
**SINGING A DIFFERENT TUNE: WAS THE SIXTH CIRCUIT
JUSTIFIED IN CHANGING THE PROTECTION OF SOUND
RECORDINGS IN *BRIDGEPORT MUSIC, INC. V.*
DIMENSION FILMS?**

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I. INTRODUCTION

“Get a license or do not sample.”¹ While those instructions sound simple enough, that short phrase actually represents the ground-breaking opinion of the United States Court of Appeals for the Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films*.² The court seized the opportunity in this case to create a bright line rule for infringement cases involving sampling of copyrighted sound recordings, where it had previously been “nearly impossible to predict [the outcome] with any degree of certainty.”³ However, the new-found certainty came with a price. In creating this bright line rule, the court questioned or rejected the applicability of three fundamental principles of copyright law: (1) the *de minimis* doctrine, (2) substantial similarity, and (3) the fair use defense.⁴ Therefore, the controversial aspect of this holding is not really the actual result; rather it is the reasoning behind the court’s decision that warrants discussion. As an unprecedented ruling on this issue,⁵ the court’s decision in *Bridgeport Music* lays the framework for future cases, and thus, its analysis demands careful scrutiny to ensure the propriety of its foundation.

This Casenote will distinguish itself from the substantial body of academic works discussing digital sampling and its potential legal implications⁶ by dissecting the analysis behind the court’s decision and

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

2. *Id.*

3. Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 188 n. 97 (2002) (quoting Rebecca Morris, *When Is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 274 (2000)).

4. *Bridgeport Music*, 410 F.3d at 801–05.

5. *Id.* at 802–03 (discussing how the decision creates a new rule and follows no prior case law).

6. *Id.* at 804 (noting that “there are probably a hundred articles dealing with sampling and its ramifications”).

attempting to gauge the decision's potential impact on the fair use defense. Part II of this Casenote will present the facts of *Bridgeport Music* and a very brief history of music sampling and its impact on today's recording industry. Part III will discuss the background of copyright protection for sound recordings and the standards employed in traditional copyright infringement cases, including the *de minimis* doctrine, the substantial similarity test, and the fair use defense. Part IV will review the conclusions and reasoning behind the Sixth Circuit's decision in *Bridgeport Music*. Part V will attempt to answer two basic questions: (1) Was the court justified in its decision in *Bridgeport Music*? and (2) Where does the fair use defense stand after this decision? Part VI will conclude that the appellate court in *Bridgeport Music* was only partially correct. While the statute *suggests* that courts need not examine the degree of similarity in digital sampling cases, there is not enough support to completely abandon the substantial similarity and *de minimis* doctrines. Also, the abandonment of both the substantial similarity and *de minimis* doctrines may significantly alter the way courts evaluate the fair use defense in cases involving digital sampling of copyrighted sound recordings.

II. BACKGROUND

A. *The Facts Behind Bridgeport Music*

Three notes. Two seconds. While that may seem insignificant to some people, that is essentially what *Bridgeport Music* is all about. Despite a complicated procedural beginning,⁷ the facts are fairly straightforward. Westbound Records claimed to own the copyright in the sound recording for the song "Get Off Your Ass and Jam" ("Get Off") by George Clinton Jr. and the Funkadelics.⁸ The beginning of "Get Off" consisted of a "three-note combination solo guitar 'riff' that lasts four seconds."⁹ The United States District Court for the Middle District of Tennessee described the solo as creating "a high-pitched, whirling sound that captures the listener's attention and creates anticipation of what is to follow."¹⁰ Subsequently, the rap group NWA

7. This case began as part of an action brought by the four plaintiffs in this case, Bridgeport Music, Southfield Music, Westbound Records, and Nine Records, that covered five hundred alleged instances of infringement by roughly eight hundred defendants. *Id.* at 795. However, a lower court separated that complaint into 476 separate actions, and this particular case was one of those. *Id.*

8. *Id.* at 796.

9. *Id.*

10. *Id.* (quoting *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp. 2d 830, 839

digitally sampled a portion of that guitar solo and included it in its song “100 Miles and Runnin” (“100 Miles”).¹¹ The rappers utilized a two-second, altered sample of the guitar solo that was included in the song in five separate seven-second segments.¹² The song “100 Miles” was featured in the sound track of the film *I Got the Hook Up* (*Hook Up*), which defendant No Limit Films released into theaters on May 27, 1998.¹³ Westbound Records subsequently brought this action against No Limit Films based on the use of “100 Miles” in *Hook Up*.¹⁴

The district court employed the traditional copyright infringement analysis and granted summary judgment to the defendant because it considered the copied portion to be *de minimis*.¹⁵ However, the Sixth Circuit reversed the district court’s grant of summary judgment.¹⁶ The Sixth Circuit held that courts should not perform traditional copyright infringement analysis when examining digital sampling of a copyrighted sound recording.¹⁷ Therefore, the Sixth Circuit’s decision in *Bridgeport Music* abandoned the *de minimis* and substantial similarity tests for this sub-group of cases, which could additionally impact the application of the fair use defense in this sub-group.

B. History of Digital Sampling

While the legal issues left in the wake of sampling litigation are seemingly complicated, the concept is relatively simple. Musical sampling involves “the incorporation of short segments of prior sound recordings into new recordings.”¹⁸ Digital sampling essentially consists of digitally recording the sound, analyzing or altering it with a computer, and playing the sound back.¹⁹ Looping, a related term, refers to utilizing

(M.D. Tenn. 2002), *rev’d*, 383 F.3d 390 (6th Cir. 2004), *amended by* 401 F.3d 647 (6th Cir. 2004), *amended by* 410 F.3d 792 (6th Cir. 2005)).

11. *Id.* Apparently, the allegation that “Get Off Your Ass and Jam” was digitally sampled was never challenged. *Id.* The opinion never explicitly mentions that the song was performed by NWA, however this was confirmed in later articles discussing the opinion. See Associated Press, *Court: Musicians Must Pay for Any Size Sampling*, WASH. POST, Sept. 9, 2004, at C10.

12. *Bridgeport Music*, 410 F.3d at 796. The pitch was lowered and the two-second segment was extended to sixteen beats. *Id.* It was specifically placed at 0:49, 1:52, 2:29, 3:20, and 3:46, with each looped portion playing for seven seconds. *Id.*

13. *Id.* No Limit Films did not deny that the sound track for *Hook Up* utilized parts of “100 Miles” that included the sample taken from “Get Off.” *Id.*

14. *Id.*

15. *Bridgeport Music*, 230 F. Supp. 2d at 842.

16. *Bridgeport Music*, 410 F.3d at 805.

17. *Id.* at 798.

18. *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).

19. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 275 (1996).

a sample multiple times either together or at separate points throughout the new work.²⁰ The main advantage to digital sampling is that, due to the digital format, a sampler can choose to reproduce the sample precisely as it sounded on the original recording, or the sampler can alter characteristics of the sound wave to change the way it sounds.²¹ These samples can consist of a single note played by a single instrument (e.g., one beat of a snare drum) or they can consist of longer passages containing multiple notes that may or may not be independently recognizable.²²

While sampling has become a very high-tech operation today, its roots were much simpler. Jamaican disc jockeys in the 1960s initiated the practice of sampling by creating the practice of “dub,” where performers created unique sounds and songs either by using reverb and echo or by filtering bass tracks and vocal tracks in and out to alter parts of an original recording.²³ Performers in the 1970s continued the growth of sampling by physically manipulating the actual record as it was playing, repeating specific portions, seamlessly switching records and emphasizing the beats with an electronic beat box.²⁴

In the 1980s sampling moved into the digital realm and became a staple of the rap and hip hop genres.²⁵ Technological advances—mainly the musical instrumental digital interface (MIDI) device—eliminated the need for a DJ’s manual dexterity and instead allowed even less-skilled users to record, manipulate, and replay any type of sound.²⁶ Sampling devices became more affordable, and their popularity mirrored the rise of rap and hip hop music throughout the decade.²⁷ Despite legal uncertainty, the use of sampling remains extremely prevalent not just in

20. Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 122 (2003).

21. See Szymanski, *supra* note 19, at 276.

22. See Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1667 (1999).

23. See David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 611 (1992); Latham, *supra* note 20, at 122; Szymanski, *supra* note 19, at 277.

24. Sanjek, *supra* note 23, at 611. This musical style was introduced to listeners in the United States in the 1970s by Kool DJ Herc, who joined other rap and hip hop pioneers such as Theodor, Afrika Bambaataa, and Grandmaster Flash in developing and refining what has become modern-day sampling. *Id.*

25. See Sanjek, *supra* note 23, at 610; Latham, *supra* note 20, at 122; Szymanski *supra* note 19, at 277.

26. For a more technical explanation of the MIDI device, see Sanjek, *supra* note 23, at 612.

27. Latham, *supra* note 20, at 123.

the rap and hip hop genres but across the entire recording industry.²⁸

III. COPYRIGHT PROTECTION FOR SOUND RECORDINGS AND INFRINGEMENT STANDARDS

The case of *Bridgeport Music, Inc. v. Dimension Films* presents several issues under copyright law. Before adequately understanding these issues, however, one must first examine legislative protection of sound recordings—namely, the Sound Recording Act of 1971 and the Copyright Act of 1976—as well as judicial standards generally applicable to copyrighted works in an infringement action.

A. Sound Recordings and Copyright Law

The United States Constitution through its Copyright and Patent Clause authorizes congressional action “[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”²⁹ Congress demonstrated this authority when it enacted the 1976 Copyright Act³⁰ (the Act) to provide copyright protection for two reasons. First, the economic rationale views the monopoly granted to the copyright owner as a necessary incentive in order to encourage the creation and dissemination of creative works to the public.³¹ Without that protection, authors, painters, singers, and others either would be unwilling to share their work with the public or would be unmotivated to create the work in the first place.³² The natural rights view treats an individual’s intellectual creations with the same protections and rights as tangible, physical property.³³

The Act explicitly covers eight discrete categories of works, including two separate types of works associated with the music industry: musical works, including any accompanying words, and sound recordings.³⁴

28. Sanjek, *supra* note 23, at 616. Examples of artists who have used sampling in hit songs include: Eminem sampled Aerosmith’s “Dream On” in his song “Sing for the Moment;” Notorious B.I.G. featuring Puff Daddy and Ma\$e sampled Diana Ross’ “I’m Coming Out” in the rap song “Mo Money, Mo Problems;” Beck, an alternative rock artist, sampled Donny Hathaway’s “The Ghetto” in his song “Where it’s At.” These and many more examples can be found at <http://www.the-breaks.com> (last visited Apr. 23, 2005).

29. U.S. CONST. art. I, § 8, cl. 8.

30. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2000).

31. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-88 to 1-90 (2004); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 427 (3d ed. 2002).

32. 1 NIMMER & NIMMER, *supra* note 31, § 1.03[A], at 1-88 to 1-90.

33. *Id.* § 1.03[A] at 1-90.

34. 17 U.S.C. § 102(a).

According to the statute, sound recordings are “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.”³⁵ Essentially, a musical composition copyright protects the song as a whole (music, words, and the combination of both) while the sound recording copyright protects only a recording of one specific performance of the work.³⁶ While there can only be one musical composition copyright for a specific song, there could be multiple sound recording copyrights covering that song, based on the number of times it was performed and recorded. Typically, the songwriter or an assignee, such as a publishing company, will possess the musical composition copyright. While the sound recording copyright could possibly be held by the artist, that copyright is often assigned to the record company.³⁷

Prior to the Sound Recording Act of 1971,³⁸ sound recordings were not protected by federal copyright law.³⁹ Congress enacted that legislation and, consequently, included sound recordings in the 1976 Copyright Act,⁴⁰ in order to help stop record piracy that flourished as duplication technology advanced.⁴¹ A copyright in a sound recording extends to two individual elements: “(1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing and processing the sounds to make the final recording.”⁴² However, Congress did not simply grant sound recordings all of the rights and privileges associated with copyright protection of other types of works.

Under the 1976 Copyright Act, a copyright owner has five exclusive rights: (1) reproduction, (2) preparation of derivative works, (3) distribution, (4) public performance, and (5) public display.⁴³ In

35. *Id.* § 101.

36. Abramson, *supra* note 22, at 1669.

37. *Id.*

38. Pub. L. No. 92-140, 85 Stat. 391 (1971). This Act was amended and made permanent by Pub. L. No. 93-573, 88 Stat. 1873 (1974) (as amended at 17 U.S.C. § 102 (1990)).

39. S. REP. NO. 104-128, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 357.

40. 17 U.S.C. § 102.

41. *Id.*

42. LIBRARY OF CONGRESS, U.S. COPYRIGHT OFFICE, CIRCULAR 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 1 (2004), *available at* <http://www.copyright.gov/circs/circ56.pdf> (last visited Jan. 29, 2006).

43. 17 U.S.C.A. § 106 (West Supp. 2005).

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

(1) to reproduce the copyrighted work in copies or phonorecords;

addition, sound recording copyright holders also have the exclusive right to use a digital audio transmission to display the sound recording to the public.⁴⁴ However, Congress expressly limited the exclusive rights of a sound recording copyright to the rights of reproduction, preparation of derivative works, distribution, and public display through a digital audio transmission.⁴⁵ In addition, even with those limited rights, the right of reproduction⁴⁶ and the right to create derivative works⁴⁷ are modified in some way by the statute.

Fundamentally, the alterations to these rights impact what types of activities will constitute infringement of a sound recording copyright. The impact on the rights of reproduction and production of derivative works is described as follows:

Subsection (b) of section 114 [of the Copyright Act of 1976] 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. Thus, infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.⁴⁸

In order to clarify exactly what is covered by the right to produce derivative works, the Act expressly states that the right is limited to the

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

Id.

44. *Id.* This particular public display right for sound recordings was not originally included in the 1976 Copyright Act, but was added by the Digital Performance Right in Sound Recording Act of 1995. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

45. 17 U.S.C. § 114(a).

46. See H.R. REP. NO. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5675.

47. See 17 U.S.C. § 114(b).

48. H.R. REP. NO. 94-1476, at 106.

“right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”⁴⁹ The Act goes on to state that both the reproduction right and the right to produce derivative works “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.”⁵⁰ Ultimately, sound recordings have received substantial protection from unauthorized copying first under the Sound Recording Act of 1971 and subsequently under the Copyright Act of 1976.

B. Standards for Infringement Under the Copyright Act

In order to succeed in a copyright infringement action, a plaintiff must demonstrate two key elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁵¹ Although not a separate prerequisite to proving a claim,⁵² a copyright registration certificate serves as prima facie evidence of ownership of a valid copyright and creates a rebuttable presumption that this element is satisfied.⁵³ The second element can be broken down even further into two additional requirements. In order to successfully prove infringement, the copyright owner must show both that the alleged infringer factually copied the work in question and that the copying constitutes improper appropriation of material protected by the copyright.⁵⁴

There is rarely, however, direct evidence of factual copying, and direct evidence of access is equally uncommon.⁵⁵ Because there is typically little or no direct evidence of factual copying, a plaintiff will usually attempt to prove this element indirectly through circumstantial evidence: (1) that the alleged infringer had access to the plaintiff’s

49. 17 U.S.C. § 114(b).

50. *Id.*

51. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see also* 4 NIMMER & NIMMER, *supra* note 31, § 13.01, 13-5 to 13-6.

52. The Copyright Act of 1976 encourages registration in several ways. While the work does not have to be registered when the infringement occurs, registration is a prerequisite for filing an infringement action if the work was created in the United States. *See* 17 U.S.C. § 411(a). Also, in order to receive statutory damages, the work must be registered at the time infringement occurs. *See id.* § 412.

53. *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.01[A], at 13-7. If the presumption is challenged with contradictory evidence, then originality and ownership can be shown through other evidence, such as deposit of a copy with an independent nongovernmental entity or expert testimony. *Id.*

54. *See id.* § 13.01[B], at 13-8 to 13-9.

55. *See id.* § 13.02[A], at 13-15.

protected work; and (2) that the works are probatively similar.⁵⁶ Additionally, access will be inferred where the alleged infringer had the opportunity to view the protected work.⁵⁷ Finally, probative similarity exists when one can show “similarities that, in the normal course of events, would not be expected to arise independently in the two works.”⁵⁸ Some courts have employed a sliding scale approach, where incredibly strong probative similarities result in a finding of factual copying despite little or no evidence of access.⁵⁹

Once factual copying is established, the plaintiff still must overcome another evidentiary hurdle in order to fully establish the second key element of his or her claim. The plaintiff must additionally show that the factual copying resulted in an improper appropriation.⁶⁰ According to Judge Learned Hand, “[e]ven where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.”⁶¹ Therefore, before the court’s analysis progresses to a more in-depth comparison, the copying must overcome an initial hurdle and be found to be substantial, or, stated differently, the copying must be more than *de minimis*.⁶²

Once the court examines both the copyrightable and uncopyrightable elements of the works and finds that minimum threshold has been satisfied, the court compares only the copyrightable elements of the two works to determine if the works are substantially similar.⁶³ Although the tests for substantial similarity are admittedly vague and arguably difficult to apply, they are necessary because copiers could otherwise avoid infringement liability by making insignificant changes to avoid verbatim copying.⁶⁴ Once the plaintiff has successfully persuaded the court that the copying at issue was more than *de minimis* and resulted in substantial similarity, the defendant may still avoid liability by successfully proving one of several affirmative defenses. While several

56. *See id.* § 13.01[B], at 13-13.

57. *See id.* § 13.02[A], at 13-15. Some courts treat opportunity to view as creating an inference of access, while other courts actually equate opportunity to view with access. *Id.* § 13.02[A], at 13-15 to 13-16.

58. *Id.* § 13.01[B], at 13-12.

59. *See id.* § 13.02[B], at 13-26.

60. *See id.* § 13.01[B], at 13-8 to 13-9.

61. *West Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909).

62. *See Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). (“This principle reflects the legal maxim, *de minimis non curat lex* (often rendered as, ‘the law does not concern itself with trifles’).”).

63. *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A], at 13-33.

64. *Id.*

affirmative defenses are available,⁶⁵ the most prominent is fair use, which essentially allows defendants to justify their copying based on various factors.⁶⁶

The three concepts addressed above go to the heart of copyright protection in the United States. A better understanding of those concepts is necessary in order to fully appreciate the magnitude of the Sixth Circuit's decision to alter infringement analysis in cases involving copyrighted sound recordings. The next three subsections of this article will provide a more in-depth discussion of the *de minimis* doctrine, the substantial similarity requirement, and the fair use defense.

1. *De Minimis* Doctrine

The basic premise of the *de minimis* doctrine, applicable to all areas of the law, is that some infringements of legal rights are too trivial to hold the infringers legally responsible.⁶⁷ Stated differently, a *de minimis* violation is one that is "so insignificant that a court may overlook it in deciding an issue or case."⁶⁸ With respect to copyright law, a *de minimis* use occurs when an alleged infringer borrows such a small portion of the protected work that a court may consider it legally insignificant.⁶⁹

The *de minimis* doctrine can be appropriately applied in two distinct manners in copyright law.⁷⁰ First, it can have its common legal meaning and refer to a use that technically infringes a copyright in a completely trivial way.⁷¹ For example, a photocopy of a picture or cartoon displayed on a home refrigerator may properly constitute a *de minimis* use.⁷² Second, the *de minimis* doctrine can be used as the minimum threshold for the quantitative component of the substantial similarity requirement.⁷³ Essentially, a use is *de minimis* when there is actual

65. See *id.* § 13.06, at 13-278 to 13-280 (explaining the defense of abandonment of copyright); *id.* § 13.07, at 13-281 to 13-285 (explaining the defense of estoppel); *id.* § 13.08, at 13-286 to 13-291 (explaining the defense of innocent intent); *id.* § 13.09, at 13-292 to 13-313 (explaining the defense of abuse).

66. See *id.* § 13.05[A], at 13-152 to 13-188; 17 U.S.C. § 107; KOHN & KOHN, *supra* note 31, at 1551-54.

67. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

68. BLACK'S LAW DICTIONARY 464 (8th ed. 2004).

69. Bradley C. Rosen, Annotation, *Cause of Action for Infringement of Copyright in Sound Recordings Under the Federal Copyright Act of 1976*, 22 CAUSES OF ACTION 2d 411, § 19 (2003).

70. See *Ringgold*, 126 F.3d at 74-75.

71. *Id.* at 74.

72. *Id.* Another example was using a picture of a toy on a display card for a competing product where the display card was never used. *Id.*

73. *Id.*

copying of such a small amount of material that it does not support a finding of substantial similarity.⁷⁴ This illustrates the difference between actual copying and actionable copying or infringement.⁷⁵ Therefore, a defendant may use the *de minimis* doctrine to argue that he or she has not actually infringed a copyright despite admitting to using a small portion of the copyrighted work.⁷⁶

Despite the fact that its basic concept is theoretically straightforward, no clear test exists that easily establishes when the *de minimis* threshold has been crossed.⁷⁷ Therefore, no magic amount of material or number of notes can freely be copied without fear of infringing the copyrighted work.⁷⁸ One court has defined a *de minimis* use as one where “the average audience would not recognize the appropriation,”⁷⁹ indicating the use is not adequately significant.⁸⁰ Notably, this test is very similar to the ordinary observer test employed to determine the existence of substantial similarity.⁸¹ The interplay between the *de minimis* doctrine and the substantial similarity requirement is discussed further in the next section.

2. Substantial Similarity Requirement

As discussed above, in order to prove infringement, the plaintiff must demonstrate that the defendant actually copied the copyrighted work and that the copying was an improper appropriation.⁸² Once the plaintiff has successfully established actual copying, then the plaintiff must establish improper appropriation by showing substantial similarity between the two works in question.⁸³ It is important to distinguish substantial similarity from probative similarity, which is used to establish factual copying by pointing out a high degree of similarity between the two works.⁸⁴ By contrast, the concept of substantial similarity is used to determine whether the copying was so significant as to warrant being considered infringement.⁸⁵ As with the *de minimis* doctrine, there is no

74. *Id.*

75. *Id.* at 75.

76. *Id.*

77. See 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A][2], at 13-57 n.109.

78. See *id.*

79. Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).

80. *Id.*

81. *Id.*

82. See *supra* Part II.B.

83. Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139–40 (2d Cir. 1992).

84. See Newton, 388 F.3d at 1194–95; 4 NIMMER & NIMMER, *supra* note 31, § 13.01[B], at 13-12.

85. See Newton, 388 F.3d at 1195.

bright line rule to determine when substantial similarity has been established. Therefore, the determination of substantial similarity must be made on an ad hoc basis.⁸⁶

The doctrine of substantial similarity attempts to strike a balance between two extreme situations. On one hand, extremely insignificant similarities, or similarities in unprotected elements of a work, do not constitute infringement. On the other hand, the law cannot require exact verbatim copying of the entire work before finding infringement; otherwise copiers could avoid liability simply by making slight alterations.⁸⁷ The substantial similarity requirement attempts to draw the line where infringement will be found, even though the placement of that line may seem arbitrary.⁸⁸ The level of substantial similarity required to constitute infringement can vary based on the level of creativity present in the copyrighted work.⁸⁹ If the work possesses a high level of creativity, then the copyright protection is robust, and thus a lower level of substantial similarity is required to find infringement. However, if the work possesses a low level of creativity, then the copyright protection is “thin” and the alleged infringing work must be almost identical to constitute an infringement violation.⁹⁰

On the spectrum of results between trivial and identical copying, music sampling cases fall toward the latter end, where there is a high degree of similarity of only a small portion of the work.⁹¹ Such cases demonstrate fragmented literal similarity, because they copy “a portion of the plaintiff’s work exactly or nearly exactly, without appropriating the work’s overall essence or structure.”⁹²

Because the degree of similarity is not really a question, the key issue then becomes whether the portion taken is substantial enough to be infringing.⁹³ When making that determination, courts will look at both the quantitative and qualitative significance of the copied segments.⁹⁴ Quantitative significance focuses on the amount of copyrighted material

86. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

87. See 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A], at 13-34.

88. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

89. See 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A], at 13-35.

90. See *id.*

91. *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004).

92. *Id.* The Ninth Circuit used language adopted by Melville and David Nimmer in their treatise. *Id.* For more information about the cited portions of this treatise, see 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A], at 13-35 to 13-36. The term “fragmented literal similarity” is contrasted with “comprehensive nonliteral similarity,” which occurs when one copies the overall structure of a work (i.e., the plot) as opposed to directly copying a few short passages. *Id.*

93. *Newton*, 388 F.3d at 1195.

94. See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997).

that was copied.⁹⁵ When determining the significance of that amount, the court will focus on what proportion of the plaintiff's work has been copied.⁹⁶ For example, an individual might sample a brief three-second segment of a song that is more than three minutes long. As discussed in the prior subsection, this is where the *de minimis* doctrine and the substantial similarity requirement seem to overlap.⁹⁷ Alternatively, the qualitative component of substantial similarity attempts to determine how important the copied segments are to the plaintiff's work.⁹⁸ For instance, a short, three-second segment could be considered qualitatively important if it is easily recognizable as the refrain or hook of a popular song.

When evaluating these two components, courts must be careful to focus solely on the copied segments' relation to the *plaintiff's* work, not the defendant's work.⁹⁹ In other words, the alleged infringer is unable to avoid liability simply by showing that the copied portions make up only a small or unimportant part of the new work.¹⁰⁰ Courts use this two-prong test as a sliding scale to determine whether the defendant has taken so much that the plaintiff is harmed in some manner.¹⁰¹

Most courts have adopted the ordinary observer test to determine the substantial similarity issue.¹⁰² This test asks whether the ordinary observer would overlook the differences between the two works in question and regard the works as having the same "aesthetic appeal."¹⁰³ Several cases have suggested that the point of view required by this test is not just the general public. Rather, the court must determine if the work in question is directed toward a particular audience, for example, children.¹⁰⁴ If the work in question does target a specific audience, then the court must use that group's point of view when applying the ordinary observer test.¹⁰⁵

95. *See id.*

96. *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A][2], at 13-54 n.97.

97. *See supra* Part II.B.1.

98. *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A][2], at 13-55, 13-57.

99. *See* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004). The court quoted *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 570 n.1 (9th Cir. 1987): "The relevant inquiry is whether a substantial portion of the protectable material in the *plaintiff's* work was appropriated—not whether a substantial portion of the *defendant's* work was derived from plaintiff's work." *Newton*, 388 F.3d at 1195.

100. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936).

101. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

102. *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.03[E][1], at 13-82.

103. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

104. *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.03[E][1][a], at 13-83.

105. *See id.*

3. Fair Use Defense

While the rights granted to a copyright owner are substantial, they are subject to certain limitations.¹⁰⁶ The fair use doctrine is one such limitation. Once a plaintiff has successfully established copyright infringement, the defendant can still escape liability by defending on grounds that the use was fair.¹⁰⁷ A fair use is defined as a “reasonable and limited use of a copyrighted work without the author’s permission.”¹⁰⁸ The concept of fair use developed under common law and was eventually codified in the Copyright Act of 1976.¹⁰⁹ Although the term “fair use” initially referred to a permissible use for lack of substantial similarity, fair use now properly indicates a defense that avoids liability even though substantial similarity exists.¹¹⁰

Traditionally, the fair use defense applied when the second author used the copyrighted material in such a way that it “advanced the public benefit, without substantially impairing the present or potential economic value of the first work.”¹¹¹ Today, the Act provides a non-exhaustive list of factors for courts to consider when evaluating a fair use claim.¹¹² The first factor is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹¹³ The statute also provides several examples of uses that would likely be considered fair use, including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research.”¹¹⁴ However, this list is not exclusive, nor will those enumerated examples always qualify as a fair use. Courts will balance all of the appropriate factors before reaching a decision in a given case.¹¹⁵ According to the United States Supreme Court, a commercial or for-profit purpose generally creates a strong presumption against a finding of fair use.¹¹⁶ A commercial use is one

106. See 17 U.S.C. §§ 107–122 (2000).

107. See 4 NIMMER & NIMMER, *supra* note 31, § 13.05, at 13-149 to 13-152.

108. BLACK’S LAW DICTIONARY 634 (8th ed. 2004).

109. See 4 NIMMER & NIMMER, *supra* note 31, § 13.05, at 13-149 to 13-150; KOHN & KOHN, *supra* note 31, at 1552.

110. See 4 NIMMER & NIMMER, *supra* note 31, § 13.05, at 13-149 to 13-150.

111. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT CASES AND MATERIALS 614 (6th ed. 2002).

112. 17 U.S.C. § 107(1)–(4) (2000).

113. *Id.* § 107(1).

114. *Id.* § 107.

115. A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 144–45 (1993).

116. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

where “the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹¹⁷ In addition, evidence that a new use is transformative, which means the material is used in a different manner than it was in the original work, weighs in favor of a finding of fair use.¹¹⁸ For example, copying a portion of an original work in order to create a parody of the original work has been considered transformative.¹¹⁹

The second factor listed by the Act is “the nature of the copyrighted work.”¹²⁰ Generally, under this factor, if the original work is creative or fictional in nature, then courts will be less likely to find a fair use. Also, the fact that the original work remains unpublished weighs against a finding of fair use.¹²¹

The third factor listed under the statute is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹²² Under this factor, courts employ a qualitative and quantitative analysis,¹²³ similar to that employed under the tests for a *de minimis* use and substantial similarity. However, one must keep in mind that under the fair use defense, this is merely one factor to be balanced and is not conclusive, as it is under the other two tests.¹²⁴

The fourth and final statutory fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.”¹²⁵ A use is considered unfair under this factor where it has a negative impact on any of the exclusive rights granted to a copyright owner.¹²⁶ For example, the finding that the new work will supplant the demand for the original work in an existing or potential market weighs against the invocation of the fair use defense. Under this final factor, “the court must weigh the benefit gained by the copyright owner when [the] use is deemed unfair against the benefit gained by the public when [the] use is deemed fair.”¹²⁷

117. *Id.*

118. Johnson, *supra* note 115, at 147–48.

119. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). In *SunTrust Bank* the author borrowed elements from Margaret Mitchell’s “Gone With the Wind” in order to comment on and criticize the book’s portrayal of slavery and race relations. *Id.* at 1259.

120. 17 U.S.C. § 107(2) (2000).

121. Johnson, *supra* note 115, at 149–51.

122. § 107(3).

123. Johnson, *supra* note 115, at 153–54.

124. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75–76 (2d Cir. 1997).

125. 17 U.S.C. § 107(4).

126. Johnson, *supra* note 115, at 154–55.

127. *Id.* at 154.

IV. THE SIXTH CIRCUIT'S DECISION AND REASONING IN
BRIDGEPORT MUSIC, INC. v. DIMENSION FILMS

"Thou shalt not steal."¹²⁸ That was how a federal judge began the opinion in *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.*,¹²⁹ one of the first cases to address the legality of digital sampling.¹³⁰ Over a decade later in the Sixth Circuit's decision in *Bridgeport Music*, that maxim has now been slightly reworded, but the general effect remains the same. "Get a license or do not sample."¹³¹

While the U.S. District Court for the Middle District of Tennessee granted Dimension Films' motion for summary judgment after determining that its use was properly classified as *de minimis* and therefore not infringing,¹³² the Sixth Circuit reversed and held that the district court should not have even utilized the *de minimis* or substantial similarity tests in this case.¹³³ The main discrepancy between the district court and the Sixth Circuit arose because they essentially answered two different questions. The district court viewed the *de minimis* analysis as a "derivation of substantial similarity."¹³⁴ Accordingly, the district court evaluated both the quantitative and qualitative significance of the segment in question and ultimately held that the copied segment was so quantitatively and qualitatively insignificant that the use was properly considered *de minimis*.¹³⁵ Notably, the Sixth Circuit acknowledged that the district court had performed this analysis properly.¹³⁶

However, the Sixth Circuit indicated the district court had quite simply obtained the right answer to the wrong question. According to the Sixth Circuit, courts should avoid traditional *de minimis* and

128. *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15).

129. *Id.*

130. In *Grand Upright Music*, the United States District Court for the Southern District of New York held that an artist had infringed a valid copyright by sampling three words and accompanying music from the plaintiff's recording. *Id.* at 185. As the Sixth Circuit pointed out in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 803 n.16 (6th Cir. 2005), it is not clear whether the court found infringement of the plaintiff's copyright in the sound recording or in the underlying musical composition.

131. *Id.* at 801.

132. *Bridgeport Music, Inc. v. Dimension Films, LLC*, 230 F. Supp. 2d 830, 839–42 (M.D. Tenn. 2002), *rev'd*, 383 F.3d 390 (6th Cir. 2004), *amended by* 401 F.3d 647 (6th Cir. 2004), *amended by* 410 F.3d 792 (6th Cir. 2005).

133. *Bridgeport Music*, 410 F.3d at 798.

134. *Bridgeport Music*, 230 F. Supp. 2d at 841.

135. *Id.* at 841–42.

136. *Bridgeport Music*, 410 F.3d at 798 n.4.

substantial similarity analysis when evaluating infringement of a copyright in a sound recording.¹³⁷ Instead of focusing on the quantitative and qualitative importance of the sample taken, the Sixth Circuit was concerned only with whether any portion at all of the original sound recording was copied.¹³⁸ Because it was undisputed that the defendant had actually copied the short guitar riff, the Sixth Circuit accordingly found the copyright had been infringed and overturned the district court's grant of summary judgment.¹³⁹

Before delving into the actual analysis, the Sixth Circuit set forth seven basic findings that both explained and limited its holding in this case.¹⁴⁰ First, the court stressed that its holding applied only to sound recording copyrights, not other types of copyrights, such as those in the underlying musical composition.¹⁴¹ Next, it stressed that it was not simply re-evaluating the district court's analysis; rather, it was employing a completely different test.¹⁴² Third, unconcerned with the originality of the sample in question, the court assumed that the plaintiff could prove a valid copyright and that a portion of that protected work was sampled by the defendant.¹⁴³ In the next two findings, the court adopted the common definition of digital sampling and expressly limited its holding to digital sampling, not other types of sampling.¹⁴⁴ Sixth, the court acknowledged that increases in technology and the popularity of hip hop music have caused corresponding increases in digital sampling and subsequent copyright litigation.¹⁴⁵ Finally, the court stated its belief that both the judiciary and the music industry would benefit from a bright line test due to this increase in litigation.¹⁴⁶

In support of its self-declared "new rule,"¹⁴⁷ the Sixth Circuit focused extensively on the language of several provisions of the Act and the history of copyright protection of sound recordings.¹⁴⁸ Specifically, the

137. *Id.* at 798.

138. *Id.* at 800–01.

139. *Id.* at 805.

140. *Id.* at 798–99.

141. *Id.* at 798. The musical composition copyrights were not at issue in this case because No Limit Films had been granted a license to use the musical composition "100 Miles." *Id.* at 796. Therefore, only the sound recording copyright could have been infringed. *Id.*

142. *Id.* at 798.

143. *Id.*

144. *Id.* The court expressly limited its holding to digital sampling due to its own admitted "limited technological knowledge in this specialized field." *Id.*

145. *Id.* at 798–99.

146. *Id.* at 799.

147. *Id.* at 802.

148. *Id.* at 799–800.

court quoted section 106¹⁴⁹ pertaining to general rights granted to copyright holders and section 114¹⁵⁰ establishing the particular rights granted to those who hold copyrights in sound recordings.¹⁵¹ To justify treating sound recordings differently from other types of copyrighted works, the court discussed the fact that sound recordings were not granted federal copyright protection until 1971 and that, unlike other types of copyrighted works, copyrighted sound recordings may be freely imitated as long as the actual sound recording is not reproduced.¹⁵²

The Sixth Circuit justified its interpretation of the statute, which does not require a *de minimis* or substantial similarity inquiry for digital sampling of sound recordings, on several grounds. First, a bright line rule that any amount of copying in this context is infringement will be easy to enforce and will not infringe on creativity, since musicians can duplicate an identical sound independently.¹⁵³ Second, the cost to obtain a license in order to sample, which will be the result of the court's bright line rule, will be kept in check because the market will not allow that cost to rise above the amount it would cost the artist to reproduce the desired sound independently.¹⁵⁴ Third, when an artist samples a sound recording, he or she does so intentionally.¹⁵⁵ By contrast, it is possible to infringe other types of copyrighted works subconsciously, without intending to do so.¹⁵⁶ Additionally, the court stressed that "even when a small part of a sound recording is sampled, the part taken is something of value."¹⁵⁷ That value is demonstrated by the fact that the portion was sampled in the first place, as the sampling itself cuts down on production costs, adds a new element to the recording, or both.¹⁵⁸

The court closed this portion of the opinion by setting forth five concluding observations.¹⁵⁹ First, the court acknowledged that there were no judicial precedents on which to base its decision; rather, it

149. 17 U.S.C. § 106 (2000). The full text of section 106 is quoted *supra* note 43.

150. *Id.* § 114(a).

151. *Bridgeport Music*, 410 F.3d at 799–800. Section 114(a) reads: "The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4)." § 114(a).

152. *Bridgeport Music*, 410 F.3d at 801.

153. *Id.*

154. *Id.*

155. *Id.*

156. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (finding that George Harrison infringed a musical composition copyright by subconsciously copying the harmony of a song recorded and released seven years prior).

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

158. *Id.* at 802.

159. *Id.* at 802–05.

suggested that a great body of law review articles and comments supported its position.¹⁶⁰ Second, the court turned again to the creativity issue, urging that artists would not suffer because many sound recordings were made before the Sound Recording Act of 1971 went into effect and therefore are not subject to federal copyright protection.¹⁶¹ Additionally, the court suggested that many artists would still sample freely and risk litigation.¹⁶² “Third, the record industry, including the recording artists, has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose.”¹⁶³ The fourth observation stated that this particular decision should not impact the “willfulness” aspect of any current cases.¹⁶⁴ Finally, the court essentially requested that Congress intervene to amend the Act if it did not intend for sound recordings to be treated separately in this manner.¹⁶⁵ Based on all of these reasons, the court felt compelled to reverse the district court’s entry of summary judgment and remand the case to the trial court, where the trial judge could consider the fair use defense that was not addressed in the first instance.¹⁶⁶

V. ANALYSIS OF THE COURT’S DECISION

A. Was the Sixth Circuit Justified in Its Decision in *Bridgeport Music*?

The Sixth Circuit admirably provides some justification for its admittedly unprecedented decision in *Bridgeport Music, Inc. v. Dimension Films* to treat copyrighted sound recordings differently from all other types of copyrighted works. However, numerous viable reasons also exist for continuing to perform *de minimis* and substantial similarity analyses in digital sampling cases. Due to the uncertainty of congressional intent regarding the treatment of copyrighted sound recordings, the better approach is to err on the side of traditional copyright jurisprudence and continue to apply the *de minimis* and substantial similarity standards to all copyrighted works, including copyrighted sound recordings.

Although the fragments of legal scholarship highlighted by the court seem to support the court’s decision to abandon *de minimis* and

160. *Id.* at 802–04.

161. *Id.* at 804.

162. *Id.*

163. *Id.*

164. *Id.* at 804–05.

165. *Id.* at 805.

166. *Id.*

substantial similarity analysis, closer examination reveals that many of those sources also recognize the applicability of the *de minimis* and substantial similarity doctrines to sound recordings. For example, the court offered the following excerpt from one source:

“In most copyright actions, the issue is whether the infringing work is substantially similar to the original work The scope of inquiry is much narrower when the work in question is a sound recording. The only issue is whether the actual sound recording has been used without authorization. Substantial similarity is not an issue”¹⁶⁷

However, that same source further acknowledges that an alleged infringer may be able to avoid liability if the use is considered *de minimis*, and it does not distinguish between types of copyrighted works when discussing this analysis.¹⁶⁸ Additionally, the court offered up the following quote from a law review article: “Since the exclusive right encompasses rearranging, remixing, or otherwise altering the actual sounds, the statute by its own terms precludes the use of a substantial similarity test.”¹⁶⁹ However, the footnote to the following sentence in the article admits “[t]here may be the possibility of a *de minimis* use defense, depending on how strictly the court interprets the ‘actual sounds’ language in the statute.”¹⁷⁰

A third secondary source cited by the court offered the following: “[T]he only way to infringe on a sound recording is to re-record sounds from the original work, which is exactly the nature of digital sound sampling This suggests that the substantial similarity test is inapplicable to sound recordings.”¹⁷¹ However, that same article stated:

Proving infringement of a protected work is the same for a digital sample, song, or a computer program The plaintiff must next demonstrate that what was actually taken rises to the level of unlawful infringement by proving that the resulting recording is substantially similar to plaintiff’s and that the taking was significant and not merely a *de minimis* appropriation.¹⁷²

Additionally, according to one leading commentator, “[t]he practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis: to the extent that the resulting

167. *Id.* at 798 n.6 (alteration in original) (quoting Rosen, *supra* note 69, § 12).

168. Rosen, *supra* note 69, § 19.

169. *Bridgeport Music*, 410 F.3d at 801 n.10 (quoting Latham, *supra*, note 20, at 125).

170. Latham, *supra* note 20, at 125 n.35.

171. Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “Rap”?*, 37 LOY. L. REV. 879, 896 (1992).

172. *Id.* at 891.

product is substantially similar to the sampled original, liability should result.”¹⁷³ Because much of the support offered by the court can easily be balanced, if not refuted, with equally forceful statements from the same sources, it cannot be asserted that the evidence conclusively favors the court’s new approach to protecting copyrighted sound recordings.

In addition to examining applicable legal scholarship, the Sixth Circuit also focused on the language of the statute to support its decision. When examining the exact language of the Act dealing with sound recordings, the court focused on two provisions in particular. First, the court pointed to section 114(b),¹⁷⁴ which states that the right to produce derivative works of a copyrighted sound recording “is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”¹⁷⁵ According to the court, this gives the copyright owner the “exclusive right to ‘sample’ his own recording.”¹⁷⁶

Initially, that particular provision does appear to negate the need for a substantial similarity inquiry. However, if one recalls that substantial similarity has a dual nature, consisting of both degree of similarity and the importance of that similarity, one can identify the flaw in the court’s reasoning. The portion of the Act quoted by the court addresses the degree of similarity between the original and allegedly infringing works. section 114(b)¹⁷⁷ simply makes examining the degree of similarity unnecessary because manipulating or changing the actual sounds contained in a sound recording, even to the point they become unrecognizable, can still constitute infringement.¹⁷⁸ However, that provision does not clearly suggest that courts should avoid analyzing the quantitative or qualitative significance of the copied portion under both traditional *de minimis* and substantial similarity analysis.

The court also quoted a leading commentator in the field regarding another portion of section 114(b).¹⁷⁹ Specifically, that commentator emphasized that:

The exclusive rights of the owner of copyright in a sound recording . . .

173. 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A][2], at 13-58.

174. 17 U.S.C. § 114(b) (2000).

175. *Id.* Section 114(b) was discussed by the court in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

176. *Id.* at 801. The court supported its suggestion by referencing a law review article that stated that section 114(b) precludes the use of a substantial similarity test. *Id.* at 801 n.10.

177. 17 U.S.C. § 114 (b).

178. *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976). This case was discussed by the Sixth Circuit in *Bridgeport Music*, 410 F.3d at 802 n.16.

179. *Id.* at 803 n.18.

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.¹⁸⁰

According to that commentator, by using the word “entirely” “Congress may have intended that a recording containing *any* sounds of another recording would constitute infringement.”¹⁸¹ The language of the statute makes it clear that artists are free to intentionally and independently imitate and reproduce sounds that appear virtually identical, as long as the actual sound recording is not copied.

Once again, however, the court’s interpretation only addresses half of the issue at hand. While independent imitation and reproduction do not constitute infringement, that is not necessarily dispositive of the liability inquiry. Even the commentator hinted at some uncertainty by stating that “Congress *may* have intended”¹⁸² in the excerpt cited by the court. Equally as likely, Congress *may* have intended to completely exempt independent imitation, while leaving courts to apply long-established copyright concepts in cases not involving independent imitation.¹⁸³ Traditionally, the concept of substantial similarity has encompassed both imitation *and* exact reproduction.¹⁸⁴ The express language of the statute merely removes independent imitation from the substantial similarity analysis regarding copyrighted sound recordings. It does not wholly abandon the need for substantial similarity and *de minimis* analyses in their entirety.

Finally, when statutory terms appear ambiguous, courts can generally turn to the legislative history for some assistance.¹⁸⁵ The Sixth Circuit did not address the legislative history of the Sound Recording Act of 1971¹⁸⁶ or the Copyright Act of 1976¹⁸⁷ at all in *Bridgeport Music, Inc. v. Dimension Films*.¹⁸⁸ However, the legislative history of the

180. KOHN & KOHN, *supra* note 31, at 1486 (alteration in original) (quoting 17 U.S.C. § 114(b) (2000)).

181. *Id.*

182. *Id.* (emphasis added).

183. 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A][2], at 13–58.

184. *Id.* § 8.05[A], at 8–91 n.2.

185. See *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (“Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”).

186. Pub. L. No. 92–140, 85 Stat. 391 (1971). This Act was amended and made permanent by Pub. L. No. 93–573, 88 Stat. 1873 (1974) (as amended at 17 U.S.C. § 102 (1990)).

187. Copyright Act of 1976, §§ 101–1332 (2000).

188. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005) (“The legislative history is of little help because digital sampling wasn’t being done in 1971.”).

Copyright Act does provide relatively short but important guidance on this issue. According to the House Report:

Subsection (b) of section 114 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. Thus, infringement takes place whenever all or any *substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced . . .¹⁸⁹

Clearly, that excerpt of the House Report indicates that Congress intended courts to examine the substantiality of the copied portion of the copyrighted sound recordings, keeping that portion of the infringement analysis consistent with other types of copyrightable works. To borrow from copyright infringement terminology, while the applicable legislative history may seem small from a quantitative standpoint, the legislative history is undoubtedly qualitatively significant.

The Sixth Circuit lastly pointed to several equitable reasons for abandoning the *de minimis* and substantial similarity analysis in this particular context. Specifically, the court suggested that the bright line rule would be easily enforced and help to avoid the “mental, musicological, and technological gymnastics that would have to be employed” in order to apply the *de minimis* and substantial similarity doctrines.¹⁹⁰ The court also indicated that the bright line rule would not stifle creativity since many artists and record companies already get licenses, and other artists and record companies will likely continue to forego licensing and “take their chances.”¹⁹¹

Although these are legitimate reasons for employing the approach suggested by the court, these concerns are not unique to sound recordings. The arbitrary nature of the substantial similarity and *de minimis* tests make them difficult to apply in virtually any context, but this difficulty does not justify absolute abandonment of the tests in this sub-group of cases. The argument regarding creativity is suggestive only of the court’s belief that neither approach, the bright line rule nor traditional analysis, will significantly affect industry behavior. Therefore, despite the fact that the bright line rule would increase judicial efficiency for this particular category of cases, the equitable reasons offered by the Sixth Circuit are not particularly persuasive.

In conclusion, while the Sixth Circuit’s decision is not without

189. H.R. REP. NO. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added).

190. *Bridgeport Music*, 410 F.3d at 802.

191. *Id.* at 804.

support, there is at least as much, and arguably stronger, evidence indicating that courts should continue employing substantial similarity and *de minimis* analysis in infringement cases involving digital sampling of sound recordings. Because there is no compelling reason to drastically change the analysis in this sub-group of cases, the courts should continue to apply the doctrines in this sub-group.

B. Is the Fair Use Defense Still Viable After Bridgeport Music?

Obviously, as evidenced by the remand instructions to the district judge, the Sixth Circuit believes that its decision in *Bridgeport Music* has not affected the fair use defense in cases involving digital sampling of copyrighted sound recordings.¹⁹² While the *Bridgeport Music* decision does not alter the substantive law behind the fair use defense, that decision could influence how the fair use defense is applied by subsequent courts in this particular context. Specifically, there is a danger that courts will interpret the third fair use factor, the amount and substantiality of the copied portion,¹⁹³ differently based on the Sixth Circuit's statement that any amount of sampling, no matter how short or qualitatively insignificant, is infringing.

Traditionally, when evaluating this particular factor of the fair use defense, courts have employed the same quantitative and qualitative analysis that is required under the *de minimis* and substantial similarity doctrines.¹⁹⁴ Courts following the *Bridgeport Music* decision will be examining the amount and substantiality for the first time as part of the fair use defense. Ideally, these courts will perform the same tests traditionally used under the *de minimis* and substantial similarity doctrines.

Nevertheless, the *Bridgeport Music* decision could influence these courts in two ways. First, the general holding and specific language from the *Bridgeport Music* decision could result in a lower threshold when determining whether this particular factor weighs against a finding of fair use. Specifically, the Sixth Circuit stated, "even when a small part of a sound recording is sampled, the part taken is something of value."¹⁹⁵ Based on this language, courts may incorrectly apply the same zero-tolerance, bright line rule developed by the Sixth Circuit to

192. *Id.* at 805. ("Since the district judge found no infringement, there was no necessity to consider the affirmative defense of 'fair use.' On remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.").

193. *See supra* Part II.B.3.

194. *See id.*

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

this factor of the fair use defense. Instead, courts should still closely examine the qualitative and quantitative significance of the copied portion.

Second, the strong, decisive language of the decision, exemplified by the instruction to “[g]et a license or do not sample,”¹⁹⁶ may tempt courts to make this particular factor dispositive when evaluating the fair use defense. This would be a major mistake. Courts have stated many times that the fair use factors must be balanced against one another in every case, and no single factor is to be given conclusive weight. Courts must proceed with caution; the same hard-line approach adopted by the Sixth Circuit when initially deciding whether infringement exists must not be confused with the subsequent analysis of the fair use defense.

In addition to these dangers, there is another reason to decline adopting the bright line rule at the outset. Although the bright line rule permits a court to quickly answer the initial infringement question, it does not enable that court to avoid the substantial similarity and *de minimis* analyses completely, because those tests resurface under the third fair use factor. Because the fair use defense requires many parallel factual inquiries, the efficient purpose of the bright line rule is likely frustrated, and judicial economy is effectively undermined.

In conclusion, regarding the fair use defense, the *Bridgeport Music* decision could lead to subsequent courts incorrectly taking a shortcut when evaluating the third fair use factor. Courts may be tempted to apply the zero-tolerance policy or simply focus exclusively on that particular factor. As the United States Supreme Court has stated, when evaluating the fair use defense “[t]he task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”¹⁹⁷ Although the *Bridgeport Music* decision did not directly address the fair use defense, the approach and emphasis adopted by the Sixth Circuit in that case could adversely affect the way courts evaluate fair use in the future.

VI. CONCLUSION

The Sixth Circuit’s new test for infringement of copyrighted sound recordings, adopted in *Bridgeport Music*, boils down to a simple yes or no question: Did the alleged infringer actually copy the copyrighted sound recording? That is it. That is the extent of the court’s new analysis in this sub-group of copyright infringement cases. If the court

196. *Id.* at 801.

197. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

answers affirmatively, then the defendant infringed. If the court answers negatively then the defendant did not infringe. According to the Sixth Circuit in *Bridgeport Music*, it can be that simple.

Because no other circuit has focused exclusively on the infringement of a copyrighted sound recording, the *Bridgeport Music* decision stands alone as the only guidepost for future cases. Unfortunately, if left unaltered, the *Bridgeport Music* decision will lead future courts down an unprecedented and dangerous road. While the test appears to be a boon to judicial efficiency and based on some scholarly and statutory support, that evidence is hardly overwhelming. The evidence clearly does not warrant the rejection or alteration of three core principles of copyright law, namely the *de minimis* doctrine, the substantial similarity doctrine, and the fair use defense.

The scholarly excerpts cited by the court to support its position can easily be countered by articles and treatises that suggest courts should continue to apply *de minimis* and substantial similarity analyses in this particular type of case. Although initially persuasive, the court's interpretation of the statutory language is far from conclusive. Properly understood, the language of the statute simply removes one type of activity from the infringement analysis, independent imitation. The statute does not relieve courts of the duty to perform *de minimis* and substantial similarity analysis completely. Due to the potential confusion surrounding the interpretation of the statutory language, the legislative history is especially helpful in this case. That history explicitly demonstrates that Congress considered substantiality of the copied portion to be important to infringement analysis involving sound recordings. Finally, the equitable reasons suggested by the court are equally unpersuasive. The *de minimis* and substantial similarity analyses are somewhat arbitrary and challenging to apply; however, that is not a valid reason to simply do away with them. Additionally, the savings in judicial efficiency stemming from the bright line rule will be short lived, because courts have to perform essentially the same analyses under the third factor of the fair use defense.

Ultimately, the Sixth Circuit's reasoning in *Bridgeport Music* is unpersuasive. Instead of trying to march to the beat of a different drummer by abandoning well-established traditions of copyright law, the Sixth Circuit should have followed the district court's lead and just kept playing the same old song by employing conventional infringement analysis.