broadcast of . . . an incidental use of a sound recording of a musical work" from infringement.[107] The common definition of incidental, "happening as a minor part or result of something else," arguably codifies the de minimis exception into the Copyright Act's protection of sound recordings.[108] While it could be argued that this action is marginal and may have no effect on the case law, it serves to remove what little support the dissent rested on.[109]

C. A New Hope for Hip-Hop?

The Ninth Circuit gives more authority to the creation of art forms that use sampling as a means of creative expression. The largest record label companies sit in California and New York, meaning Ninth and Second Circuit rulings on copyright law in relation to music massively impact the industry.[110] Specifically, hip-hop music frequently samples sound recordings, remixing several recordings from different sources to create "collage-like ar-

102. *See id.*

103. *Id.* at 885.

104. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).

105. *See id.*; *Ciccone*, 824 F.3d at 885.

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

107. H.R. 1733, 114th Cong. § 5(c) (2015).

108. *See id.*; MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/incidental (last visited Nov. 2, 2016).

109. *See Ciccone*, 824 F.3d at 889.

110. *Statistics and Facts on Record Labels in the U.S.*, STATISTA, https://www.statista.com/topics/2126/record-labels/ (last visited Oct. 2, 2016).

tistry."[111] In fact, some producers in the genre refer to the sampler—the physical tool or software that samples a recording and is able to manipulate it—as a musical instrument on its own.[112] After *Grand Upright*, the days of casual sampling came to an end, but the practice of sampling continued to grow, only with the added difficulties of licensing.[113] These problems usually come from the lack of an industry standard on how to license recordings to samplers, leading to factor-based considerations when negotiating licensing agreements.[114] This resulted in varying and sometimes excessive licensing fees that damaged the availability and creative uses of sampling.[115] It was most likely because of this that unauthorized sampling continued.[116] And was aided, no doubt, by the fact that, until *Bridgeport*, the applicability of the de minimis exception to sampling was not addressed.[117]

In a broader context, borrowing in music is not a concept that only arose with the emergence of hip-hop. Going back to the days of classical music, composers would frequently take inspiration from or borrow the work of other composers to further their own creation.[118] While an argument could be made that Section 114(b)'s protection of duplications based on independent sounds was enacted to cover this sort of borrowing, sampling may just be accomplishing the same goal of musical borrowing with new technology. In affirming the use of the de minimis exception when analyzing sampled music, the Ninth Circuit allows for this area of expression to grow.

Allowing the de minimis exception to be applied to sound recording infringement cases beneficially strikes a balance between the competing private and public interests.[119] As stated above, a copy that an average audience

111. Evans, *supra* note 18, at 856.

112. *Id.* at 858.

113. *See id.* at 865.

114. *Id.* at 865–66 ("These factors include the stature of the sampling and sampled artists, the success of the sampled song, the intended use, the duration and content of the sample (hook versus a beat, for example), and the number of times the sample is looped in the resulting track.").

115. *Id.*

116. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802–03 (6th Cir. 2005) (describing the regime in place at the time of the decision).

117. Somoano, *supra* note 9, at 287–98; Gilmore, *supra* note 14, at 42.

118. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) ("Musicologists use a number of terms to describe composers' uses of existing works, including borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase and indebtedness.").

119. *See* Reuven Ashtar, *Theft, wTransformation, and the Need of the Immaterial: A Proposal for A Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 317 (2009).

member cannot recognize as appropriated takes little, if anything, away from the copyright owner. At the same time, the public, or more specifically, artists unable to afford the production costs of professional music, are able to advance creative expression, perhaps going as far as to create a new genre of music.[120]

V. CONCLUSION

While the law of "thou shalt not steal" is a principle central to western civilization, it is still a law, and the Supreme Court has made it clear that the law does not concern itself with trifles.[121] The Ninth Circuit also made it clear in *Ciccone* that the recording at issue was a trifle. At the same time, the court ruled that the weight of authority—and logic—was against the Sixth Circuit's attempt to create a bright-line infringement rule. The Sixth Circuit lacked the foundation required to create a rule that turned the standards of copyright law on their head. While choosing to create a split among the circuits was a drastic step, the Ninth Circuit has become the loudest voice in the growing number of courts throughout the country that have decided not to follow the *Bridgeport* decision. Hopefully, such a split will compel a judicial or legislative remedy. For the time being, courts will have to independently choose whether to stick with the fact-intensive analysis for finding a substantial portion before finding infringement, or adopt a bright-line infringement rule and come down hard on a burgeoning area of music and creative expression.

120. *See* Arewa, *supra* note 118, at 597 (discussing how borrowing from past traditions serves as the foundation for new music, and "the variety and breadth of such terminology gives a good indication of the widespread nature of borrowing in the European classical music tradition.").

121. *See* Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).