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Sampling and the De Minimis Exception: Balancing the Competing Interests of Copyright Law in Sound Recordings

Tim Schaefer

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SAMPLING AND THE DE MINIMIS EXCEPTION: BALANCING THE COMPETING INTERESTS OF COPYRIGHT LAW IN SOUND RECORDINGS

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I. INTRODUCTION

Copyright law is about balancing the interests of copyright holders in profiting from their labor with the interests of the public in furthering the arts and creative works.¹ In addition to this guiding principle, copyright law must also consider how new technologies affect what constitutes infringement.² Sampling is a technology that pushes the boundaries of copyright law; sampling occurs when a musician copies one or more segments from another musician’s sound recording and pastes it into their own sound recording.³ However, even if the sampled material was copyright protected, copyright law may provide no recourse if the copying of the sample is insignificant enough or “de minimis.”⁴ Ambiguity in the law has led to a circuit split,⁵ and courts are currently wrestling to reconcile logic and fairness with the application of copyright principles to technologies unanticipated by lawmakers. For instance, the Ninth Circuit allows sampling to be small enough that it is considered de minimis,⁶ which makes the copying not actionable, but musicians in the Sixth Circuit are advised to “[g]et a license or do not sample.”⁷ To make conditions for sampling even more unpredictable, courts have found that samples as short as one second could be substantial enough not to qualify for the de minimis exception.⁸ This Comment argues that because of their unique characteristics, sound recordings deserve greater protection from unlicensed sampling and should not be subject to the de minimis exception.

Part II of this Comment introduces the concepts needed to put the discussion into context. It begins by introducing the topic of sampling and then moves to the general requirements of copyright law. Part II then discusses the Sound Recording Amendment and ends with an examination of the tests used to determine if copying a sound recording is de minimis.

Part III tracks the cases that developed the application of the de minimis exception to sampling. The Sixth and Ninth Circuits have split regarding whether the de minimis exception applies to sound recordings, creating uncertainty and varying levels of copyright protection in different jurisdictions. This Comment addresses this split and offers potential solutions for the disagreement.

1. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

2. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1993) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984)).

3. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 875 (9th Cir. 2016).

4. *Id.* at 877 (quoting *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004)).

5. Michael G. Kubik, Note, *Rejecting the De Minimis Defense to Infringement of Sound Recording Copyrights*, 93 NOTRE DAME L. REV. 1699, 1699 (2018).

6. *VMG*, 824 F.3d at 887 (holding that 0.23 seconds of horns sampled from a copyright protected song was not actionable copying because it was de minimis).

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

8. *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 603–04 (S.D.N.Y. 2013) (denying defendants’ motion to dismiss because the court could not conclude that the one-second phrase “say what” was insignificant to the original song).

In Part IV, this Comment argues that the de minimis exception should not apply to sound recordings. The Sixth Circuit held that 17 U.S.C. §§ 106, 114(b) eliminated the de minimis exception for sound recordings, and the court distinguished sound recordings from other media protected by the statute.⁹ Conversely, the Ninth Circuit held that de minimis did apply to sound recordings because 17 U.S.C. §§ 106, 114(b) were written to limit the rights of copyright owners, not exempt them from defenses.¹⁰ While both arguments have merit, the Sixth Circuit’s interpretation aligns better with the guiding principles of copyright law.

Part V of this Comment discusses four alternatives to the traditional de minimis exception to sampling that better balance the principles of copyright law. First, applying a narrower scope to the de minimis exception without eliminating it would increase protection for sound recordings without completely depriving the public of access to samples. Second, a less complex way of achieving those same goals would be to grant holders of sound recording copyrights the exclusive right to sample their work for a limited time. Third, the effort that went into creating the sound recording could be considered in a de minimis analysis. Finally, compulsory licensing for samples would both reward copyright owners for their ingenuity and labor, while also giving them and others access to their work for continuing progress and improvement in art.

II. BACKGROUND

A. Sampling

Sampling is a technique where a musician copies part of an existing sound recording and incorporates it into a new sound recording.¹¹ One well-known example of sampling is the bass line from Vanilla Ice’s “Ice Ice Baby,” which was sampled from the popular Queen song, “Under Pressure.”¹² Sampling can involve simply copying and pasting part of a sound recording into a new sound recording, but often the creator of the new work will alter the speed or pitch of the sample and use software to manipulate it in other ways.¹³ A “sampler” is a device or software capable of copying sound recordings.¹⁴ While the current level of protection against unlicensed sampling is in flux, sound recordings went without protection from federal copyright laws for most of the twentieth century.¹⁵

B. Copyright Law Prior to the Sound Recording Amendment

The United States Copyright Act of 1790 gave authors exclusive rights in their maps,

9. *Bridgeport*, 410 F.3d at 801–02.

10. *VMG*, 824 F.3d at 883.

11. *Id.* at 875.

12. KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE* 4 (2011).

13. *VMG*, 824 F.3d at 875; Alexander Stewart, “*Been Caught Stealing*”: *A Musicologist’s Perspective on Unlicensed Sampling Disputes*, 83 *UMKC L. REV.* 339, 342 (2014).

14. *HIP HOP AND THE LAW* 299 (Pam Bridgewater, andré douglas pond cummings & Donald Tibbs eds., 2015).

15. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.10[A][1][c] (Matthew Bender ed., 2018).

charts, and books.¹⁶ The goal of the act was to “promote the progress of science” by giving authors exclusive rights to their writings.¹⁷ Its rationale was that if authors were guaranteed the means to benefit financially from their work, they would have an incentive to create, which would also benefit the public.¹⁸ The Copyright Act was amended in 1831 to give copyright protection for authors of any musical composition “which may be now . . . or shall hereafter be made or composed.”¹⁹

In order for a court to perform an analysis for infringement, a plaintiff must first show that the subject of the litigation is something that can be copyrighted.²⁰ The requirements for a work to be protected by copyright are originality, expression, and fixation.²¹ Originality simply means that the work was created by the author and has “at least some minimal degree of creativity.”²² This does not mean that the original work is novel or has never before been seen or heard.²³ For example, if two people independently composed the same song with identical lyrics and music, they would both be entitled to copyright protection.²⁴ The expression requirement limits copyright protection to expressions of ideas and not the ideas themselves.²⁵ This means that the author of a book with all of the major scales for piano could not monopolize all of those notes by obtaining a copyright, but she could copyright the order or arrangement of those scales within a book.²⁶ The final requirement is that the work be fixed in a tangible medium such as a writing, sculpture, or audio recording.²⁷ Once the work has been established as copyrightable, the analysis can proceed to whether actionable infringement occurred.

In order to succeed on a copyright infringement claim, a musician must prove (1) that she owns a valid copyright and (2) that the defendant substantially copied protected expression from her work.²⁸ A copyright registration certificate creates a presumption that the owner has a valid copyright, and the burden then shifts to the defendant to prove otherwise.²⁹ The second element for infringement can be broken into two parts: actual copying and actionable copying.³⁰ Because proving actual copying can be difficult, courts typically consider the level of access that the alleged copier had to the sound recording and whether the alleged infringing work has probative similarity with the protected

16. *Golan v. Holder*, 565 U.S. 302, 320–21 (2012).

17. *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 9 (S.D.N.Y. 1992) (quoting U.S. CONST. art. I, § 8, cl. 8).

18. *Id.*

19. Copyright Act of 1831, ch. 16, 4 Stat. 436.

20. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991).

21. DAVID J. MOSER & CHERYL L. SLAY, *MUSIC COPYRIGHT LAW* 25 (Cathleen D. Small & Sandy Doell eds., 2012).

22. *Feist*, 499 U.S. at 345 (citing 1 *NIMMER & NIMMER*, *supra* note 15, §§ 2.01[A], [B]).

23. *MOSER & SLAY*, *supra* note 21, at 26.

24. *Feist*, 499 U.S. at 346 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)).

25. *Id.* at 348–49.

26. *Id.*

27. *MOSER & SLAY*, *supra* note 21, at 28.

28. *Feist*, 499 U.S. at 361 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)).

29. 4 *NIMMER & NIMMER*, *supra* note 15, § 13.01[A].

30. *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 595 (S.D.N.Y. 2013) (quoting *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999)).

work.³¹ Probative similarity exists when the protected work and the alleged infringing work contain similarities that are unlikely to naturally occur.³²

Even when a court finds actual copying, the second element is still not satisfied if the copying was not actionable.³³ If a court finds that the copying is significant enough to be “substantially similar” to the protected work, the copying is actionable; but if a court finds that the copying is legally insignificant, the copying is de minimis and is not actionable.³⁴ It is clear that copying a single note is always de minimis,³⁵ but copying small portions of sound recordings may be found substantially similar if qualitatively important enough.³⁶ The requirements to be copyrightable, elements for infringement, and de minimis exception were all part of copyright law prior to the 1971 amendment that first recognized sound recordings as a protected medium.

C. The Sound Recording Amendment

The Sound Recording Amendment of 1971 and its subsequent incorporation into the Copyright Act of 1976 officially recognized sound recordings as a federally protected medium and laid out the rights of copyright holders.³⁷ The three sections of the Copyright Act that are relevant to this discussion are section 102, which lists the mediums protected by copyright law, section 106, which lists the exclusive rights of a copyright owner, and section 114(b), which limits the scope of the rights of copyright owners of sound recordings.³⁸

Section 102 defines the categories of works of authorship that are protected by copyright law, which includes literary works, dramatic works, motion pictures, musical compositions, sound recordings, and others.³⁹ Section 106 gives copyright owners the exclusive rights to reproduce songs in copies and “to prepare derivative works based on the copyrighted work.”⁴⁰ Section 114(b) explains that the rights of a copyright holder under section 106 do not extend to imitating a sound recording through “an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”⁴¹ In other words, an artist that records her own note-for-note version of a protected sound recording does not infringe that work as long as her imitation does not contain actual sounds from the original recording.

The nature of sampling and its interplay with sections 106 and 114(b) are the primary source of disagreement about whether de minimis should apply to sampling. Sampling involves copying part of a preexisting sound recording and incorporating it into a new

31. 4 NIMMER & NIMMER, *supra* note 15, § 13.01[B].

32. *Id.*

33. *TufAmerica*, 968 F. Supp. 2d at 595 (quoting *Hamil*, 193 F.3d at 99).

34. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877 (9th Cir. 2016) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004)).

35. *Poindexter v. EMI Record Grp., Inc.*, No. 11 Civ. 559, 2012 U.S. Dist. LEXIS 42174, at *11–12 (S.D.N.Y. Mar. 27, 2012) (quoting *Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004)).

36. *TufAmerica*, 968 F. Supp. 2d at 603–04.

37. *MOSER & SLAY*, *supra* note 21, at 18.

38. 17 U.S.C. §§ 102, 106, 114(b).

39. § 102.

40. § 106.

41. § 114(b).

sound recording, which would mean that the new sound recording did not consist entirely of an independent fixation of other sounds. The disagreement between the Sixth and Ninth Circuits is over whether this language was meant to eliminate the de minimis exception for sound recordings.

D. Tests for Determining De Minimis Copying for Sound Recordings

Differentiating between copying that is de minimis and copying that is substantially similar is considered one of the most challenging things to determine in copyright law.⁴² Within jurisdictions that apply the de minimis exception to the sampling of sound recordings, the two most frequently applied tests for finding substantial similarity are the fragmented literal similarity test and the audience test.

The fragmented literal similarity test examines exact copying of smaller pieces of a copyrighted work.⁴³ This test determines whether copying is de minimis by balancing the quantitative and qualitative value of the copied material to the original work.⁴⁴ The quantitative value is the amount of material copied from the original work, and the qualitative value is the importance of that material to the original work.⁴⁵ It is possible for both a large quantity of material⁴⁶ and small quantity of important material to be substantially similar.⁴⁷ For example, a single sentence from a book could be substantially similar if it is of particular qualitative importance. Likewise, copying an entire page of unimportant sentences could also be a large enough quantity to be found substantially similar. The analysis is about the amount and significance of the copied material to the original work, not to the copying work.⁴⁸ This means that sampling a three-second clip of a guitarist strumming a C major chord and pasting it fifty times into a new sound recording might not be any more significant than if the copier had pasted the sequence only once. Absent some additional characteristic of greater qualitative importance, copying a three-second clip like this would probably be considered de minimis.

Copying is de minimis under the audience test if the average audience would not recognize the appropriation without any help or suggestion.⁴⁹ The rationale behind this test is that the copier does not benefit from copying expressive content that the public does not recognize.⁵⁰ In determining if the average audience would recognize unlicensed

42. 4 NIMMER & NIMMER, *supra* note 15, § 13.03.

43. *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001) (citing *Jarvis v. A & M Records*, 827 F. Supp. 282, 289 (D.N.J. 1993)).

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

45. 4 NIMMER & NIMMER, *supra* note 15, § 13.03[A][2][a].

46. *Iowa State Univ. Research Found., Inc. v. ABC*, 463 F. Supp. 902, 904–05 (S.D.N.Y. 1978) (holding that ABC infringed plaintiff's copyright when it copied a two minute and thirty second segment of plaintiff's documentary).

47. *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 603–04 (S.D.N.Y. 2013) (denying defendants' motion to dismiss because the court could not conclude that the one-second phrase "say what" was insignificant to the original song).

48. *Jarvis*, 827 F. Supp. at 290 (D.N.J. 1993) (citing *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982)).

49. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)).

50. *Id.* at 881.

sampling, courts consider the size of the sample and whether the sample was lengthened or shortened, raised or lowered in pitch, or mixed with other instruments.⁵¹

III. DEVELOPMENT OF THE DE MINIMIS EXCEPTION APPLIED TO SAMPLING

Sampling experienced its Golden Age between 1987 and 1992,⁵² but this period came to an end with the ruling in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, which applied a bright-line test against unlicensed sampling.⁵³ *Grand Upright* did not explicitly hold that de minimis did not apply to sound recordings; however, ten years later, the Southern District of New York applied the de minimis exception in a sampling case.⁵⁴ In *Bridgeport Music Inc. v. Dimension Films*, the Sixth Circuit adopted the approach from *Grand Upright* and held that de minimis did not apply to sound recordings at all, and the Ninth Circuit created a current split by directly challenging the Sixth Circuit’s reasoning in *VMG Salsoul, LLC v. Ciccone*.⁵⁵

A. Grand Upright Holds that Unlicensed Sampling Infringed a Protected Sound Recording Without Applying the De Minimis Exception

The Southern District of New York was the first court to address copyright infringement in the context of sampling, and it set the tone for its holding by beginning with “[t]hou shalt not steal.”⁵⁶ Grand Upright Music owned the sound recording rights to Gilbert O’Sullivan’s “Alone Again” and sought a preliminary injunction to prevent the defendants from releasing an album that used unlicensed samples from “Alone Again.”⁵⁷ The defendants argued that their copying should be excused because using unlicensed samples was prevalent in the rap genre, but the Southern District of New York rejected this argument.⁵⁸

The Southern District first addressed the copying element and noted that the defendants admitted in their post-hearing memorandum that they had sampled “Alone Again” without permission from Grand Upright.⁵⁹ The court found that this evidence was sufficient in itself to satisfy the copying element.⁶⁰ It declined to analyze whether the copying was de minimis and determined that the only remaining issue was whether Grand Upright owned a valid copyright to “Alone Again.”⁶¹

The court considered three pieces of evidence in determining whether Grand Upright owned a valid copyright: a deed that vested title of the copyrights to O’Sullivan, testimony from O’Sullivan and the original performer, and documents containing acknowledgements

51. *Id.* at 879–80.

52. Stewart, *supra* note 13, at 339.

53. 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

54. Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001).

55. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016).

56. *Grand Upright*, 780 F. Supp. at 183 (quoting *Exodus* 20:15).

57. *Id.* at 183–84.

58. *Id.* at 185 n.2.

59. *Id.* at 183.

60. *Id.*

61. *Grand Upright*, 780 F. Supp. at 183.

from the defendants that they needed to obtain a license.⁶² The court found that the most persuasive evidence was that each defendant who testified at trial was aware that acquiring a license was necessary in order to use the samples from “Alone Again.”⁶³ It further noted that the defendants discussed among themselves the need to get a license but ended up using the samples without permission nonetheless.⁶⁴ The Southern District stated that the defendants showed a “callous disregard for the law and for the rights of others,” and it granted Grand Upright’s request for a preliminary injunction against the defendants.⁶⁵ While the court in Grand Upright declined to consider whether the copying was de minimis, the Southern District would apply the substantial similarity analysis in a later case.⁶⁶

B. Williams v. Broadus Declines to Follow Grand Upright

The United States District Court for the Southern District of New York’s opinion in *Broadus* served as a stepping-stone between *Grand Upright* and *Bridgeport*, the next major development in sampling copyright law. In *Broadus*, the plaintiffs released the recording “The Symphony” in 1988.⁶⁷ The defendants released the recording “Ghetto Symphony” in 1998 and admittedly sampled portions of “The Symphony” without the plaintiffs’ permission.⁶⁸ The defendants moved for summary judgment and argued that the plaintiffs’ copyright was invalid because “The Symphony” included unlicensed samples from another recording called “Hard to Handle.” The unique procedural circumstances of *Broadus* forced the Southern District to assess whether the plaintiffs had infringed a third party’s copyright through unlicensed sampling.⁶⁹

The court noted that while it had found actionable copying in *Grand Upright* without considering substantial similarity, Second Circuit precedent instead recognized that multiple tests could be used to determine whether copying a sound recording was actionable.⁷⁰ The Southern District first considered whether to apply the average audience test to the sample copied by the defendants, which was a two-measure sample containing five ascending notes followed by five descending notes.⁷¹ The defendants argued that the average audience test was the correct test to apply, but the Southern District declined to use this test because of the small size of the copying.⁷²

The court instead applied the fragmented literal similarity test by examining the sample’s qualitative and quantitative importance to “Hard to Handle.”⁷³ The defendants argued that the two-measure phrase from “Hard to Handle” was qualitatively important

62. *Id.* at 183–84.

63. *Id.* at 184–85.

64. *Id.* at 184.

65. *Id.* at 185.

66. Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001).

67. *Id.* at *1.

68. *Id.*

69. *Id.*

70. *Id.* at *3 (citing Castle Rock Entm’t, Inc. v. Carol Publ’n Grp., Inc., 150 F.3d 132, 138–41 (2d Cir. 1998)).

71. *Broadus*, 2001 WL 984714, at *3.

72. *Id.*

73. *Id.* at *4.

because it appeared at the very beginning of the song and was repeated both verbatim and in variation by other instruments later in the song.⁷⁴ The defendants also contended that the substantial similarity analysis should focus only on comparing the original two-measure clip from “Hard to Handle” with the sample from “The Symphony,” but the court disagreed. The Southern District explained that limiting the scope to the two-measure clip would improperly “achieve a juxtaposition that makes for greater similarity” and that a fragmented similarity analysis should compare each song in its totality.⁷⁵ The court held that this was a fact intensive situation for a trier of fact to determine and denied the defendants’ motion for summary judgment.⁷⁶

C. Bridgeport Music, Inc. v. Dimension Films Establishes a Bright-Line Test for Unlicensed Sampling

The Sixth Circuit summarized its holding in *Bridgeport* by stating, “[g]et a license or do not sample.”⁷⁷ The plaintiffs sued the defendants for using a sample from its song “Get Off Your Ass and Jam” without permission in the defendants’ sound recording of “100 Miles.”⁷⁸ The sample was two seconds of a guitar riff from the beginning of “Get Off” that was lowered in pitch and repeated so that it lasted seven seconds.⁷⁹ The district court found that the defendants had sampled the plaintiffs’ sound recording without permission, but it held that the copying was de minimis.⁸⁰ The Sixth Circuit reversed and held that the de minimis exception was inapplicable to sound recordings based on the plain meaning of sections 106 and 114(b) of the Copyright Act of 1976.⁸¹

The court began its analysis by quoting section 106, which defines the rights of copyright owners as the rights “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work.”⁸² The first part of section 114(b) states that these rights are limited to the rights “to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality” and “to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”⁸³ The court also quoted the second half of section 114(b), which states:

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.⁸⁴

74. *Id.*

75. *Id.* (quoting *Warner Bros. v. Am. Broad. Co.*, 654 F.2d 204, 211 (2d Cir. 1981)).

76. *Broadus*, 2001 WL 984714, at *6.

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

78. *Id.* at 795.

79. *Id.* at 796.

80. *Id.* at 795.

81. *Id.* at 800–01.

82. *Bridgeport*, 410 F.3d at 799 (quoting 17 U.S.C. § 106(1), (2)).

83. 17 U.S.C. § 114(b).

84. *Bridgeport*, 410 F.3d at 799 (quoting 17 U.S.C. § 114(b)).

The Sixth Circuit noted that the purpose of copyright law is to “strike a balance between protecting original works and stifling further creativity.”⁸⁵ It reasoned that sections 106 and 114(b) strike this balance by giving the holders of sound recording copyrights the exclusive right to “recapture the actual sounds fixed in the recording,” while leaving unprotected the right to imitate a sound recording by creating a new sound recording made entirely of independent sounds.⁸⁶ The Sixth Circuit interpreted sections 106 and 114(b) to give the owners of sound recording copyrights the exclusive right to sample their recordings.⁸⁷ The court reasoned that the addition of the word “entirely” in the Copyright Act of 1976 reinforced its interpretation that use of unlicensed samples of any size infringed the rights of the copyright holder.⁸⁸ The Sixth Circuit created a bright-line test with its interpretation because without the possibility of sampling being de minimis, any unlicensed sampling of a protected sound recording would be actionable regardless of its size or significance.

The Sixth Circuit further supported its holding with some practical reasons for its interpretation. It noted that its bright-line test gave both courts and members of the music industry clarity on whether or not unlicensed sampling infringed a copyright.⁸⁹ Additionally, the Sixth Circuit reasoned that creativity would not be stifled because, even though the de minimis exception would no longer apply to audio recordings, artists could still imitate sound recordings note-for-note without infringing a protected sound recording.⁹⁰

The Sixth Circuit also addressed why copying three notes from a sound recording should be treated differently from copying three notes from a musical composition.⁹¹ The court began by reiterating that its interpretation of copyright statutes called for greater protection for sound recordings.⁹² Furthermore, it reasoned that sampling a sound recording is different from borrowing a musical idea from a composition because sampling is a “physical taking” of sound as it was fixed in a sound recording.⁹³ While it is possible to infringe a compositional copyright accidentally, sampling is always intentional.⁹⁴ The court also noted that copying a sound recording is taking something of value, and that sampling results in a producer or artist saving on the cost of creating that sound independently.⁹⁵

With its holding in *Bridgeport*, the Sixth Circuit embraced the bright-line rule first applied in *Grand Upright*. The court interpreted sections 106 and 114(b) to exclude sound recordings from the de minimis exception and distinguished sound recordings from musical compositions. However, the Ninth Circuit did not find this reasoning persuasive.

85. *Id.* at 800.

86. *Id.* at 799–800.

87. *Id.* at 801.

88. *Id.* at 800–01.

89. *Bridgeport*, 410 F.3d at 802.

90. *Id.* at 801.

91. *Id.*

92. *Id.*

93. *Id.* at 802.

94. *Bridgeport*, 410 F.3d at 801.

95. *Id.* at 802.

D. VMG Salsoul, LLC v. Ciccone Creates a Split with the Sixth Circuit by Holding That the De Minimis Exception Does Apply to Sound Recordings

The Ninth Circuit created a circuit split when it explicitly rejected the Sixth Circuit's interpretation of federal copyright statutes. VMG Salsoul owned the copyright for the composition and sound recording of "Love Break."⁹⁶ It alleged that Shep Pettibone sampled two "horn hits"⁹⁷ from "Love Break" and used it in Madonna's "Vogue."⁹⁸ One sample was a "single" horn hit, which lasted 0.23 seconds and contained the notes of Eb, A, D, and F.⁹⁹ The second sample was a "double" horn hit, which was comprised of the same group of notes from the single horn hit but played twice in a row.¹⁰⁰ For the purpose of summary judgment, the court found that the plaintiff demonstrated actual copying and moved on to whether that copying was substantially similar or de minimis.¹⁰¹ The court separately addressed claims for compositional and sound recording infringement.

The Ninth Circuit began its analysis for infringement of the musical composition by recognizing that the focus should be on the generic notes, not on how they are played.¹⁰² The Ninth Circuit used the audience test because it determined that the sample taken from "Love Break" was altered too much to use the fragmented literal similarity test.¹⁰³ The court noted in its holding from *Newton v. Diamond* that an average audience would not recognize a six-second sample containing three notes of flute.¹⁰⁴ Because samples from *Newton* were longer and more frequent than the samples in "Love Break," which were still found to be de minimis, the Ninth Circuit held that Salsoul did not infringe the composition copyright for "Love Break" by copying a 0.23-second clip of horns.¹⁰⁵

The Ninth Circuit then began its de minimis analysis for the sound recording copyright by recognizing that the focus should be on how the notes are played in the sound recording, and it again applied the audience test.¹⁰⁶ The court noted that the sample was very short and easily overlooked.¹⁰⁷ Additionally, the defendants altered the sample by filtering out the background instruments, changing the overall pitch, adding effects, and mixing the horn sample with other instruments.¹⁰⁸

The Ninth Circuit found it significant that Salsoul's expert made an error in assessing the sample.¹⁰⁹ The professional for the plaintiffs originally testified that both the single and double horn hits were separate samples from "Love Break."¹¹⁰ In actuality, the double

96. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

97. Also known as a "horn part." *Id.* at 875 n.1.

98. *Id.* at 874.

99. *Id.* at 875.

100. *Id.*

101. VMG, 824 F.3d at 877.

102. *Id.* at 878 (quoting *Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2004)).

103. *Id.* at 880 n.8 (quoting *Newton*, 388 F.3d at 1195).

104. *Id.* at 879 (citing *Newton*, 388 F.3d at 1196).

105. *Id.* at 879–80.

106. VMG, 824 F.3d at 878 (quoting *Newton*, 388 F.3d at 1193; *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986)).

107. *Id.* at 880.

108. *Id.* at 879–80.

109. *Id.* at 879.

110. *Id.*

horn hit in “Vogue” was created by pasting two samples of the single horn hit from “Love Break” next to each other, as opposed to sampling a double horn hit from “Love Break.”¹¹¹ Regardless of this mistake, the sampled horn hit still originated from “Love Break.”¹¹² The court held that the copying was de minimis because an average audience would be unlikely to recognize that the sample was taken from “Love Break.”¹¹³ Because the plaintiff specifically relied on the holding from *Bridgeport* to argue that the de minimis exception did not apply, the court next addressed whether the de minimis exception should apply to sound recordings.¹¹⁴

The court first noted that it is firmly established that de minimis applies to all types of copyrighted works.¹¹⁵ The reason for de minimis is that the “plaintiff’s legally protected interest [is] the potential financial return from his compositions which derive from the lay public’s approbation of his efforts.”¹¹⁶ It reasoned that if the public does not recognize that the copying was from the original artist, there is no infringement because the copier would not benefit without the public recognizing the original work.¹¹⁷ The Ninth Circuit stated that it was unaware of any case other than *Bridgeport* that held that the de minimis exception did not apply in a copyright infringement case.¹¹⁸

The Ninth Circuit then examined the language of 17 U.S.C. §§ 102, 106, and 114(b) and found no indication that the de minimis exception did not apply to sound recordings.¹¹⁹ It emphasized that section 114(b) was intended as a limitation on sound recording copyrights that allowed other musicians to imitate the sounds from a protected sound recording.¹²⁰ The court reasoned that *Bridgeport*’s holding was flawed because the Sixth Circuit had interpreted an expansion of rights for holders of sound recording copyrights from a section meant to limit those rights.¹²¹ In other words, the Ninth Circuit reasoned that just because sound recording rights do not extend to songs that contain no samples does not necessarily mean that any use of an unlicensed sample is infringement. It supported its interpretation of section 114(b) with a quote from a House Report that observed, “infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced.”¹²²

Finally, the Ninth Circuit gave three reasons why it disagreed with *Bridgeport*’s conclusion that sound recordings deserve extra protection because sampling involves taking something of value. First, it noted that a physical taking is possible in other types of artistic expression protected by copyright, and de minimis still applies to those forms.¹²³

111. *VMG*, 824 F.3d at 879–80.

112. *Id.* at 880.

113. *Id.*

114. *Id.*

115. *Id.* at 881 (quoting *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004)).

116. *VMG*, 824 F.3d at 881 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977)).

117. *Id.*

118. *Id.*

119. *Id.* at 881–83.

120. *Id.* at 883.

121. *VMG*, 824 F.3d at 884.

122. *Id.* at 883 (quoting H.R. REP. No. 94-1476, at 61 (1976)).

123. *Id.* at 885.

Second, even if sound recordings are qualitatively different from other forms of art, that does not mean that Congress actually intended that sound recordings have a different rule.¹²⁴ Third, one of the Sixth Circuit’s rationales for distinguishing a physical taking from an intellectual taking was because of the savings a copier gains by not having to pay musicians and studios to record.¹²⁵ The Ninth Circuit argued that extending protection to the effort of musicians followed the “sweat of the brow” doctrine, which viewed copyright protection as a reward for an author’s labor.¹²⁶ The Ninth Circuit noted that the United States Supreme Court had rejected the “sweat of the brow” doctrine in *Feist Publishing, Inc. v. Rural Telephone Service, Co.* because facts are not copyrightable regardless of how much work or expense went into discovering or compiling them.¹²⁷ Based on this analysis, the Ninth Circuit held that Congress had intended to retain the de minimis test for sound recordings.¹²⁸

IV. THE DE MINIMIS EXCEPTION SHOULD NOT APPLY TO SOUND RECORDINGS

When uncertainty plagues an area of copyright law, courts should return to the original purpose of copyright law.¹²⁹ While the ultimate goal is “to stimulate artistic creativity for the general public good,”¹³⁰ that aim is best achieved by the “encouragement of individual effort by personal gain.”¹³¹ Courts should seek to balance both considerations when technology creates ambiguity in the law,¹³² and the Sixth Circuit’s interpretation of sections 106 and 114(b) achieves that balance by rejecting the application of the de minimis exception to sound recordings. Both the Sixth Circuit and legislative history of the Sound Recording Amendment distinguish sound recordings from musical compositions and recognize the value of sound recordings.¹³³ Furthermore, the provisions of the Sound Recording Act ensure that any additional protection received by sound recordings is not allowed to stifle the progress of art.

A. The Sixth Circuit’s Interpretation of The Sound Recording Act Balances the Competing Interests of Copyright Law Better Than the Ninth Circuit’s Interpretation

The core of the dispute between the Sixth and Ninth Circuits is their differing interpretations of sections 106 and 114(b). The Sixth Circuit reasoned that Congress intended to eliminate the de minimis exception for sound recordings because section 114(b) states that copyright protection for sound recordings does not extend to recordings

124. *Id.*

125. *Id.*

126. *VMG*, 824 F.3d at 885 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

127. *Id.* (citing *Feist*, 499 U.S. at 349).

128. *Id.* at 887.

129. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

130. *Id.*

131. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

132. *Id.*

133. *Bridgeport v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005); H.R. REP. No. 92-487, at 1569 (1971).

that “consist[] entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”¹³⁴ This language implies that the content of the recording does not matter.¹³⁵ If the content was determinative of infringement in these cases, section 114(b) would not have allowed other artists to avoid infringement by imitating a sound recording note-for-note in their own version of the same song.¹³⁶

On the other side of the split, the Ninth Circuit reasoned that because section 114(b) was constructed as a limitation on the rights found in section 106, it could not be read as expanding those rights by eliminating the de minimis exception for sound recordings.¹³⁷ The Ninth Circuit noted that section 102, which lists the media covered by copyright law, includes sound recordings with all of the other media and gives no indication that sound recordings should be treated differently from the others.¹³⁸ The legislative history of the Sound Recording Act is one possible source for clarifying this disagreement between the circuits.

The Ninth Circuit referenced the legislative history in support of its holding in *VMG* that Congress did not intend to eliminate the de minimis exception for sound recordings.¹³⁹ It quoted the House Report as saying that section 114(b) “makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists and would not prevent a separate recording of another performance in which those sounds are imitated.”¹⁴⁰ It reasoned that this meant that the only purpose of section 114(b) was to allow musicians to record their own independent versions of copyrighted sound recordings.¹⁴¹ The Ninth Circuit also noted that the same paragraph of the House Report stated that infringement takes place whenever someone reproduces “all or any substantial portion of the actual sounds” of a copyrighted sound recording.¹⁴² The Ninth Circuit found that the presence of the phrase “substantial portion” strongly implied that the de minimis exception still applied to sound recordings because the exception applies to copying that is insubstantial.¹⁴³

While the Sixth Circuit declined to examine the legislative history because sampling was not prevalent when Congress enacted the Sound Recording Act,¹⁴⁴ there is support for the Sixth Circuit’s holding in the legislative history. The legislative history for the Sound Recording Act discusses concerns for the economic impact on sound recording industry due to rampant piracy.¹⁴⁵ The House Report states that the denial of royalties to musicians was of equal importance to the economic harm caused by piracy.¹⁴⁶ The House

134. 17 U.S.C. § 114(b).

135. Kubik, *supra* note 5, at 1716.

136. *Id.*

137. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016).

138. *Id.* at 881.

139. *Id.* at 883.

140. *Id.*

141. *Id.* at 884.

142. *VMG*, 824 F.3d at 884.

143. *Id.* at 884.

144. *Bridgeport v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

145. Kubik, *supra* note 5, at 1715.

146. *Id.*

Report also mentions protecting the integrity of sound recordings and the skill and effort it represents,¹⁴⁷ which demonstrates both Congress’s recognition of the value and uniqueness of sound recordings and its willingness to protect them.

Another way of reconciling the disconnect between the Sixth and Ninth Circuit’s interpretation of the Sound Recording Act is to explain that advances in technology since the adoption of the Sound Recording Amendment have led to the elimination of the de minimis exception for sound recordings. Because sampling was not prevalent when Congress enacted the Sound Recording Amendment, sampling was not likely something considered when it referenced “an independent fixation of other sounds” in section 114(b).¹⁴⁸ Congress would have been unaware of how technological advances in sound recording would lead to the prevalent use of samples in new sound recordings, and Congress would also not have been able to predict how prevalent sampling would affect what constituted “an independent fixation of other sounds.”¹⁴⁹

The Ninth Circuit stated in *Sega Enterprises Ltd. v. Accolade, Inc.* that “[w]hen technological change has rendered an aspect or application of the Copyright Act ambiguous, ‘the Copyright Act must be construed in light of [its] basic purpose.’”¹⁵⁰ Due to the ambiguities present in sections 106 and 114(b) of the Sound Recording Amendment, courts should consider the balance between protecting original works and stimulating artistic creativity and provide sound recordings with increased protection by not applying the de minimis exception.

B. Sound Recordings Are Unique and Warrant Stronger Protection Against De Minimis Copying Than Musical Compositions

In *Bridgeport*, the Sixth Circuit distinguished sound recordings from musical compositions by the type of copying involved.¹⁵¹ It noted that while copying notes from a song is an intellectual taking, sampling involves a “physical taking” of “sounds that are fixed in the medium of his choice.”¹⁵² The Ninth Circuit argued that the Sixth Circuit’s distinction between a physical and intellectual taking was weakened by the fact that even though a physical taking is possible for digital artwork, copyright law does not exempt it from the de minimis exception.¹⁵³ While the absence of special treatment for other media covered by the Copyright Act does help the Ninth Circuit’s argument, the House Report for the Sound Recording Act supports the Sixth Circuit’s physical-versus-intellectual taking distinction between musical compositions and sound recordings.¹⁵⁴

The House Report stated that the Senate rejected a proposal from unnamed third parties that Congress include a compulsory license for sound recordings similar to the

147. *Id.* at 1716.

148. *Bridgeport*, 410 F.3d at 805; 17 U.S.C. § 114(b).

149. *Bridgeport*, 410 F.3d at 805; 17 U.S.C. § 114(b).

150. 977 F.2d 1510, 1527 (9th Cir. 1993) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984)).

151. *Bridgeport*, 410 F.3d at 802.

152. *Id.*

153. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016).

154. H.R. REP. No. 92-487, at 1569 (1971).

compulsory license enacted for mechanical reproduction of musical compositions.¹⁵⁵ The Senate reasoned that musical compositions and sound recordings were not analogous because while the notes in a musical composition provided one access to “raw materials” of a piece of music, a sound recording provided one with the “finished product” of performers, arrangers, and audio engineers.¹⁵⁶ While the House Report’s expressed legislative purpose was to combat the piracy¹⁵⁷ of sound recordings,¹⁵⁸ the Senate’s differentiation between the raw materials and the finished product runs parallel to the Sixth Circuit’s distinction between physical and intellectual takings. By rejecting a compulsory license for sound recordings, the Senate recognized the value in sound recordings and gave it stronger protection than musical compositions.

Sound recordings are also unique because, unlike with musical compositions, fixing audio into a tangible medium captures the essence of that performance.¹⁵⁹ The uniqueness of the sound is affected by the individual characteristics of performers and their instruments.¹⁶⁰ Additionally, the studios that record the audio have their own acoustic characteristics, microphones, and equipment.¹⁶¹ All of these factors come together to create a unique performance, and even when an audio engineer alters a sampled clip, the underlying essence of that performance remains.¹⁶² If a performer attempts to create an identical performance of a previous sound recording, variation is inevitable, even if the performances are extremely similar.¹⁶³

The same is not true for musical compositions. Originality for musical compositions is defined by its melody, harmony, and rhythm.¹⁶⁴ Because the originality of a musical composition is tied only to those elements, a composer does not create separate, unique versions of a musical composition when she writes it down or inputs it into music notation software multiple times.

C. Eliminating the De Minimis Exception for Unlicensed Sampling Would Not Stifle the Progress of Art

The burdens imposed on sample-dependent music genres would be similar to the burdens already faced by other genres. To many, samplers (the devices or software capable of copying sound recordings) are musical instruments, and samples are its notes.¹⁶⁵ However, this is not a reasonable justification to sample copyrighted works without a license. In order to ply their crafts, painters must buy paints, and pianists must maintain their pianos. Artists are not owed the means to create art simply because they are artists.

155. *Id.*

156. *Id.*

157. A pirated sound recording is “an unauthorized copy of a performance already commercially released.” *Dowling v. United States*, 473 U.S. 207, 209 n.2 (1985).

158. H.R. REP. NO. 92-487, at 1566 (1971).

159. Stewart, *supra* note 13, at 356.

160. *Id.* at 345.

161. *Id.*

162. *Id.* at 356.

163. *Id.*

164. 1 NIMMER & NIMMER, *supra* note 15, § 2.05[B].

165. HIP HOP AND THE LAW, *supra* note 14, at 299.

Sampling copyrighted audio recordings is also not the only way to acquire samples. Musicians have access to online services with both free and paid sources of samples, which include individual downloads, packages, and monthly subscriptions to entire libraries of samples.¹⁶⁶ While these sources provide musicians access to affordable samples that do not need to be licensed, there are settings where these samples would not meet all of the desires of the musician.¹⁶⁷

Additionally, section 114(b) of the Sound Recording Act would still prevent copyright holders from inhibiting the progress of art for sound recordings even if the de minimis exception did not apply. The requirement of originality for something to be copyrightable and the de minimis exception together prevent copyright holders from inhibiting progress of art across all protected media. Originality prevents someone from copyrighting facts,¹⁶⁸ and de minimis extends that protection to some instances of expression of those facts. For example, a musician would not be able to copyright a single note, like C or Db, from a musical composition because a single note is a musical fact. Furthermore, a musical composition containing the note C followed immediately by Db would almost certainly be covered under the de minimis exception. But once a composition strung together a longer series of C's and Db's, the composer could very well have infringed the copyright for the theme from the movie "Jaws." The originality requirement and de minimis exception allow people to use portions of John Williams's famous theme while still protecting his musical composition from more serious copying. The absence of the de minimis exception for musical compositions would not inhibit another composer's ability to advance her art.

However, even if the de minimis exception were completely eliminated from applying to sound recordings, artists would still be free to imitate an entire sound recording without infringing that copyright.¹⁶⁹ Section 114(b) of the Copyright Act provides that a valid copyright does not prevent another musician from recording a song that completely imitates a copyrighted sound recording.¹⁷⁰ This gives musicians the ability to build off of the work of others while still protecting sound recordings. Regardless of whether the de minimis exception applied to sound recordings, section 114(b) would prevent the stifling of the progress of art.

D. The "Sweat of the Brow" Doctrine Does Not Apply to Original Expression

The Ninth Circuit's dismissal of the *Bridgeport* court's reasoning as following the "sweat of the brow" doctrine does not further its argument that Congress intended to keep the de minimis exception for sound recordings. The "sweat of the brow" doctrine was

166. BIGFISHAUDIO, <https://www.bigfishaudio.com> (last visited Mar. 11, 2019); CONVERSE SAMPLE LIBRARY, <https://www.conversesamplelibrary.com/learn-more> (last visited Mar. 11, 2019); CYMATICS, <https://cymatics.fm> (last visited Mar. 11, 2019); LOOPERMAN, <https://www.looperman.com/loops> (last visited Mar. 11, 2019); SPLICE, <https://splice.com/sounds> (last visited Mar. 11, 2019).

167. In some communities, sampling plays a cultural role in the music, and online sources of samples would be unlikely to fulfill those needs; however, this discussion is beyond the scope of this Comment. HIP HOP AND THE LAW, *supra* note 14, at 158.

168. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

169. 17 U.S.C. § 114(b).

170. *Id.*

created by courts in the early 1900s as a way to justify protecting compilations of facts.¹⁷¹ These courts rejected originality as the primary consideration for protection and held that copyright was a reward for the hard work put into the “industrious collection” of facts.¹⁷² The majority in *VMG* cited *Feist Publications, Inc. v. Rural Telephone Service, Co.* as a case where the Supreme Court soundly rejected “sweat of the brow,”¹⁷³ but as the dissent in *VMG* noted, “sweat of the brow” was not invoked by those seeking protection against unlicensed sampling in *VMG*.¹⁷⁴

In *Feist*, Rural Telephone Service (Rural) was a public utility and sole provider of telephone service to northwest Kansas.¹⁷⁵ In accordance with state regulation, Rural published an annual telephone directory, which it filled with the names and addresses of residents who subscribed to Rural’s services.¹⁷⁶ Feist Publications specialized in area-wide telephone directories, and its service covered eleven different telephone service areas, which included Rural’s geographic area.¹⁷⁷ Feist offered to pay Rural for the right to use the names, numbers, and addresses from its directory, but Rural refused to grant Feist a license.¹⁷⁸ Because Feist was not a telephone company, it did not have the same access to the area’s telephone numbers and addresses and would have had to travel door-to-door to obtain the information.¹⁷⁹ Instead of regathering all of the telephone numbers and addresses, Feist copied Rural’s directories without its consent.¹⁸⁰ Of the 46,878 listings in Feist’s directory, 1,309 were identical to listings from Rural’s directory, four of which were fictitious listings that Rural placed in order to detect copying.¹⁸¹

Rural sued Feist for infringing the copyright of its directories, and Feist argued that the information within the directories was not protected by copyright.¹⁸² The District Court for Kansas held that Rural’s compilation of facts was copyrightable, and the Tenth Circuit affirmed.¹⁸³ The Supreme Court granted certiorari.¹⁸⁴

The Supreme Court first addressed the doctrinal tension between the principles that while facts are not copyrightable compilations of facts generally are.¹⁸⁵ The Court focused on the requirement of originality for a work to be copyrightable. Original means independently created by an author with a “modicum of creativity.”¹⁸⁶ An author is “he to whom anything owes its origin.”¹⁸⁷ An author who accuses another of infringement must

171. *Feist*, 499 U.S. at 352.

172. *Id.* at 352–53.

173. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016) (citing *Feist*, 499 U.S. at 349).

174. *Id.* at 889.

175. *Feist*, 499 U.S. at 342–43.

176. *Id.* at 342.

177. *Id.* at 342–43.

178. *Id.* at 343.

179. *Id.*

180. *Feist*, 499 U.S. at 343.

181. *Id.* at 344.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Feist*, 499 U.S. at 344.

186. *Id.* at 346.

187. *Id.* (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 94 (1884)).

prove “the existence of those facts of originality, of intellectual production, of thought, and conception.”¹⁸⁸ In other words, the author must first prove that her work qualifies for copyright protection before a court need check for infringement.

Because facts are discovered, not created, they do not satisfy the originality requirement of copyrightability and are not copyrightable.¹⁸⁹ The Court noted that “[c]ensus takers . . . do not create population figures . . . ; in a sense, they copy these figures from the world around them.”¹⁹⁰ While independent facts lack the requisite originality to be copyrighted, compilations of facts may contain some expressive elements.¹⁹¹ These expressive elements could include the decision to add specific facts to the compilation, the order of the facts, and the arrangement of the facts.¹⁹² The Supreme Court recognized that choices concerning selection and arrangement of facts are copyrightable as long as “they are made independently by the compiler and entail a minimal degree of creativity”¹⁹³ However, it noted that just because one aspect of a work is copyrighted does not mean that all other aspects are as well.¹⁹⁴ Copyright assures protection for the original work of authors but simultaneously allows other authors to use the uncopyrightable facts contained in that work.¹⁹⁵ The Supreme Court concluded that while compilations are copyrightable, protection for factual compilations is “thin” and limited to its expressive elements.¹⁹⁶

Having addressed the doctrinal tension between the copyrightability of facts and compilations of facts, the Supreme Court made it clear that the “sweat of the brow” doctrine was flawed.¹⁹⁷ The Supreme Court explained that part of the purpose of the Copyright Act of 1976 was to rebuff the “sweat of the brow” doctrine and firmly establish originality as the basis of copyright protection for fact-based works.¹⁹⁸ It noted that copyright law provides greater protection for works of fiction than for factual works¹⁹⁹ and that the point of not extending protection to facts was that the public would be free to use and spread them.²⁰⁰ Extending copyright protection based solely on effort would go against the founding principles of copyright law because it would result in protection without encouraging other authors to create new works.²⁰¹ The Court reiterated that only the expressive aspects of a compilation are copyrightable and held that Rural’s directory was not copyrightable because it did not contain sufficient creativity to make it original.²⁰²

Feist is distinguishable from *Bridgeport* because *Feist* involved a factual work while

188. *Id.* at 346–47 (quoting *Sarony*, 111 U.S. at 59–60).

189. *Id.* at 347.

190. *Feist*, 499 U.S. at 347.

191. *Id.* at 349.

192. *Id.* at 348.

193. *Id.*

194. *Id.*

195. *Feist*, 499 U.S. at 349–50 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1997)).

196. *Id.* at 349.

197. *Id.* at 354.

198. *Id.* at 359–60.

199. *Id.* at 354 (quoting *Harper*, 471 U.S. at 563 (1997)).

200. *Feist*, 499 U.S. at 354 (quoting *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966)).

201. *Id.*

202. *Id.* at 360, 362.

Bridgeport involved a creative work. In *Feist*, Rural was trying to prevent Feist from using names and addresses that were not organized in a creative way.²⁰³ Conversely, the plaintiffs in *Bridgeport* were trying to prevent the defendants from using part of a guitar solo that was expressed in a sound recording.²⁰⁴ While the song contained musical facts, such as notes and rhythms, the plaintiffs in *Bridgeport* sought protection against unlicensed copying of their creative expression of those facts.²⁰⁵

Furthermore, the Supreme Court's rationale from *Feist* does not apply to *Bridgeport*. The Supreme Court rejected the "sweat of the brow" doctrine because it replaced originality with effort to justify protecting facts and discoveries in compilations.²⁰⁶ The plaintiffs in *Bridgeport* would only have been invoking the "sweat of the brow" doctrine if they had argued that their copyright prevented the defendants from using the actual notes contained in the guitar riff from "Get Off." Instead, they argued that the defendants could not copy the sound recording that the plaintiffs created.²⁰⁷ Prohibiting unlicensed sampling does not protect the uncreative expression of facts. It protects the creative, original work of a copyright holder from being used without a license and is therefore inconsistent with the "sweat of the brow" doctrine.

V. ALTERNATIVES TO THE DE MINIMIS EXCEPTION

While adopting the Sixth Circuit's holding in *Bridgeport* would provide one solution for the split between the Sixth and Ninth Circuits, there are other compromises and tests that could provide greater clarity to courts and fairness for authors. Some of these alternatives could be implemented by courts, but others would require action by Congress.

A. The Narrower Scope Test from *Broadus*

The test proposed by the defendants in *Broadus* would provide stronger protection for sound recordings against unlicensed sampling while still allowing for application of the de minimis exception for unique uses of samples. In *Broadus*, the defendants argued that the Southern District of New York should compare the two-measure sample at issue with only the original clip, as opposed to comparing each song in its entirety.²⁰⁸ While the court in *Broadus* found that focusing solely on the sampled measures was improper,²⁰⁹ narrowing the scope would encourage samplers either to pay for a license or use the sample in a unique way.

Under this narrower-scope test, if the sample and the original clip are found to be similar, then the copying would not qualify for the de minimis exception, but if the sample was transformed enough that it is no longer recognizable, then it would qualify for the de minimis exception. This would lead to both additional compensation for copyright owners and encouragement for the advancement of the arts, which furthers the founding principles

203. *Id.* at 343, 363.

204. *Bridgeport v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005).

205. *Id.* at 795.

206. *Feist*, 499 U.S. at 353.

207. *Bridgeport*, 410 F.3d at 795.

208. *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *4 (S.D.N.Y. 2001).

209. *Id.* (quoting *Warner Bros. v. Am. Broad. Co.*, 654 F.2d 204, 211 (2d Cir. 1981)).

of copyright law. Additionally, a more stringent test would increase the level of clarity for both courts and the music industry concerning what is and is not de minimis.

B. Limited Term of Copyright Protection Specific to Sampling of New Works

Instead of completely eliminating the de minimis exception for sound recordings, Congress could amend the Copyright Act to include a limited period of time where any unlicensed sampling satisfies the copying element of infringement regardless of its qualitative or quantitative value. While creating a separate term that protects only against sampling would be unorthodox, it would not be the first time that Congress considered the monetary benefit of authors when setting the duration of copyright protection.²¹⁰

Prior to the enactment of the Copyright Act of 1909, authors commonly sold their copyrights to publishers before knowing how successful their works would be.²¹¹ This uncertainty led authors to sell the copyrights to their works for much less than they would have made by keeping the copyrights.²¹² In response, Congress created the ability for authors to take back the copyrights that they sold by renewing the copyright in their own names after the initial twenty-eight year term.²¹³ While Congress subsequently eliminated the renewal term in The Copyright Act of 1976 because of the burden it produced, this example still demonstrates Congress's willingness to consider the benefit of authors when setting the duration for copyright protection.²¹⁴

Under this alternative, Congress would create a separate copyright term for sound recordings that prohibited unlicensed sampling of protected sound recordings regardless of whether the copying was de minimis. After the period prohibiting unlicensed sampling ends, the de minimis exception would then apply to sound recordings. This limited period would not affect the rights of copyright owners under the current Copyright Act except to protect sound recordings from unlicensed sampling. A twenty-year limit would represent a much shorter barrier than waiting for a song to enter the public domain, which would be seventy years after the author's death.²¹⁵ This timeframe would allow musicians to access to a variety of sound recordings to sample under de minimis while still protecting more recent sound recordings from infringement.

C. Considering Effort as a Factor for the De Minimis Exception Applied to Sound Recordings

Before addressing effort as a factor in the de minimis analysis, it is worth discussing whether effort has been definitively banished from copyright law. As previously discussed in section IV of this Comment, the "sweat of the brow" doctrine is the idea that effort can replace the requirement of originality in order to copyright facts. But while this doctrine has been overruled by the Supreme Court, its holding has been primarily applied to cases where parties were attempting to copyright compilations of facts by replacing originality

210. 3 NIMMER & NIMMER, *supra* note 15, § 9.02.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. 17 U.S.C. § 302.

with effort, rather than supplementing originality with effort.²¹⁶

The plaintiff in *Earth Flag Ltd. v. Alamo Flag Co.* argued that while effort alone could not justify copyrightability, *Feist* left the door open for effort to be considered as a factor in determining copyrightability.²¹⁷ Earth Flag produced flags featuring a public domain picture of Earth and claimed that its flags deserved copyright protection because it had “the creative spark to take the NASA photograph, place it on a flag, file[] a copyright in the U.S. Copyright Office and begin to make it a symbol of a movement for peace and later ecology.”²¹⁸ The Southern District of New York rejected this argument and reasoned that making “sweat of the brow” a factor would go against the purpose of the Copyright Act of 1976, which was to defeat the “sweat of the brow” doctrine.²¹⁹ It also noted that while the plaintiff argued that effort should be a factor in determining copyrightability, because it failed to show any original aspect of its flag, the plaintiff was in actuality trying to use effort as the sole factor in the analysis.²²⁰ While the plaintiff in *Earth Flag* failed to articulate a test that used effort as a factor, sampling is a context where a work can be copyrightable on the merits of its originality and effort might also play a role.

In a de minimis analysis that used effort as a factor, effort would be considered in conjunction with the two traditional elements of de minimis, which are a sample’s quantitative and qualitative value. Just as in the current standard, the factors would be weighed against one another, and a deficiency in one factor could be overcome by the strength of the others. In order to comply with the holding from *Feist*, effort alone would not be able to outweigh deficiencies in both quantitative and qualitative value. The effort factor could consider the skill required to perform the music, the number of instruments, and the recording techniques used by the audio engineer. The amount of time spent recording excessive takes would need to be excluded from this analysis because of its potential to reward wasted time in the studio.

D. Compulsory License for Sound Recordings

Copyright owners are normally free to decline granting licenses for their work; however, 17 U.S.C. § 115 created a right for licensees to make sound recordings of a musical composition without the copyright owner’s permission.²²¹ The only requirements are that the musical composition has been previously distributed to the public by the copyright owner and that the person seeking the compulsory license follow with the statutory procedures for acquiring the license.²²²

While a compulsory licensing scheme for sound recordings was rejected by

216. *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176, 1181–82 (9th Cir. 2018); *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1411 (11th Cir. 2015); *FMC Corp. v. Control Sols., Inc.*, 369 F. Supp. 2d 539, 561–62 (E.D. Pa. 2005); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991).

217. *Earth Flag Ltd. v. Alamo Flag Co.*, 153 F. Supp. 2d 349, 355 (S.D.N.Y. 2001).

218. *Id.*

219. *Id.* (quoting *Feist*, 499 U.S. at 359–60).

220. *Id.*

221. 17 U.S.C. § 115(a)(1)(A).

222. *Id.*

Congress in 1971,²²³ technology has progressed enough that its reasons for doing so may no longer apply. Congress rejected suggestions that it create a compulsory license system for audio recordings because it did not want to force copyright owners to allow others to use their finished products.²²⁴ With the prominence of sampling, it seems as though people have access to those finished products anyway, and a compulsory license system may be the best way to provide access to culturally important samples to the artists that desire them while also compensating the copyright holders.²²⁵

VI. CONCLUSION

Sound recordings should receive more protection against unlicensed sampling, and adopting the Sixth Circuit's interpretation of the Copyright Act is the best way to dispel the uncertainty surrounding this split. While the interpretations of the Sixth and Ninth Circuits both have merit, courts should look to the purpose of copyright law when advances in technology create doubt. Eliminating the de minimis exception for sound recordings comports with the purpose of copyright law because it would protect the interests of authors without inhibiting the progress of art.

The legislative history of the Sound Recording Amendment recognized that sound recordings deserve greater protection from copyright law. Congress refused to enact a compulsory license scheme for sound recordings because it did not want to force copyright owners to give up their finished work. The Sixth Circuit recognized this same distinction but articulated it as the difference between a physical taking versus an intellectual one, and its reasoning in *Bridgeport* conforms with the intent of Congress. Furthermore, even though eliminating the de minimis exception for sound recordings would provide it stronger protections, section 114(b) of the copyright act ensures that art will not be stifled by granting musicians the right to record note-for-note imitations. By granting sound recordings greater protection while still allowing the progress of art through note-for-note imitation, the competing interests of copyright law would be balanced.

In the absence of a resolution to this split, there are a handful of compromises that could also address the issue, which include: narrowing the scope of the de minimis analysis, granting limited protection from unlicensed sampling, considering effort as a factor in the de minimis analysis, and a compulsory licensing scheme for sound recordings. No one fix is likely to make all sides of this split happy, but when uncertainty hangs over cases involving sampling, courts should look to the founding purpose of copyright law in guiding the way forward.

—Tim Schaefer*

223. H.R. REP. NO. 92-487, at 1569 (1971).

224. *Id.*

225. Still, there are critics on the other side of this debate who argue that the highest forms of hip-hop would still be inhibited by the costs of acquiring all of the licenses necessary to comply with copyright law. HIP HOP AND THE LAW, *supra* note 14, at 311.

*Mr. Schaefer earned his bachelor's degree in guitar performance and his master's degree in music production, and, prior to beginning law school, he taught as an adjunct professor of music at Oral Roberts University. He will earn his J.D. from the University of Tulsa College of Law in May 2020. In the fall, Mr. Schaefer will begin a position with the Department of Justice as a judicial law clerk for the Office of the Chief Immigration Judge.