Little Bits Can’t Be Wrong: The De Minimis Doctrine in the Context of Sampling Copyright-Protected Sound Recordings in New Music

Christopher J. Norton*

ABSTRACT

The de minimis doctrine in copyright law precludes infringement claims in instances of trivial, unrecognizable copying. This has historically applied to every type of creative work with the unusual exception of sound recordings, thanks to a 2005 Sixth Circuit decision holding that any copying of a copyrighted sound recording, commonly known in musical production as “sampling,” is infringement. The Ninth Circuit’s 2016 decision in VMG Salsoul, LLC v. Ciccone threw the state of this doctrine into doubt, creating a circuit split by holding that the de minimis doctrine applies equally to sound recordings as to any other copyright-protected work. This paper advocates for a robust role for the de minimis doctrine in sound recording copyright law, in line with the VMG Salsoul Ninth Circuit case. It then proposes a two-step application of the doctrine in sound recording infringement cases: first in considering substantial similarity, and second in considering fair use.

DOI: https://doi.org/10.15779/Z38N00ZT4S

* J.D., University of California, Berkeley, School of Law. The author would like to thank Professor Pam Samuelson for her invaluable expertise and inspiration during the drafting of this article, and Professor Peter Menell for his guidance and encouragement in the study of copyright law, as well as the author’s family and above all his partner Keara Scott for their boundless support and generosity of spirit.
I. INTRODUCTION

The de minimis doctrine stems from the ancient legal maxim, *de minimis non curat lex*: the law does not concern itself with trifles. As applied in copyright law, the doctrine is founded on the principle that not all uses of copyrighted creative works in new works necessarily constitute infringement, unless the use is significant enough to be unfair to the copyright owner. For a de minimis based defense to succeed against an infringement claim, the secondary creator’s use of the original work must be insubstantial in relation to the copyrightable expression of the original work as a whole, and usually must be entirely unrecognizable to the average audience.

Historically, the de minimis doctrine has not differentiated between different types of copyrightable works or media. In the case of sound recordings, however, the applicability of the de minimis doctrine was unsettled until the Sixth Circuit’s 2005 decision in *Bridgeport Music, Inc. v. Dimension Films*.¹ In that case, the court held that any copying of a copyrighted sound recording for use in a new sound recording, commonly known in music production as “sampling,” is *per se* infringement, no matter how minor or insubstantial the sampling may be. The court came to that conclusion even though the de minimis doctrine has long been applied to musical compositions. The *Bridgeport* case remained the only decision on the matter at the appellate level for the subsequent decade until 2016 when the Ninth Circuit decided *VMG Salsoul, LLC v. Ciccone*.² In *Salsoul*, the Ninth Circuit explicitly repudiated the Sixth Circuit’s reasoning in *Bridgeport* and held that the de minimis doctrine applies to sound recordings, just as it does to other copyrightable creative works. This paper will examine this fresh circuit split regarding the de minimis doctrine within the

---

¹. 410 F.3d 792 (6th Cir. 2005).
². 824 F.3d 871 (9th Cir. 2016).
context of the evolving practices and realities that lie at the intersection of music and technology, two areas that consistently outpace the development of the relevant law and in which judges are notoriously poorly versed.

Since the advent of digital sampling in the 1980s and the rise of whole new types of music (such as hip hop, house, and techno), courts have generally failed to adequately comprehend or grapple with sampling. The Ninth Circuit’s Salsoul decision is a welcome change of pace, which, with some refinement, should stand as the law of the land instead of the Sixth Circuit’s rigid and ill-conceived Bridgeport rule.

This paper will assess how sound recording copyright law can and should remain flexible enough to accommodate new creative works built extensively on those that came before, as every creative work does. Part II surveys the history and philosophy behind the de minimis doctrine, showing it to be a core guarantor of the constitutional imperative that intellectual property exists “[t]o promote the Progress of Science and useful Arts.”3 The section also includes a brief history of digital sampling’s meteoric rise to prominence from the 1980s to the present, elucidating the legal and creative challenges at hand. Part III analyzes the new circuit split, demonstrating how the Ninth Circuit jurisprudence provides a better path forward. Part IV highlights the many problems with denying the application of the de minimis doctrine to sound recordings and focuses specifically on the modern music industry. Finally, looking forward, Part V proposes a robust dual role for the de minimis doctrine in copyright: first in the substantial similarity phase of the infringement analysis and then in the fair use affirmative defense to infringement.

II. THE HISTORICAL BACKDROP

II(a). Origins and traditional applications of the doctrine

The de minimis non curat lex maxim originally arose in the common law in 16th century England, and even earlier in some European civil law regimes, thus predating what is generally recognized as the first-ever copyright statute (England’s Statute of Anne, passed in 1710).4 The doctrine has been applied broadly across a wide variety of legal fields, such as contract and tort law, although courts’ application of the doctrine has been inconsistent in some areas, such as property, criminal, and constitutional law.5

Traditional manifestations of the doctrine in American copyright law can

5.  Id. at 949.
be found throughout the nation’s history. The earliest articulation of the de minimis doctrine in American case law may be the landmark 19th century case *Folsom v. Marsh*, in which Justice Story described the key doctrinal issue as whether “so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another[.]”

In 1926, the Second Circuit in *Dymow v. Bolton* used the de minimis doctrine to find in favor of a defendant playwright who had written a new play that allegedly ripped off several plot points from a script he was supposed to be translating from Russian into English. The panel, which included the great copyright jurist Judge Learned Hand, drew first on copyright law’s essential dichotomy between the underlying unprotected ideas and the protected expression of those ideas as a justification for its findings. Judge Hand articulated this core copyright doctrine in its most famous formulation as the idea-expression dichotomy. Most importantly for the purposes of this paper, however, the court held that even if the defendant did in fact take some elements of the copyrighted dramatic work’s protected expression rather than simply the underlying ideas, any such taking was too insubstantial to constitute infringement. The court concluded:

> [T]he copyright, like all statutes, is made for plain people; and that copying which is infringement must be something which ordinary observations would cause to be recognized as having been taken from the work of another. It requires dissection rather than observation to discern any resemblance here. If there was copying (which we do not believe), it was permissible, because this mere subsection of a plot was not susceptible of copyright.

The court’s holding in *Dymow* provides a foundation for one of the most classic de minimis tests courts invoke in copyright disputes: whether the average observer would recognize the copying of protected expression as an appropriation of another’s work (Part IV(b) will revisit this test in detail).

Over seven decades later, in *Ringgold v. Black Entertainment Television, Inc.*, the Second Circuit extensively assessed the various potential applications of the de minimis doctrine in the context of the substantial similarity and fair use

---

7. 11 F.2d 690 (2d Cir. 1926).
8. Id. at 691.
10. *Dymow*, 11 F.2d at 692 (citation omitted).
analyses, which are both of great relevance to the solution proposed in Part IV, and potential standalone defenses themselves. In *Ringgold*, a quilt maker sued the producers of a television show in which one of her copyrighted quilts appeared momentarily in the background of several scenes, amounting to less than 30 seconds in which the quilt was visible.12

The court treated the standalone conception of de minimis summarily because it rarely, if ever, shows up in court: the most obviously trivial instances of copying practically never generate legal action, since such lawsuits are not worth pursuing on the copyright holder’s part.13 As to the substantial similarity analysis, the court noted that the de minimis doctrine plays a vital role in assessing both the quantitative and qualitative aspects of substantial similarity.14 The court ultimately concluded that the multiple appearances of the quilt in the television show crossed the threshold from de minimis to actionable copying.15 The court took a dimmer view of the relevance of de minimis regarding the third factor in the fair use analysis, which involves the amount and substantiality of the portion of the copyrighted work used in relation to the whole work. The court noted that the third factor plays out on a continuum of substantiality, with no easily identifiable bright line between a de minimis use militating in favor of a fair use finding and a potentially infringing use that cannot be defended as fair.16 While conducting the fair use analysis for the immediate case, though, the court observed that the third factor requires courts to assess the amount and substantiality of the appropriated portion even when the de minimis threshold for actionable copying has been crossed.17

Judge Pierre N. Leval, a renowned copyright jurist of the Second Circuit, described the paradoxically vital, yet infrequently invoked role of the de minimis doctrine in copyright law in *Davis v. Gap Inc.*

The *de minimis* doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying. Nonetheless, it is an important aspect of the law of copyright. Trivial copying is a significant part of modern life. Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the de minimis doctrine, would technically constitute a violation of law.18

11. 126 F.3d 70 (2d Cir. 1997).
12. *Id.* at 73.
13. *Id.* at 74.
14. *Id.* at 75.
15. *Id.* at 77.
16. *Id.* at 75-76.
17. *Id.* at 80.
In the realm of musical compositions, as considered separately from sound recordings, the most relevant and current de minimis precedent is the Ninth Circuit’s decision in Newton v. Diamond.\textsuperscript{19} In that case, jazz flautist James Newton sued the Beastie Boys and their record label for infringement of a three-note flute pattern from Newton’s 1982 composition “Choir”\textsuperscript{20} that the rap group sampled in the song “Pass the Mic.”\textsuperscript{21} The Beastie Boys had properly licensed the right to sample the sound recording in which the flute pattern was embodied, but neglected to license the composition rights (perhaps thinking it unnecessary).\textsuperscript{22} Finding in favor of the Beastie Boys, the court held that the rappers’ use of the composition, as distinct from the use of Newton’s recorded performance, was de minimis because the brief and relatively simple segment of the composition the Beastie Boys used was neither quantitatively nor qualitatively significant when viewed in relation to the composition as a whole.\textsuperscript{23} The court also found that the average audience would not be able to recognize the appropriation in the Beastie Boys song.\textsuperscript{24} Thus, despite the high degree of similarity with the original recorded composition, the scope of the similarity was not substantial enough to support Newton’s infringement claim.\textsuperscript{25} This case was a landmark development in the history of sampling.

\section*{II(b). The History of Sampling}

The act of creating music necessarily involves building on previous artistic works, whether in the artist’s chosen medium or any other that may serve as influence. The weight and influence of aesthetic tradition and inherited expression inevitably shape and inform every creator who seeks to make something fresh and ostensibly “new.” In his landmark essay “Tradition and the Individual Talent,” the poet T.S. Eliot framed this fundamental truth:

\begin{quote}
[T]he historical sense compels a man to write not merely with his own generation in his bones, but with a feeling that the whole of the literature of Europe from Homer and within it the whole of the literature of his own country has a simultaneous existence and composes a simultaneous order . . . No poet, no artist of any art, has his complete meaning alone. His significance, his appreciation is the appreciation of his relation to the dead poets and artists. You cannot value him alone; you must set him, for contrast and comparison, among the dead.\textsuperscript{26}
\end{quote}

\begin{itemize}
\item \textsuperscript{19} 388 F.3d 1189 (2004).
\item \textsuperscript{20} JAMES NEWTON, CHOIR, on AXUM (ECM 1982).
\item \textsuperscript{21} BEASTIE BOYS, PASS THE MIC, on CHECK YOUR HEAD (Capitol Records 1992).
\item \textsuperscript{22} Newton, 388 F.3d at 1190-91.
\item \textsuperscript{23} Id. at 1195.
\item \textsuperscript{24} Id. at 1195-96.
\item \textsuperscript{25} Id. at 1196-97.
\item \textsuperscript{26} T.S. Eliot, The Sacred Wood: Essays on Poetry and Criticism 44 (1921),
\end{itemize}
In many forms of art, the act of referencing and recombining works of the past may be called “quotation,” “allusion,” “collage,” “bricolage,” or any number of terms that are not only accepted but well-respected; these acts have even been the basis for some of the most renowned creative works of all time. Without the free availability of such techniques, the entire body of modern and postmodern English-language literature, including Eliot’s own work such as “The Waste Land,” would have never been created. In music, however, the corresponding terms of “remix,” “mashup,” and, above all, “sampling,” remain dirty words in the eyes of many traditional musicians who came of age in the era preceding the advent of digital sampling. More importantly, they remain dirty in the eyes of industry gatekeepers who control the copyrights to the vast majority of musical sound recordings. To understand why, it is necessary to examine the history of sampling, the musicians who use samples, and how and why they do so.

The definitive text on sampling’s history, theory, and practice—Kembrew McLeod and Peter DiCola’s remarkable book Creative License: The Law and Culture of Digital Sampling—was published in 2011, roughly at the midpoint between the Sixth Circuit’s Bridgeport decision and the Ninth Circuit’s Salsoul decision. McLeod and DiCola locate the pre-digital roots of sampling in the 1970s, when dub reggae producers in Jamaica, such as Lee “Scratch” Perry and King Tubby, perfected their arcane but visionary processes of painstakingly assembling different versions of hit songs from their individual component instrument tracks using elaborate analog multi-track recording studio technology. Id.

During that same decade, Jamaican immigrants brought the island’s party culture of DJ battles featuring enormous sound systems facing off against one another to New York City, and specifically to the Bronx, where one such immigrant adopted the name DJ Kool Herc. Herc pioneered the style of isolating a dance song’s drum break on two copies of the same vinyl record, and extending it by playing one break after the other, back and forth across two turntables and a mixer. As the style spread, the innovations of DJs like Herc, Grandmaster Flash, Afrika Bambaataa, and many others blended with the upfront showmanship of MCs rapping over the extended drum breaks, and hip hop was born.

At the dawn of the 1980s, as hip hop flowered into a distinct art form and musical style of its own, technological advances gave rise to the invention of digital samplers.

These devices used computers, keyboards, and familiar components of existing analog recording technology to give users the power to digitally recapture preexisting recorded sounds from vinyl records, tape reels, or other sources and then manipulate those sounds in a range of ways. Early instruments, like the Fairlight CMI, were cumbersome, hard to use, and extraordinarily expensive, but as the decade progressed, more affordable and user-friendly samplers, such as the E-Mu SP1200 and the Akai MPC, became the backbone instruments of hip hop production.

In the years after digital samplers became widely available, an explosion of sample-based hip hop and other music followed. Aided by the fact that no one in the mainstream music industry (i.e. the copyright owners of the recordings that were being sampled) was paying much attention to hip hop at the time, producers began to experiment with more elaborate sample manipulation, including stitching and collage techniques. The late 1980s and early 1990s have since been recognized as the Golden Age of sampling, as DJs and producers ran wild with the limitless possibilities that sampling technology had opened up for them.28

The holy trinity of Golden Age sample-based hip hop is generally considered to include Public Enemy’s Fear of a Black Planet, produced by the Bomb Squad, the group’s own in-house production team; the Beastie Boys’ Paul’s Boutique, produced by the Dust Brothers; and De La Soul’s 3 Feet High and Rising, produced by Prince Paul. However, as hip hop artists broke through to mainstream audiences and began to sell records in tremendous numbers, the record industry began to take notice, and lawsuits followed. A flurry of copyright infringement lawsuits filed by major record labels against sampling artists in the early 1990s led to a rash of court decisions in favor of the labels, which in turn gave rise to a copyright licensing economy of “sample clearance” that looms over the production of, and market for, sample-based music today.29

However, every single player in the music business seemed to be caught by surprise at the turn of the millennium when the Internet changed every facet of the record industry and nearly destroyed all of the established industry players entirely. This occurred at the flash point when widespread broadband Internet adoption converged with Napster’s introduction of file-sharing to the listening public. In the wake of that cataclysm, the Recording Industry Association of America turned its attention to suing its own customers, and the big record labels consolidated their power as a means of survival. Everyone lost spectacular

28. See id. at 19-30.

amounts of money, and the sample clearance economy remained stultified despite the most promising opportunities musicians and their business counterparts may have ever had to reform the sample licensing process to everyone’s benefit.30

Despite these industry-wide failures, the Internet allowed for even more radical possibilities in the dissemination of unlicensed, unauthorized sample-based music on a non-commercial basis as rapidly evolving technology made the practice of sampling easier and cheaper than ever before. The mid-2000s saw mashup albums succeed wildly, most notably Danger Mouse’s The Grey Album, built entirely of blended samples of The Beatles’ White Album and Jay-Z’s The Black Album, and Girl Talk’s Night Ripper, built of samples of just about any and every corner of popular musical history. Both albums reached millions of listeners and secured their creators highly lucrative musical careers going forward, despite the albums never seeing a traditional commercial release or any authorized licensing of the underlying copyrights in the sampled source material. The stage was thus set for the first-ever decision at the circuit court level on whether an unlicensed sample of a sound recording in a new work could be considered de minimis.

III. THE CIRCUIT SPLIT

III(a). The Sixth Circuit’s Bridgeport decision

In 2005, the Sixth Circuit handed down its decision in Bridgeport Music Inc. v. Dimension Films,31 a case in which the owner of the sound recording copyright for Funkadelic’s song “Get Off Your Ass And Jam”32 sued the producers of a film that featured the rap group N.W.A.’s song “100 Miles And Runnin’,” which incorporated a four-second sample of the introductory guitar riff from the Funkadelic’s song.33 The court declared that the infringement analyses for musical compositions and sound recordings are not, and should not be, the same, thereby avoiding the application of the well-established Newton v. Diamond de minimis rule for musical compositions.34 The court wrote:

The music industry, as well as the courts, are best served if something approximating a bright-line test can be established. Not necessarily a “one size fits all” test, but one that, at least, adds clarity to what constitutes actionable infringement with

31. 410 F.3d 792.
32. FUNKADELIC, GET OFF YOUR ASS AND JAM, on LET’S TAKE IT TO THE STAGE (Westbound Records Inc. 1975).
34. Bridgeport Music, 410 F.3d at 799.
regard to the digital sampling of copyrighted sound recordings.\textsuperscript{35}

The court read Section 114 of the federal Copyright Act of 1976’s limitations on rights in a copyrighted sound recording to mean that “the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made.”\textsuperscript{36} The court claimed that this reading of the statute leads directly to a negative answer to the question at issue, which the court defined as, “[i]f you cannot pirate the whole sound recording, can you ‘lift’ or ‘sample’ something less than the whole[?]”\textsuperscript{37} In phrasing the question this way, the court placed its emphasis squarely on the thieving, immoral quality of the sampler’s behavior, rather than on the use of the sample itself.

The court trained its attention on the text of the Section 114(b) sound-alike exception to sound recording infringement, which indicated that a sound-alike recording must “consist entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”\textsuperscript{38} The court wrote that due to Congress’s inclusion of the word “entirely,” if there is even the smallest exact reproduction of the original recording in the new work, then the new work does not qualify for the infringement exception. The court wrote “[i]n other words, a sound recording owner has the exclusive right to ‘sample’ his own recording.”\textsuperscript{39}

In support of this interpretation, the court cited a range of dubious justifications, including the most notorious passage of the opinion: “To begin with, there is ease of enforcement. Get a license or do not sample. We do not see this as stifling creativity in any significant way.”\textsuperscript{40} The court asserted that the market would automatically ensure that licensing prices remained reasonable, an assertion that was provably false at the time the court made it and has been proven false time and again in the decade since.\textsuperscript{41} As McLeod and DiCola wrote, the Sixth Circuit “did in fact rely on ‘mere conjecture’ in Bridgeport” and “[t]he economic evidence we have collected in this book significantly contradicts the Bridgeport court’s economic presumptions.”\textsuperscript{42} Finally, because “sampling is

\textsuperscript{35} Id. at 799.
\textsuperscript{36} Id. at 800.
\textsuperscript{37} Id.
\textsuperscript{38} Id.; See also 17 U.S.C. § 114(b).
\textsuperscript{39} Id. at 801.
\textsuperscript{40} Id.
\textsuperscript{41} See e.g., KEMBREW McLEOD & PETER DICOLA, supra note 27; see also Mike Suppapola, Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings, 14 TEX. INTELL. PROP. L.J. 93, 130 (2006).
\textsuperscript{42} McLEOD & DICOLA, supra note 27, at 224.
never accidental,” the court incorrectly imputed a presumption of wrongdoing to any and all samplers, in contrast to “the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before.”43 By emphasizing the sampler’s act of “taking another’s work product,” the court framed the issue as one of misappropriation.44

The court continued to argue against the applicability of the de minimis doctrine to sound recordings, despite its applicability to compositions. The court opined that the two types of work are different by their very nature, and characterized the act of sampling a recording as “a physical taking rather than an intellectual one,”45 another bare assertion that is simply wrong in both artistic and philosophical terms.46 The court made reference to some vague, unspecified “mental, musicological, and technological gymnastics that would have to be employed if one were to adopt a de minimis or substantial similarity analysis” for sound recordings, casting the shadow of a convenient boogeyman.47

However, the court immediately followed that unsubstantiated claim by averring: “considerations of judicial economy are not what drives this opinion. If any consideration of economy is involved it is that of the music industry. As this case and other companion cases make clear, it would appear to be cheaper to license than to litigate.”48 Here, the court essentially held that defining the relationship between record labels and artists was outside of the realm of the judiciary, that record companies and artists know what is best for each of their own interests, and that they will be fine working it out for themselves.49

Understandably, scholars, legal practitioners, and artists across the board (with the natural exception of the large record labels) have excoriated the Bridgeport decision since the moment it was handed down. Moreover, lower courts outside the Sixth Circuit have frequently declined to follow the Sixth Circuit’s position.50

William Patry, author of one of the leading copyright treatises, has

43. Bridgeport Music, 410 F.3d at 801.
44. Id.
45. Id. at 802.
46. See e.g., MCLEOD & DiCOLA, supra note 27, at chapter 2 (discussing historical, aesthetic, and technological development of sampling).
47. Bridgeport Music, 410 F.3d at 802.
48. Id.
49. Id. at 804.
variously called Bridgeport “abysmal,” 51 “one of the most wrong-headed copyright opinions in 300 years of case law,” 52 and “a disturbing, inexplicable departure from the de minimis non curat lex doctrine.” 53 Patry has even accused the Sixth Circuit of “continuing to single-handedly destroy the field of musical copyright” while assessing a subsequent infringement lawsuit Bridgeport Music filed against UMG Recordings over a George Clinton song. 54 There, Bridgeport alleged a new song infringed on Clinton’s pronunciation of the word “dog” in the song “Atomic Dog.” 55 According to Patry, “between Dimension Films and UMG Recordings, the Sixth Circuit has managed to rewrite and bungle 300 years of copyright law, in the process creating a precedent that will provide a reward for copyright trolls, and which has itself wreaked incalculable havoc on the music industry.” 56

McLeod and DiCola suggest several possible responses to Bridgeport in their own consideration of the de minimis doctrine’s utility in sampling cases. They posit that Congress could revise Section 114(b) of the Copyright Act to clarify its meaning; courts outside the Sixth Circuit could decline to follow Bridgeport and instead adjudicate the de minimis inquiry on a case-by-case basis. 57 Alternatively, according to McLeod and DiCola, the law could require some kind of bright-line de minimis threshold, but leave it up to the music industry to hash out the specifics. 58 Patry, McLeod, and DiCola will likely find solace and vindication in the Ninth Circuit’s recent repudiation of the Sixth Circuit’s Bridgeport reasoning in VMG Salsoul, LLC v. Ciccone.

III(b). The Ninth Circuit’s VMG Salsoul decision

In VMG Salsoul, LLC v. Ciccone, 59 the Ninth Circuit considered an even less substantial instance of sampling than the Sixth Circuit did in Bridgeport. Record producer Shep Pettibone sampled a single quarter-note played by the horn section in the disco song “Ooh I Love It (Love Break),” 60 which he produced for the Salsoul Orchestra in the 1980s, and digitally manipulated it for Madonna’s 1990 song “Vogue.” 61 The “Love Break” horn sample used in “Vogue” lasted for less than a quarter of a second. 62 The Ninth Circuit affirmed

51. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:163 (Mar. 2017 Update).
52. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:209 (Mar. 2016 Update).
53. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:61 (Sept. 2017 Update).
54. 3 PATRY, supra note 52, § 9:209.20.
56. 3 PATRY, supra note 52, § 9:209.20.
57. See McLeod & DiCola, supra note 27, at 232-34.
58. Id.
59. 824 F.3d 871 (9th Cir. 2016).
60. SALSOUl ORCHESTRA, OOH, I LOVE IT (LOVE BREAK), on THE SALSOUl ORCHESTRA (Salsoul Records 1983).
61. MADONNA, VOGUE, on I’M BREATHLESS (Sire Records 1990).
62. Salsoul, 824 F.3d at 874.
the district court’s finding in favor of Pettibone and Madonna, ruling, “as a matter of law, a general audience would not recognize the brief snippet in Vogue as originating from Love Break.”63 But the court went even further, writing explicitly: “[L]ike the leading copyright treatise and several district courts—we find Bridgeport’s reasoning unpersuasive.”64 The Ninth Circuit then held that the de minimis doctrine applies to infringement allegations over sound recordings and samples “just as it applies to all other copyright infringement actions.”65

The Ninth Circuit approvingly cited the rule it laid down in Newton v. Diamond (discussed in Part II(a) supra) that an unauthorized use of a copyrighted work is de minimis “only if the average audience would not recognize the appropriation.”66 The court quickly disposed of the composition copyright infringement claim in “Love Break,” which it found to be precluded by the de minimis doctrine. It then turned to the sound recording copyright infringement claim for a more detailed assessment of the sampling at issue and the troubling implications of Bridgeport. In deciding that no reasonable jury would expect an average audience to recognize the “Love Break” horn hit in “Vogue,” the Ninth Circuit focused on pragmatic assessments of the Salsoul Orchestra and Madonna recordings themselves, noting, “[t]hat common-sense conclusion is borne out by dry analysis.”67 To reinforce its own assessments of the length, prominence, and recognizability of the horn sample, the Ninth Circuit noted “a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job.”68 This battle of experts approach is much more practical than the Sixth Circuit’s vague, circular and self-serving policy arguments in Bridgeport, which barely even touched on the actual Funkadelic and N.W.A. recordings that were before the court in that case.

Turning to the Bridgeport decision itself, the Ninth Circuit rejected “[t]he rule that infringement occurs only when a substantial portion is copied is firmly established in the law.”69 The court cited historical precedent supporting that rule, ranging from the 1841 opinion in Folsom v. Marsh (discussed in Part II(a) supra) to present day cases. It then turned to the statutory language of the Copyright Act, specifically rebutting the Bridgeport court’s reading of Section 114(b), which the Sixth Circuit relied upon as its only textual argument. The Ninth Circuit held:

63. Id.
64. Id.
65. Id.
66. Id. at 878.
67. Id. at 880.
68. Id.
69. Id.
We ordinarily would hesitate to read an implicit expansion of rights into Congress’ statement of an express limitation on rights. Given the considerable background of consistent application of the de minimis exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule. 70

Further, the Ninth Circuit accused the Sixth Circuit Bridgeport panel of ignoring the Copyright Act’s statutory structure, Section 114(b)’s express limitation on the rights of a copyright holder, and the relevant legislative history.71 Diving further into the Bridgeport court’s reasoning, the Ninth Circuit wrote: “As pointed out by Nimmer, Bridgeport’s interpretive method ‘rests on a logical fallacy.’ A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances.”72

The court then dismantled Bridgeport’s trio of facile arguments that were based on the Sixth Circuit’s misunderstanding of the nature of sound recordings. First, the court held that the possibility of a “physical taking” exists with respect to many other kinds of artistic works, for instance photographs, to which the de minimis rule applies.73 Second, the court found that even if sound recordings are indeed qualitatively different from other copyrighted works, and, as such, could possibly need their own separate infringement rule, any such theoretical difference does not mean that Congress actually adopted a different rule for sound recordings.74 Third, the court held that the Sixth Circuit’s distinction between a “physical taking” and an “intellectual taking” is irrelevant.75 In a vitally important acknowledgement of the underlying justifications for the United States copyright system, the Ninth Circuit wrote: “[T]he Supreme Court has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and not the ‘fruit of the [author’s] labor.’”76

Given the freshness of the Salsoul decision, the practical consequences of the Ninth and Sixth Circuit split have yet to be seen. As the next section demonstrates, however, Salsoul provides great promise moving forward for a jurisprudence that is based in the realities of musical production, as technology continues to make it easier to sample preexisting recordings in novel ways.

70. Id. at 883.
71. Id. at 882-84.
72. Id. at 884.
73. Id. at 885.
74. Id. at 884.
75. Id. at 885.
76. Id. (citing Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991)).
IV. MODERN IMPLICATIONS AND HOPE FOR THE FUTURE

IV(a). The Legal, Economic, and Creative Quagmire

The prohibitive costs and difficulties of licensing even the tiniest sample of a copyrighted sound recording under the Bridgeport regime for all parties involved in licensing transactions have been well documented. Donald Passman, author of the definitive guidebook to the music industry for musicians, and one of the most prominent artist-side music attorneys, has called the Bridgeport decision and its adherents “scary enough that everyone now handles the clearance of samples with white velvet gloves.”77 His best advice to musicians is the following: “The lesson in all this is that putting a sample in your record is serious business. So think carefully about what it means. A moment of pleasure can mean a lifetime of pain.”78

McLeod and DiCola present compelling evidence in Creative License that Bridgeport’s rigid, coercive rule mandating a license for every sample, backed by the threat of massive infringement damages if one neglects to do so, is failing every participant in the sample clearance system. For instance, they have determined that for two of the three greatest albums from the Golden Age of sampling (described in Part II(b) supra), Public Enemy’s Fear of a Black Planet and the Beastie Boys’ Paul’s Boutique, it would be so expensive to clear and license every sample used that the albums could not be made or released today. Based on real sales figures, which are well over $1 million for each album, and the hundreds of known samples used on each album (which is inevitably only a portion of all the samples used, many of which are unidentifiable after the fact), McLeod and DiCola project that Fear of a Black Planet would lose Public Enemy about $6.8 million and Paul’s Boutique would lose about $20 million if they were made, cleared, and released today.79 Both groups of artists would fall further into debt with every new copy of the records sold.

These economic roadblocks continue to plague musicians making sample-based music today. DJ Shadow, whose 1996 debut album EndtroducingFalse.80 is generally recognized as the first record created exclusively from samples of preexisting records, said of sample clearance in a 2012 interview with PopMatters: “Unfortunately there are many examples in my catalog of judgment calls I’ve made that I ended up having to hassle with or remain uncleared to this day. That’s part of the nature of what I do unfortunately. I wish I could clear

77. Donald S. Passman, All You Need to Know About the Music Business 361 (9th ed. 2015).
78. Id. at 362.
79. MCLEOD & DICOLA, supra note 38, at 201-12.
80. DJ SHADOW, ENDTRODUCING. (Mo’ Wax Recordings 1996).
everything but it literally is impossible." Any artist who relies heavily or exclusively on sampling in their own music faces similar difficult choices: They can pay exorbitant license fees and high transaction costs to make the music they want to hear legally—if they can even locate the copyright owner of the sample source at all—and potentially lose money on their own music, or, like Danger Mouse and Girl Talk (discussed in Part II(b) supra), they can sample without permission, distribute their work non-commercially or illegally on the back channels of the Internet, and hope to gain enough of an audience to build a musical career in some other way, such as through touring extensively.

The current sample clearance system is quite beneficial for only one group of music industry participants: The entrenched rights holders of large legacy catalogs of popular sound recordings and there are precisely three of them. Universal Music Group, Warner Music Group, and Sony Music Entertainment represent the consolidation of the wreckage of the record business that survived in the post-Napster era. According to many estimates, this triumvirate controls roughly two-thirds or more of all copyrighted sound recordings in existence." Accordingly, these are the main culprits in the economic, legal, and artistic morass of sampling culture. When the only choices for an artist are to get a license, to not sample at all, or to sample illegally at risk of infringement damages, the major labels can, and do, sit atop their heap of master recordings and hold out on samplers until they get the price they desire, or simply just say no to all comers who request permission.

Today, the major labels are pessimistic about the future of the music industry in the Internet era. This is despite the fact that, thanks to the explosion of streaming music, 2016 saw the industry reap its greatest financial rewards since its financial high-water mark in the late 1990s, immediately before Napster’s debut. Artists, meanwhile, are being squeezed tighter by the fractional royalty percentages they receive from new revenue sources like streaming services. As for the artists who sample, they remain at the mercy of the exact same business interests that nominally exist to support them. But there are good reasons for hope, and the decision in Salsoul is one of them. The next


section will articulate a clear application of the de minimis doctrine to sound recordings and sampling based on the Salsoul decision that could potentially open up breathing room for the creativity that the current sample clearance and licensing system is stifling.

IV(b). A Path Forward

This paper proposes a two-step application of the de minimis doctrine in evaluating sampling claims, rooted in average audience recognition—the most sensible and frequently invoked de minimis test. First, courts should conduct a substantial similarity analysis, and then, if that analysis fails to negate the infringement claim, courts should apply the four-factor balancing test for transformative fair use.

Nimmer endorses a traditional role for the de minimis doctrine in sound recording cases at the substantial similarity phase, writing: “The inquiry should remain whether the sampled portions are substantially similar to plaintiff’s work. If so—but only if so—then liability should result.” To refine this approach for sound recording sampling purposes, courts analyzing substantial similarity should rely on ordinary observation methods of the contested sound recording. If “[i]t requires dissection rather than observation to discern any resemblance,” as in Dymow, and especially if an expert witness such as a professional musicologist is unable to discern the appropriation, as in Salsoul, then the sampling must be de minimis and there can be no finding of infringement. While this may require a little more work for courts than the Bridgeport bright-line rule, such work is closer to “dry analysis,” as the Ninth Circuit characterized it, than the “mental, musicological, and technological gymnastics” that the Sixth Circuit invoked. This test is not only the most straightforward option available—specifically for sound recordings beyond the Bridgeport rule—but also the simplest option for judges to apply, regardless of how limited their own personal knowledge of music may be.

If the sample fails to pass muster as de minimis in the substantial similarity phase of the infringement determination, then the court must revisit the possibility of the sample being de minimis because of fair use. A sample is de minimis when it is insignificant compared to the whole of the original work. For

84. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (Matthew Bender, Rev. Ed).
85. Dymow, 11 F.2d at 692.
86. Salsoul, 824 F.3d at 880.
87. Id.
88. Bridgeport, 410 F.3d at 802.
89. But see NIMMER, supra § 13.03[E] (expressing skepticism of some applications of the average audience test)
fair use, courts apply a four-factor balancing test considering the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market value of the original work.

Nimmer and others have argued that the traditional de minimis doctrine is related but not quite apposite to the third fair use factor—the amount and substantiality of the portion used. 90 This is partially because if a sample was found to cross the de minimis threshold into infringement during the substantial similarity analysis, then the amount and substantiality factor would seem to automatically weigh against a finding of fair use. As Nimmer writes:

This issue of “amount and substantiality” relates to the previously discussed matter of “substantial similarity.” Of course, in order even to reach the stage at which the affirmative defense of fair use comes into play, plaintiff must already have demonstrated substantial similarity. Therefore, this factor analytically requires more than that plaintiff show the amount appropriated is substantial, as that showing will never be lacking when fair use is actively contested.91

Nonetheless, in the context of the modern transformative fair use determination, fragmentary and less-substantial uses should still be found to favor fair use even when the de minimis infringement threshold is crossed. As the Supreme Court explained in the definitive modern fair use case, *Campbell v. Acuff-Rose Music Inc.*, which firmly established the power of transformative use, the four factors must not be “treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”92 Accordingly, in considering the third factor, a fragmentary amount and substantiality of use that is too significant to defeat the substantial similarity analysis on de minimis grounds should still be a highly relevant consideration in determining whether a use is transformative. Nimmer cites as a useful example the Eleventh Circuit’s identification of a “more nuanced” inquiry into the third factor, focusing on “whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution.”93

Transformative use is the key to the fair use doctrine’s relevance in the Internet era, as technology enables ever-expanding types of uses for copyrighted

90. *See NIMMER supra § 13.05[A][3].
91. *Id.*
93. *NIMMER supra § 13.05[A][3] (quoting Peter Letterese & Assocs. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1314 n.30 (11th Cir. 2008)).
works that were never before imaginable, and as artists breathe new life into old
works with the requisite spark of originality. Sometimes sampling artists can
even reinvigorate the market value of the initial works or create entire new
markets for original works in the process, rather than detracting from their value
or supplanting the market for the original, all of which is relevant to the fourth
fair use factor as well. 94 Congress consistently fails to keep pace with these
trends, so the courts must make up the ground that Congress has ceded. The
transformative fair use analysis is a manifestly appropriate tool to deploy in that
pursuit. Two precedents support this two-step approach to the de minimis
determination for sample-based music: the Newton v. Diamond 95 musical
composition quantitative and qualitative de minimis precedent and the
substantial similarity and fair use analyses in Ringgold v. Black Entertainment
Televisi on, the quilt infringement case. 96 The Ringgold court’s sequential
consideration of the role of the de minimis doctrine, first in substantial similarity
and second in fair use, is worth emulating. Some commentators have argued, in
contrast to the court’s holding in Ringgold, that there is a proper and valuable
role for a standalone de minimis defense to infringement. 97 However, Nimmer
believes the doctrine should be confined to its roles in the substantial similarity
and fair uses analyses, and this paper concurs with him. 98 As Judge Leval and
the Ringgold court have both pointed out, instances of infringement so obviously
trivial on their face as to warrant a peremptory dismissal on de minimis grounds
alone, without either a full substantial similarity or fair use analysis, do not make
it to court in the first place. 99

To put this proposed two-step approach to de minimis sampling in
perspective, it is useful to consider its potential application to tangible examples
of the work of some of the leading lights of sample-based musical production.
The minimal techno producer Axel Willner, who records and performs as The
Field, has carved out a distinct aesthetic identity through his practice of chopping
up samples into miniscule fragments, rendering it impossible to discern that they
are samples at all, let alone samples of recognizable songs. The fragments sound
more like individual notes played on a synthesizer than like pieces of preexisting
songs. But in many such songs, built on dozens of fragments artfully snipped,

94. See, e.g. McLeod & DiCola, supra at 98-101 (discussing sampling’s capability to reanimate cultural history).
96. 126 F.3d 70 (2d Cir. 1997), discussed in Part II(a) supra. See also Brett I. Kaplicer, Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples, 18 Cardozo Arts & Ent. L.J. 227 (2000).
97. See e.g., Inest, supra note 4.
99. See Davis, 246 F.3d 152; see Ringgold, 126 F.3d at 74.
rearranged, and reconstituted into his distinctive style, he often suddenly drops a recognizable, longer snippet of the sample’s source material at the very end of the song. In doing so, he tips his hand as to the obfuscated source of the sounds he deploys and the skill it takes to transform that source into something wholly fresh and unrecognizable.

For instance, on The Field’s 2007 album From Here We Go Sublime, the song “A Paw In My Face” pulls off this trick to miraculous effect with Lionel Ritchie’s smooth R&B standard “Hello.”\textsuperscript{100} The song “From Here We Go Sublime”\textsuperscript{101} does the same with the Flamingos’ doo-wop classic “I Only Have Eyes For You,” and the song “Over The Ice” uses Kate Bush’s “Under The Ice” the same way.\textsuperscript{102} The fragmentary sampling that comprises the bulk of each song would unquestionably pass the proposed average audience de minimis test at the substantial similarity phase. When the recognizable version of each sample drops in at the end of each song, though, the substantial similarity de minimis threshold for infringement would certainly be crossed. But it is the juxtaposition of the two sample uses that lends The Field’s reworking of the samples its unique aesthetic value and originality, and that juxtaposition provides a compelling case for the need for the secondary de minimis-related determination of transformative use in each case. In this way, a single exceptionally well-constructed sample-based song can simultaneously implicate both steps of the de minimis two-step approach, though most sample-based music will likely only implicate one of the steps.

Similar examples of this double de minimis artistic escape hatch from infringement claims can be seen in the work of the late J Dilla, considered by many to be the greatest sample-based music producer in history. His 2006 album, Donuts, composed on his deathbed and released three days before his passing, does the same thing The Field does many times over, but in the opposite order: Dilla frequently starts a song with a lengthy, unaltered sample of his source material, and then suddenly chops it up into miniscule, single-note component pieces, rearranging those slices into an entirely new structure and creating original melodies, harmonies, and rhythms in the process.\textsuperscript{103} The Donuts track “Don’t Cry” is a prime example of Dilla’s adroit touch with a sampler and masterful compositional technique.\textsuperscript{104} The track has been extensively broken down and analyzed by numerous Dilla enthusiasts on the Internet.\textsuperscript{105} One such enthusiast wrote an entire essay about his attempts to reconstruct “Don’t Cry”

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{100.} The Field, A PAW IN MY FACE, on FROM HERE WE GO SUBLIME (Kompakt 2007).
\item \textsuperscript{101.} The Field, FROM HERE WE GO SUBLIME (Kompakt 2007).
\item \textsuperscript{102.} The Field, OVER THE ICE, on FROM HERE WE GO SUBLIME (Kompakt 2007).
\item \textsuperscript{103.} J DILLA, DONUTS (Stones Throw Records 2006).
\item \textsuperscript{104.} J DILLA, DON’T CRY, on DONUTS (Stones Throw Records 2006).
\item \textsuperscript{105.} See e.g., WhoSampled, http://www.whosampled.com/J-Dilla/producer (last visited March 25, 2018).
\end{itemize}
\end{flushleft}
from its original source material, the Escorts’ 1974 song “I Can’t Stand (To See You Cry),” which is actually a cover itself, and his even greater appreciation for Dilla’s artistic mastery of the form that resulted. The most viscerally enjoyable Dilla-ology to date also deconstructs “Don’t Cry” and deploys it as raw material in a web-based interface. This allows viewers to use their own computer keyboards to trigger each slice of “I Can’t Stand (To See You Cry)” that Dilla used to build his new song, giving the viewer the option to either attempt to match Dilla’s deft touch or create something completely original from the same component pieces. This is a quintessential manifestation of sampling fragments of a sound recording that should be considered de minimis on an individual basis, but also cohere into a transformative and original unitary whole.

V. CONCLUSION

The novelist and essayist Jonathan Lethem’s 2007 riposte to the enemies of sampling in any guise, “The Ecstasy of Influence: A Plagiarism,” is composed entirely of sentences and passages lifted from preexisting written works. Lethem puts a postmodern spin on T.S. Eliot’s conception (cited in Part II supra) of the relationship between the artist creating new work and the entire body of art that came before:

[A]rtists, or their heirs, who fall into the trap of attacking the collagists and satirists and digital samplers of their work are attacking the next generation of creators for the crime of being influenced, for the crime of responding with the same mixture of intoxication, resentment, lust, and glee that characterizes all artistic successors. By doing so they make the world smaller, betraying what seems to me the primary motivation for participating in the world of culture in the first place: to make the world larger.

Making the world larger, richer, and better through the act of creation is the explicit reason the Constitution authorizes Congress to enact copyright law in the first place. The Article I, section 8, clause 8 directive to “promote the Progress of Science and the useful Arts” is not to be discounted as merely a vague or intangible philosophical ambition, nor as a justification to grant monopoly power to creators whose work necessarily stands on the shoulders of those who came before them. It is the central reason we allow intellectual property rights to subsist in any original work of creative expression at all, in a nation that at its

best moments has always been defined by ingenuity, inspiration, and relentless collaborative progress.

In keeping with that constitutional mandate, the proposed de minimis two-step approach to sampling infringement claims, built on the Ninth Circuit’s *Salsoul* rule and elucidated in Part IV(b), should be the law of the land if and when the Supreme Court considers the circuit split for a more permanent resolution. The Sixth Circuit’s artistically bankrupt *Bridgeport* maxim of “[g]et a license or do not sample” is not merely smug, facile, and wrongheaded: it is potentially unconstitutional. More importantly, though, it is fundamentally un-American.

The United States itself is a collage, a *Paul’s Boutique* of polity, composed of people and ideas sampled from across the globe and the whole of human civilization, all forged into a flawed yet beautiful unitary whole, built on another ancient legal maxim: *E pluribus unum*. Our nation of dreamers, strivers, and creators deserves better.