

# SEARCHING FOR A SOUND: A PROPOSAL FOR CREATING CONSISTENT *DE MINIMIS* SAMPLING STANDARDS IN THE MUSIC INDUSTRY

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## INTRODUCTION

Reminiscing on the “golden age” of music sampling, from the late 80s to early 90s,<sup>1</sup> producer Miho Hatori described the process of finding music to sample: “We’re just buying records, searching, searching, and we find a record and it’s like, ‘There, *that* bass line.’ ... To find the right one or two seconds of sound – that’s a lot of work.”<sup>2</sup> And it is those “one or two seconds”—those samples—that have been the subject of large amounts of legal action, two of those cases creating a recent circuit split regarding the legality of sampling.<sup>3</sup>

While *Bridgeport Music, Inc. v. Dimension Films*, a 2005 Sixth Circuit decision, held that all samples, regardless of length, are infringing without licenses,<sup>4</sup> the Ninth Circuit in *VMG Salsoul, LLC v. Ciccone* declined to follow its’ sister circuit’s holding. Instead, the *VMG Salsoul* court applied a *de minimis* standard to samples in order to determine infringement.<sup>5</sup> Because the deadline for the plaintiff in *VMG Salsoul* to submit a petition for certiorari to the Supreme Court passed this past September, this circuit split will remain for the foreseeable future, dividing the legal status of potentially *de minimis* samples in Los Angeles and Nashville, two centers of the music industry.

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<sup>1</sup> KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 5 (2011).

<sup>2</sup> KEMBREW MCLEOD, AN ORAL HISTORY OF SAMPLING: FROM TURNTABLES TO MASHUPS 89 (2014).

<sup>3</sup> See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>4</sup> *Bridgeport Music*, 410 F.3d at 800.

<sup>5</sup> *VMG Salsoul*, 824 F.3d at 887.

This paper will examine the history of sampling and the sampling licensing market, the impact of *Bridgeport Music* and the recent circuit split, and present an industry-driven solution to the unclear state of sampling in the music world. Without the guidance of further judicial decisions or congressional legislation on the issue of sampling, the music industry should come to a consensus about the use of *de minimis* sampling without licenses, and develop guidelines for best practices in music sampling. The development of “best practice” guidelines for fair use has been effective in the field of documentary filmmaking, providing creators with guidance that is largely accepted by the industry, and resulting in fewer unnecessary copyright clearances for uses that fall within fair use. This paper proposes that similar “best practice” guidelines for the use of *de minimis* sampling without licenses be created or endorsed by music industry organizations to provide musicians with guidance and legal support for cutting back the strict licensing requirements that are a result of *Bridgeport*, and to effectively write the *de minimis* doctrine back into music copyright law.

## I. MUSIC SAMPLING AND THE SAMPLE LICENSING MARKET

“Sampling” is “the process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording.”<sup>6</sup> Apart from early experimental music collages,<sup>7</sup> sampling had its roots in the early 1970s practices of rap and hip-hop DJs, who used turntables and mixers to create new sounds from pre-recorded music.<sup>8</sup> These techniques focused on isolating the “break beat,” the section where “the band breaks down, the rhythm section is isolated, basically where the bass guitar and drummer take solos.”<sup>9</sup> When digital synthesizers with Musical Instrument Digital Interface (MIDI) keyboard controls were developed and became

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<sup>6</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>7</sup> See generally JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY Chapter 3 (2006).

<sup>8</sup> JOSEPH SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 25- 31 (2014).

<sup>9</sup> *Id.* at 31-32.

more widely accessible in the 1980s,<sup>10</sup> sampling became more common, and the manipulation and combination of pre-recorded sounds became a staple of the newly emerging hip-hop genre. Groups like De La Soul, the Beastie Boys, and Public Enemy used sampling to rise to the forefront of hip-hop.<sup>11</sup> For some complex songs built around samples, “the drum track alone was built from a dozen individually sampled and sliced beats.”<sup>12</sup>

Even during the early days of hip-hop, when sampling was largely flying under the radar of copyright litigation,<sup>13</sup> sampling that took too much from the original song made some hip-hop artists uncomfortable.<sup>14</sup> As rapper T La Rock commented on EPMD’s “Strictly Business,” which sampled Eric Clapton’s “I Shot the Sheriff,”<sup>15</sup> “I don’t care who you are, you *know* where that loop is from.... There were some producers who really had no originality. It’s as if they took the whole song. They sampled so much out of that record that there was no real production there.”<sup>16</sup> And even before the litigation of the early 1990s made sample licensing a major concern for artists, there was an awareness that certain samples should be licensed. Regarding his use of “Super Freak” in “U Can’t Touch This” in 1990, MC Hammer stated “I didn’t need a lawyer to tell me that [I needed permission to use the song].... I’m borrowing enough of his song that he deserves to be compensated.”<sup>17</sup>

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<sup>10</sup> David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM & MARY L. REV. 2399, 2403 (2004).

<sup>11</sup> Public Enemy’s second record, *Fear of a Black Planet*, is on the New York Times list of the 25 most significant albums of the last century, and was included in the Library of Congress’s 2004 National Recording Registry. MCLEOD & DICOLA, *supra* note 1, at 22.

<sup>12</sup> *Id.* at 24.

<sup>13</sup> *Id.* at 25-26.

<sup>14</sup> *Id.* at 26.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (emphasis in original).

<sup>17</sup> Thomas W. Joo, *Remix Without Romance*, 44 CONN. L. REV. 415, 429 (2011).

While early litigation surrounding sampling did exist<sup>18</sup> and some early producers did license their samples,<sup>19</sup> the 1991 decision in *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.* formalized the necessity of licensing music samples. The *Grand Upright* court's decision opens strongly with the Biblical quote "Thou shalt not steal,"<sup>20</sup> and continues to state that sampling without licensing "violates not only the Seventh Commandment, but also the copyright laws of this country."<sup>21</sup> Following this hard-line determination that sampling constituted infringement<sup>22</sup> and the many infringement lawsuits that followed,<sup>23</sup> the licensing of samples became common industry practice.<sup>24</sup> Flat fees to sample master recordings fell anywhere between \$2,500 and \$20,000, often with advances starting at \$5,000.<sup>25</sup> According to Chuck D, the front man of Public Enemy, "it had become so difficult to the point where it was impossible to do any of the types of records we did in the late 1980s, because every second had

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<sup>18</sup> Indeed, "Rapper's Delight," the first hip-hop single to become a national hit, was threatened with litigation for infringing the instrumental portion of another song, which was recreated by vocalists, rather than mechanically sampled, in "Rapper's Delight." *See id.* at 427. The parties settled out of court, and the authors of the original song were listed as co-writers. *Id.* at 428.

<sup>19</sup> One of the earliest examples of remix artists who engaged in extensive licensing is the musical duo Bill Buchanan and Dickie Goodman. Their 1956 musical collage, "The Flying Saucer," was the earliest commercially popular and successful example of music based on sampling, rising to #3 on the Billboard chart and selling over a million copies. After they were sued for their use of seventeen top 20 hits in the collage, they licensed all samples used throughout the rest of their career, even though the lawsuit was dismissed because "The Flying Saucer" was found to be a fair use. MCLEOD & DICOLA, *supra* note 1, at 38; George Brandon, *Dickie Goodman and the Art of the 'Break-In' Record*, REBEAT MAGAZINE (April 14, 2015), <http://www.rebeatmag.com/dickie-goodman-and-the-art-of-the-break-in-record/>.

<sup>20</sup> *Exodus* 20:15; *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

<sup>21</sup> *Grand Upright Music*, 780 F. Supp. at 183. The sample in question involved the opening eight bars, lasting 30 seconds, of the original song "Alone Again (Naturally)" by Gilbert O'Sullivan. Those eight bars were looped to form the basis of the length of Biz Markie's "Alone Again." Joo, *supra* note 17, at 430.

<sup>22</sup> *E.g.*, *Grand Upright Music*, 780 F. Supp. at 183.

<sup>23</sup> One of the most famous of these is the Turtles' lawsuit against De La Soul over a 12-second sample of a song they had written in the 1960s, and which settled out of court for 1.7 million. MCLEOD & DICOLA, *supra* note 1, at 131. As producer Greg Tate put it, "I think that everyone woke up after De La Soul's Record came out and Turtles sued them." MCLEOD, *supra* note 2, at 90.

<sup>24</sup> MCLEOD & DICOLA, *supra* note 1, at 2.

<sup>25</sup> Al Kohn & Bob Kohn, KOHN ON MUSIC LICENSING 1548-49 (4th ed. 2010). The licensing fees for sample-heavy works can easily reach into the hundreds of thousands. *See* John S. Pelletier, *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U.L. REV. 1161, 1163 (2011-2012).

to be cleared.”<sup>26</sup> Although licensing samples became the standard practice in the recording industry,<sup>27</sup> and many labels erred on the side of caution, refusing to release records without complete clearance,<sup>28</sup> there were still instances in which sample clearance was not required by law: samples that could be considered fair use<sup>29</sup> and *de minimis* samples.

## II. THE *DE MINIMIS* DOCTRINE AND SAMPLING

Copyright infringement is determined by two factors: first, whether copying occurred, and second, whether there is “substantial similarity”<sup>30</sup> between the two works sufficient for a reasonable observer to conclude that an “unlawful appropriation” occurred.<sup>31</sup> As part of the analysis of “substantial similarity,” the legal doctrine of *de minimis non curat lex* is generally applied to copyright actions.<sup>32</sup> Under this standard, to avoid infringement, the amount copied must be *de minimis*,<sup>33</sup> that is, “so trivial to fall below the quantitative threshold of substantial similarity.”<sup>34</sup> The issue of *de minimis* sampling was first addressed in 2004 in *Newton v.*

*Diamond*. The Ninth Circuit held that the sampling of a three-note sequence was *de minimis*, and

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<sup>26</sup> MCLEOD & DICOLA, *supra* note 1, at 27. As hip-hop journalist Harry Allen quipped, “we would have to sell [albums like *It Takes a Nation of Millions* or *3 Feet High and Rising*] for, I don’t know, \$159 each just to pay all the royalties from publishers making claims for 100 percent on your compositions.” *Id.*

<sup>27</sup> Joo, *supra* note 17, at 428.

<sup>28</sup> MCLEOD & DICOLA, *supra* note 1, at 28-29.

<sup>29</sup> Although the potential for a fair use defense for sampling is interesting, the focus of this paper is on the status of the *de minimis* doctrine as it relates to music sampling.

<sup>30</sup> A phrase that, according to Patry, first appeared in 1894, in *Springer Lithographing Co. v. Falk*, 59 F. 707 (2d Cir. 1894). 3 PATRY ON COPYRIGHT § 9:19 n.1, Westlaw (database updated Sept. 2016).

<sup>31</sup> VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881 (9th Cir. 2016)

<sup>32</sup> 2-8 NIMMER ON COPYRIGHT § 8.01 (2015).

<sup>33</sup> Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 137-38 (2d Cir. 1998).

<sup>34</sup> *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998). Instances of exact copying that have been found to be *de minimis* include the appearance of the copyrighted design of a Silver Slugger pinball machine in the background of a 3.5-minute long movie scene, with the machine in question appearing for no more than a few seconds at a time, *see* *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008); copyrighted photographs that appear in the background of a movie for a total of 35.6 seconds, *Sandoval*, 147 F.3d; and the copying of fourteen copyrighted sample exam questions from a total of 1,083 multiple-choice questions, *see* *Louisiana Contractors Licensing Serv., Inc. v. Am. Contractors Exam Servs., Inc.*, 13 F. Supp. 3d 547, 554 (M.D. La. 2014), *aff’d*, 594 F. App’x 243 (5th Cir. 2015). These examples demonstrate the applicability of the *de minimis* doctrine to copyright infringement cases across a range of art forms.

thus did not infringe on the copyright of the music composition.<sup>35</sup> The Ninth Circuit stated that the *de minimis* doctrine “applies throughout the law of copyright, including cases of music sampling.”<sup>36</sup> However, just a year later, the Sixth Circuit reached the opposite conclusion. In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit announced a new rule<sup>37</sup> for sampling recordings: that the *de minimis* doctrine does not apply to sound recordings, and any sample, no matter how small, is infringement. The opinion succinctly stated its rule for musicians: “[g]et a license or do not sample.”<sup>38</sup>

Although some district courts declined to follow *Bridgeport*,<sup>39</sup> the ruling had an undeniable impact on the clearance of samples. According to music lawyer Dina LaPolt, “I would advise my clients before *Bridgeport* if they used a little snippet of a recording that was *de minimis*, ‘That’s fine; we don’t have to clear it....’ But now I can’t say that anymore.”<sup>40</sup> Even with increased caution about clearances, the floodgates for lawsuits had opened.<sup>41</sup> The *Bridgeport Music* case was one of almost 500 claims that the company brought against over 800 plaintiffs.<sup>42</sup> After their success at the Sixth circuit, they continued to bring suit, successfully receiving an injunction and over \$4 million in damages over samples used in Notorious B.I.G.’s

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<sup>35</sup> *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004). The defendants in this case had gotten licenses for the actual recording that they sampled, so only the music composition copyright was at issue.

<sup>36</sup> *Id.* at 1195.

<sup>37</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 (6th Cir. 2005).

<sup>38</sup> *Id.* at 801. The opinion claims not to contradict the previous *Newton* ruling, instead stating that a different rule exists for audio recordings as opposed to musical compositions. The sample in question was a two-second clip from a three-second solo guitar riff, composed of a three-note arpeggiated chord, from “Get Off Your Ass and Jam.” *Id.* at 796. The pitch of the sample was lowered and looped, extending to sixteen beats, or seven seconds of music. This loop was then used five times throughout the song. *Id.* If the court had applied a *de minimis* analysis to it, it may have been found to be non-infringing.

<sup>39</sup> *See, e.g., Steward v. West*, No. 13-02449, Docket No. 179 at 14 n.8 (C.D. Cal. 2014) (unpublished civil minutes); *Pryor v. Warner/Chappell Music, Inc.*, No. CV13-04344, 2014 WL 2812309, at \*7 n.3 (C.D. Cal. June 20, 2014) (unpublished); *Batiste v. Najm*, 28 F.Supp.3d 595, 625 (E.D. La. 2014); *Zany Toys, LLC v. Pearl Enters., LLC*, No. 13-5262, 2014 WL 2168415, at \*11 n.7 (D.N.J. May 23, 2014) (unpublished); *Saregama India Ltd. v. Mosley*, 687 F.Supp.2d 1325, 1340-41 (S.D. Fla. 2009); *EMI Records Ltd v. Premise Media Corp.*, No. 601209, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008) (unpublished).

<sup>40</sup> McLEOD & DiCOLA, *supra* note 1, at 141.

<sup>41</sup> *Id.* at 31

<sup>42</sup> *Bridgeport Music*, 410 F.3d at 795.

“Ready to Die,”<sup>43</sup> among many other cases, and earning themselves the title “sample troll” from critics.<sup>44</sup>

The legal landscape for music sampling has been made even more complex by the recent Ninth Circuit decision in *VMG Salsoul, LLC. v. Ciccone*. Here, the Ninth Circuit declined to follow the Sixth Circuit’s rule that the *de minimis* doctrine does not apply to recorded music. Calling the Sixth Circuit’s *Bridgeport* opinion “unpersuasive” and “illogic[al],”<sup>45</sup> the Ninth Circuit found that a 0.23-second “horn hit” sampled in Madonna’s “Vogue,” was *de minimis*, and therefore non-infringing.<sup>46</sup> Although Judge Graber acknowledged that their decision created a circuit split, “the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent,” and “we [are] convinced . . . that our sister circuit erred.”<sup>47</sup> This decision cited their previous *Newton* decision and prior precedent to define *de minimis* sampling as a taking that is “so meager and fragmentary that the average audience member would not recognize the appropriation.”<sup>48</sup> In the immediate wake of the *VMG Salsoul* decision, many attorneys anticipated that the plaintiff would submit a petition of certiorari to the Supreme Court to conclusively settle the circuit split, two attorneys even going so far as to call the petition

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<sup>43</sup> Tim Wu, *Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That’s Destroying Hip-Hop*, SLATE (Nov. 16, 2006), [http://www.slate.com/articles/arts/culturebox/2006/11/jayz\\_versus\\_the\\_sample\\_troll.html](http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html).

<sup>44</sup> *Id.* This title is particularly warranted as *Bridgeport Music* is a one-man corporation with no employees, and no reported assets beyond the copyrights it owns. *Id.* The company owns the copyrights of the catalogue of George Clinton, one of the most widely sampled musicians in rap music, although Clinton himself claims that the copyrights were fraudulently obtained. *Id.*

<sup>45</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874, 884 (9th Cir. 2016).

<sup>46</sup> The “horn hit” in question was taken from the song “Ooh I Love It (Love Break),” recorded in the 1980s by The Salsoul Orchestra. The hit appears in two forms in the original: a “single” horn hit, a quarter-note chord (comprised of four notes), and a “double” horn hit, an eighth-note followed by a quarter-note chord, comprised of the same four notes. The radio edit of the potentially infringing song in question, Madonna’s “Vogue,” uses the single horn hit once, the double horn hit three times, and a “breakdown” version once. In the “compilation” version of the song, which is 24 seconds longer than the radio edit, the double horn hit is used five times. *Id.* at 875-76.

<sup>47</sup> *Id.* at 886. In discussing their disagreement with the Sixth Circuit decision, the opinion discussed congressional intent, the failure of other districts to follow the *Bridgeport* decision, and the multi-page discussion of *Bridgeport*’s incorrectness in *Nimmer*, the “leading copyright treatise.” *Id.*

<sup>48</sup> *Id.* at 878 (citing *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986)).

“inevitable.”<sup>49</sup> However, that “inevitable” petition has not materialized, and, given that the Supreme Court’s 90-day deadline for petitions for writ of certiorari<sup>50</sup> has passed unmarked, the Ninth Circuit’s decision remains binding, resulting in a divide between two of the major centers of the American music industry.<sup>51</sup>

### III. CRITICISMS OF *BRIDGEPORT*

*Bridgeport*’s bright-line rule requiring licenses for all sampling undoubtedly signified a substantial change in the way hip-hop music was created and the rigor with which labels required licenses before releasing music including samples, and the circuit split created by *VMG Salsoul* disrupts a decade of *Bridgeport*’s prominence as the only circuit-court decision dealing with the *de minimis* sampling of sound recordings. However, *Bridgeport*’s rule against *de minimis* sampling was never completely accepted by district courts that were not bound by the Sixth Circuit decision.<sup>52</sup> Further, *Bridgeport* has been harshly criticized by copyright scholars and practitioners alike.

The foundation of the *Bridgeport* decision, and the basis for its criticism, is the Sixth Circuit’s interpretation of Section 114(a) and (b), which give copyright owners the exclusive right to reproduce their work, prepare derivative works, distribute copies, and to perform the work

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<sup>49</sup> Mark Wittow & Eliza Hall, *Sometimes Borrowing Isn’t Stealing: De Minimis Sampling of Music Sound Recordings Isn’t Copyright Infringement, Say Two Key Courts in the United States and Germany*, K&L GATES LEGAL INSIGHT (June 16, 2016), [http://www.klgates.com/files/Publication/e029b24e-f238-42ea-9165-6c8411c94ea2/Presentation/PublicationAttachment/57b262de-4680-409b-8ab0-77591ad13531/IP\\_Alert\\_06162016.pdf](http://www.klgates.com/files/Publication/e029b24e-f238-42ea-9165-6c8411c94ea2/Presentation/PublicationAttachment/57b262de-4680-409b-8ab0-77591ad13531/IP_Alert_06162016.pdf); Ira S. Sacks & Julia R. Lissner, *Ninth Circuit “Strikes a Pose” For Madonna and Music Sampling in “Vogue” Copyright Dispute*, MARKS, WORKS & SECRETS: AKERMAN INSIGHTS ON THE LATEST DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW (June 7, 2016), <http://www.marksworldandsecrets.com/2016/06/ninth-circuit-strikes-a-pose-for-madonna-and-music-sampling-in-vogue-copyright-dispute/>; Tamany Vinson Bentz & Matthew J. Busch, *VMG Salsoul, LLC v. Madonna Louise Ciccone, et al.: Why a Bright Line Infringement Rule for Sound Recordings is no Longer in Vogue*, VENABLE NEWS & INSIGHTS (June 28, 2016), <https://www.venable.com/vmg-salsoul-llc-v-madonna-louise-ciccone-et-al-why-a-bright-line-infringement-rule-for-sound-recordings-is-no-longer-in-vogue-06-28-2016/>.

<sup>50</sup> SUP. CT. R. 13.

<sup>51</sup> Wittow & Hall, *supra* note 48.

<sup>52</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).



publically through digital audio transmissions.<sup>53</sup> The court focused predominantly on the exclusive right provided by § 114(b), which grants copyright owners of sound recordings the exclusive right to duplicate or prepare derivative works, but does not prevent others from “the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds ... [that] imitate or simulate those in the copyrighted sound recording.”<sup>54</sup> Based on this clause of the Copyright Act, implying that recordings that were not “entirely” independently created were infringing, the court in *Bridgeport* found that “a sound recording owner has the exclusive right to ‘sample’ his own recording”<sup>55</sup> without any consideration for the potentially *de minimis* nature of the sample. Further recommending this interpretation, according to the *Bridgeport* analysis, is the ease of enforcement of such a bright-line rule,<sup>56</sup> the available alternative to sampling, that is, to recreate independently the desired sounds,<sup>57</sup> and the fact that many musicians were already licensing samples.<sup>58</sup> The Court did not consider legislative history, as “digital sampling wasn’t being done in 1971,”<sup>59</sup> a statement that does not accurately reflect the state of technology at the time.<sup>60</sup>

This interpretation of Section 114(b) and its focus on the word “entirely” to justify its exclusion of the *de minimis* exception from sound recordings is subject to harsh criticisms, in addition to being contradicted by legislative history. As the 1975 Committee on the Judiciary Copyright Law Revision Report stated in its explicit analysis of the scope of exclusive rights in sound recordings, infringement occurs when “all or a substantial portion of the actual sounds

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<sup>53</sup> 17 U.S.C. § 114(a)-(b) (2012).

<sup>54</sup> 17 U.S.C. § 114(b) (2012).

<sup>55</sup> *Bridgeport Music*, 410 F.3d at 801.

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

<sup>57</sup> *Id.* at 800.

<sup>58</sup> *Id.* at 804.

<sup>59</sup> *Id.* at 805.

<sup>60</sup> *VMG Salsoul*, 824 F.3d. at 884.

that go to make up a copyrighted sound recording are reproduced in phonorecords....”<sup>61</sup> The inclusion of the phrase “substantial portion of” indicates that Congress did not intend any of their statutory provisions regarding infringement of sound recordings to preempt the previous “substantial similarity” requirement.<sup>62</sup> Furthermore, as *Nimmer on Copyright* points out, the Sixth Circuit’s conclusion “rests on a logical fallacy,”<sup>63</sup> that is, merely validating sound-alike recordings as immune from liability “contains no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law.”<sup>64</sup>

Nor is the commentary in *Nimmer* the worst criticism that the decision has received. William Patry, author of the other of the two leading copyright treatises, called the decision “judicial policy making run amok, in the face of a contrary statute, contrary legislative history, and contrary uniform, case law. It is hard to imagine how one could get more things wrong.”<sup>65</sup> Indeed, even parties that might be expected to support the ruling have come out against it.<sup>66</sup> Robert Sullivan, the attorney who argued for the plaintiffs in *Bridgeport*, has stated that the holding would open the floodgates for more litigation, and that the plaintiffs had not argued for the elimination of the *de minimis* standard.<sup>67</sup> Furthermore, the RIAA, which has historically defended copyright law against music piracy,<sup>68</sup> and whose mission is “to protect the intellectual

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<sup>61</sup> H.R. Rep. No. 94-1476, at 106 (1975) (emphasis added).

<sup>62</sup> *VMG Salsoul*, 824 F.3d at 884.

<sup>63</sup> 4-13 NIMMER ON COPYRIGHT § 13.03 (2015).

<sup>64</sup> *Id.*

<sup>65</sup> 3 PATRY ON COPYRIGHT, *supra* note 30, § 9:61

<sup>66</sup> Steven D. Kim, *Taking De Minimis out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 JEFFREY S. MOORAD SPORTS L.J. 103 (2006).

<sup>67</sup> Peter Kirn, *Step Away from the Sampler*, KEY BOARD MAG (January 2005), archived by Remix Theory at <http://remixtheory.net/?p=192>.

<sup>68</sup> Kim, *supra* note 70, at 27.

property and First Amendment rights of artists and music labels,”<sup>69</sup> argued against the *Bridgeport* decision in an amicus brief, criticizing the retroactivity of the decision, and calling it “unprecedented” and “unsustainable.”<sup>70</sup>

These criticisms of the *Bridgeport* holding have also appeared in district court opinions. In *Saregama India Ltd. v. Mosley*, the district court for the Southern District of Florida refused to follow the Sixth Circuit’s decision, instead relying on the Eleventh Circuit’s “substantial similarity” requirement “as a constituent element of *all* infringement claims.”<sup>71</sup> Because the Sixth Circuit’s rule against *de minimis* sampling would contradict Eleventh Circuit precedent, requiring that “the defendant succeeded [in appropriating the plaintiff’s original expression] to a meaningful degree” for there to be infringement,<sup>72</sup> the district court refused to follow it. Indeed, even after declaring *Bridgeport* a departure from Eleventh Circuit precedent, the decision went on to criticize the Sixth Circuit’s reasoning in adopting its new rule, questioning the court’s reading of the statute.<sup>73</sup> Such skepticism of the Sixth Circuit’s analysis was also expressed by the district courts for the Central District of California and the Eastern District of Louisiana, and the Supreme Court of New York. In *Pryor v. Warner/Chappell Music, Inc.*, *Batiste v. NAJM*, and *EMI Records Ltd. v. Premise Media Corp.*, respectively, all three courts declined to apply the *Bridgeport* standard, criticizing its reading of Section 114 of the Copyright Act.<sup>74</sup> Indeed, *Batiste*

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<sup>69</sup> *About RIAA*, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, <http://www.riaa.com/about-riaa/> (last visited Jan. 4, 2016).

<sup>70</sup> Peter Kirn, *supra* note 71.

<sup>71</sup> *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338 (S.D. Fla. 2009), *aff’d*, 635 F.3d 1284 (11th Cir. 2011) (emphasis in original).

<sup>72</sup> *Leigh v. Warner Bros.*, 212 F.3d 1210, 1214 (11th Cir. 2000).

<sup>73</sup> *Saregama*, 687 F. Supp. at 1339-41.

<sup>74</sup> *Pryor v. Warner/Chappell Music, Inc.*, No. CV 13-04344 RSWL, 2014 WL 2812309 (C.D. Cal. June 20, 2014); *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 (E.D. La. 2014); *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 WL 5027245.

v. *NAJM* went so far as to say that it is “far from clear” that the *Bridgeport* rule on *de minimis* sampling should be used, given the widespread failure of non-bound district courts to apply it.<sup>75</sup>

In light of the dramatic backlash against the *Bridgeport* ruling among critics and district courts, as well as the circuit split created by *VMG Salsoul*, the treatment of sampling of sound recordings is ripe for review, either by the Supreme Court or Congress, and the criticisms of the Sixth Circuit’s holding that the *de minimis* exception is inapplicable to sound recordings should be given due consideration. However, until such a review occurs, it is up to the music industry to find a workable approach to providing clarity to musicians regarding the licensing of music samples.

#### IV. AN INDUSTRY-DRIVEN SOLUTION TO THE SAMPLING SPLIT

Barring congressional legislation to revise the Copyright Act to take sampling into account, or a sampling case that is successfully appealed to the Supreme Court, the circuit split regarding the legal status of *de minimis* samples—samples so small that the average audience member would not recognize them—makes it impossible for artists to know what rule to apply, as potential plaintiffs could forum shop to bring suit in the most sympathetic circuit. However, just as the music industry began enforcing clearance requirements that may have been overly stringent,<sup>76</sup> the music industry also has the potential to create an industry standard that provides musicians with clear, even if not court-imposed, guidelines regarding sampling licensing, and that restores some of the leeway that existed in the “golden age” of hip-hop.<sup>77</sup>

##### i. *The De Minimis Doctrine as Part of the Genre of Hip-Hop*

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<sup>75</sup> *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 (E.D. La. 2014).

<sup>76</sup> *MCLEOD & DiCOLA*, *supra* note 1, at 28-29.

<sup>77</sup> *See VMG Salsoul*, 824 F.3d; *MCLEOD & DiCOLA*, *supra* note 1, at 136-144.

The earliest hip-hop songs that used sampling focused on using the music from past generations to blend into complex new sounds.<sup>78</sup> Producers focused on finding rare records to sample, reviving obscure songs through their use of samples.<sup>79</sup> As Hank Shocklee comments about the sampling that went into Public Enemy’s records, “we had to comb through thousands of records to come up with maybe five good pieces.”<sup>80</sup> And the pieces that they did sample were often fragmentary, unrecognizable samples that were looped and layered—the “one or two seconds of sound” that Miho Hatori discussed.<sup>81</sup> Chuck D describes the process of creating Public Enemy’s records as transforming sounds in part to disguise them, but primarily to “create a new sound out of the assemblage of sounds that made us have our own identity.”<sup>82</sup> The end result was hundreds of unrecognizable samples incorporated into their second album, *Fear of a Black Planet*.<sup>83</sup>

As part of the goal of early hip-hop was to transform obscure samples into an unrecognizable new sound, hip-hop artists themselves understood when sampling had gone too far. In MC Hammer’s acknowledgement that he should pay Rick James for the “Super Freak” sample used in “U Can’t Touch This,” he focused on how much of the song he had used: “I’m borrowing *enough* of his song that he deserves to be compensated.”<sup>84</sup> Without using the same language as the courts, it seems that early hip-hop artists had an implicit belief that *de minimis* samples were acceptable, while more recognizable or substantial copying required licensing. This convention of the musical genre of hip-hop has been obscured by the strict licensing requirements imposed by labels, exacerbated by the *Bridgeport* decision, making it impossible

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<sup>78</sup> MCLEOD & DICOLA, *supra* note 1, at 23.

<sup>79</sup> *Id.* at 66.

<sup>80</sup> MCLEOD, *supra* note 2, at 88.

<sup>81</sup> *See supra* note 2 and accompanying text.

<sup>82</sup> MCLEOD & DICOLA, *supra* note 1, at 23.

<sup>83</sup> MCLEOD, *supra* note 2, at 84.

<sup>84</sup> Joo, *supra* note 17, at 429(emphasis added).

to create records like *Fear of a Black Planet* today.<sup>85</sup> However, the circuit split and widespread criticism of the *Bridgeport* decision provide an opportunity for the music industry to reclaim the idea of *de minimis* sampling as non-infringing copying that does not need licensing, melding the community traditions of early hip-hop with the long-standing *de minimis* doctrine of copyright law.

ii. *A Fair Use Case Study: The Power of Industry Standards to Impact Practices*

This paper proposes the creation of industry best practices that provide an artist-friendly definition of *de minimis* sampling that does not require a license. This approach parallels the successful approach used by the American University Center for Media & Social Impact to define fair use within documentary filmmaking. Similar to music labels requiring complete clearance before releasing records, broadcasting and distribution companies for documentaries require that filmmakers are covered by Errors & Omissions (E&O) Insurance in order for their documentaries to be released.<sup>86</sup> The providers of E&O insurance at one time required clearance of all copyrighted or trademarked material appearing in the film,<sup>87</sup> regardless of the possibility that its use would be considered fair use. However, following the 2005 publication of the “Documentary Filmmakers’ Statement of Best Practices in Fair Use,” headed by Patricia Aufderheide and the Center For Media & Social Impact, documentary filmmakers have been able to take greater advantage of fair use rather than paying unnecessary licensing fees. In turn, E&O providers have required less strict copyright clearances, allowing for the release of films

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<sup>85</sup> MCLEOD & DICOLA, *supra* note 1, at 27.

<sup>86</sup> Winnie Wong, *Errors & Omissions & Rights, Oh My! A Guide to Protecting Your Film*, INT’L DOCUMENTARY ASS’N: DOCUMENTARY MAG. (Spring 2012), <http://www.documentary.org/magazine/errors-omissions-rights-oh-my-guide-protecting-your-film>.

<sup>87</sup> Pat Aufderheide & Peter Jaszi, “Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers,” CTR. FOR MEDIA & SOC. IMPACT (Nov. 2004), <http://www.cmsimpact.org/fair-use/best-practices/documentary/untold-stories-creative-consequences-rights-clearance-culture>. The requirement of exhaustive and detailed clearance for all potential copyright issues was often a prohibitive roadblock for independent filmmakers, who were often unable to keep up with rising costs. *Id.*

that would have been prohibitively expensive to clear.<sup>88</sup> The best practices for fair use for documentary filmmakers has been endorsed and used by organizations such as PBS, ITVS, and WGBH, accepted by all four major U.S. E&O insurance providers, showcased by the Copyright Society of the USA, and adopted into the business practices of Cablecaster IFC.<sup>89</sup> On a case-by-case basis, fair use claims grounded in the best practices have been accepted by cable companies such as HBO, Discovery Times, and the Sundance Channel.<sup>90</sup> Furthermore, several statements of best practices of fair use for other art forms, including poetry and dance, have also been published,<sup>91</sup> and neither the best practices for filmmakers nor any of the other fair use best practices have been challenged in court.<sup>92</sup> A similar “best practices” guideline for *de minimis* music sampling could have similar beneficial effects.

Until the *Bridgeport* decision is challenged in the Sixth Circuit or at the Supreme Court, the music industry can itself provide a set of guidelines for the treatment of music samples based on the *de minimis* doctrine. Similar to the Center for Media and Social Impact’s best practices for fair use, any of the music industry organizations, such as the Recording Industry Association of America (RIAA), the Recording Artists’ Coalition (RAC), American Federation of Musicians (AMF), or any others, could draft a “best practices” guideline for determining when licensing is required in music sampling, supporting the unlicensed use of *de minimis* samples.

Alternatively, as the *de minimis* doctrine is of concern to copyright attorneys and scholars outside the music industry, an organization such as the American Intellectual Property Law

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<sup>88</sup> Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELLECTUAL PROPERTY TODAY (October 2007), <http://cmsimpact.org/wp-content/uploads/2016/01/IPTodaySuccess.pdf>. Coincidentally, one of the films that was shown at Sundance Film Festival after using the fair use guidelines to justify its use of materials is entitled *Hip Hop: Beyond Beats and Rhymes*. *Id.*

<sup>89</sup> *Success of the Statement of Best Practices*, CTR. FOR MEDIA & SOC. IMPACT, <http://cmsimpact.org/resource/success-of-the-statement-of-best-practices/> (last visited Jan. 27, 2016).

<sup>90</sup> Aufderheide & Jaszi, *supra* note 88.

<sup>91</sup> *Success of Fair Use Consensus Documents*, CTR. FOR MEDIA & SOC. IMPACT, <http://cmsimpact.org/resource/success-fair-use/> (last visited Jan. 27, 2016).

<sup>92</sup> *Success of the Statement of Best Practices*, *supra* note 90.

Association (AIPLA), the Copyright Society, or a university program, could undertake to develop guidelines and seek endorsement from the music industry. Such guidelines could build on the Ninth Circuit's "recognizability" test, and present extensive research into both hip-hop's inherent notions of acceptable sampling and transformation, and what labels and commonly-sampled artists consider fair. Ideally, such research would result in a set of detailed, practical guidelines for determining what constitutes acceptably *de minimis* sampling, providing labels and musicians with a concrete guide to consult in determining whether a sample would be considered *de minimis*, or whether industry practice requires a license.<sup>93</sup> Additionally, an initiative could be developed to provide legal defense for musicians whose use of unlicensed samples complies with the best practices for *de minimis* sampling, similar to the current Stanford University Fair Use Project, which performs that service for filmmakers using fair use in accordance with best practices in lieu of copyright clearance.<sup>94</sup> In the face of the heavy criticism that the *Bridgeport* decision has received, it is possible that a best practices guide, created and adopted by the music industry, would persuade other circuits to follow the Ninth Circuit's acceptance of *de minimis* sampling, or even encourage the Sixth Circuit to reverse its previous decision, should further litigation arise.

Although music sampling does create revenue for musicians and music labels, the limitations that sampling requirements have placed upon hip-hop music have stifled creation within an entire genre of music, a genre that has proven to be very lucrative for the music industry. Based on the RIAA's list of albums that have been certified to reach platinum sales, over 136 hip-hop artists have reached that benchmark, selling over one million albums, for a

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<sup>93</sup> Aufderheide & Jaszi, *supra* note 88.

<sup>94</sup> *Id.*



total of 316 hip-hop albums that have reached platinum.<sup>95</sup> By encouraging artistic creation within a genre that has proven to create revenue for the music industry, the establishment of best practices for music sampling would result in greater revenue for the industry as a whole, making up for any revenue lost through the small number of samples that could, according to best practices, be used without licenses. Additionally, the restoration of the *de minimis* requirement for copyright infringement of sound recordings according to standards researched and adopted by the music industry itself would provide a more appropriate balance between the protection of copyrighted works and the fostering of creativity, in accordance with the purpose of copyright law, than the rule created by the Sixth Circuit, which weighs heavily against creators.

### CONCLUSION

Music sampling is an integral part of hip-hop, which, at its roots, is centered around creating new music from fragments of old, searching for the perfect beats and notes to weave together into a transformed piece. Although some producers took sampling too far, a large number of samples used by hip-hop producers are brief enough, and transformed enough, to be unrecognizable by the average listener, and thus *de minimis*, non-infringing uses. Although many of the samples used in these practices may have been protected by the *de minimis* doctrine, the Sixth Circuit decision in *Bridgeport* wrote it out of music copyright law, and the Ninth Circuit attempted to put it back in again, resulting in a patchwork of legal holdings about the status of *de minimis* sampling. The development of industry-created or industry-endorsed best practices for *de minimis* sampling would provide musicians with guidance in the midst of an unclear legal landscape, provide support for those musicians in case of legal issues, and serve to write the *de minimis* doctrine back into music copyright law, even without the reversal of *Bridgeport*.

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<sup>95</sup> Nathan S., “We Listed Every Rapper With a Platinum Album in Hip-Hop History,” DJBOOTH, <http://djbooth.net/news/entry/2015-10-14-rappers-platinum-albums-hip-hop-history> (last visited March 3, 3017).

