"GO WITH THE FLOW?" SHOULD MADONNA'S *VOGUE* SET THE NEW NORMAL FOR SOUND RECORDING COPYRIGHT TREATMENT NATIONWIDE?

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"Talent imitates, genius steals." -*Picasso, Oscar Wilde, T.S. Eliot*

I. INTRODUCTION

As stylistic preferences and expressive methods have changed over time, the music industry has undoubtedly evolved, and consequently transformed our popular culture. Particularly, in recent years, the industry has become increasingly tech-centric.[1] One of the primary, and perhaps most legally concerning trends has been that of taking previously released songs, or bits of songs, and reworking and branding them as original products.[2] This practice dates back to the 1960s,[3] and has been deemed "sampling."[4] However, it was not until the late 1970s and early 1980s that sampling "exploded" thanks to its prevalence in hip-hop.[5]

Across the music industry, most professionals agree that it takes certain talent to sample a song and effectively use it in a creative, new way.[6] Additionally, it is indisputable that the practice of sampling has played a predominant role in shaping the genre of hip-hop.[7] However, some

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[1] Jesse Kirshbaum, *6 Top Music Marketing Trends for 2016*, HYPEBOT (Jan. 4, 2016), http://www.hypebot.com/hypebot/2016/01/6-music-marketing-trends-in-2016-draft.html.

[2] Ian Paul Byamugisha, *The Demise of Creativity in the Music Industry*, PPCORN, http://ppcorn.com/us/the-demise-of-creativity-in-the-music-industry (last visited Sept. 11, 2017).

[3] Jane McGrath, *How Music Sampling Works*, ENTERTAINMENT: HOW STUFF WORKS, http://entertainment.howstuffworks.com/music-sampling.htm (last visited Sept. 11, 2017).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

commentators within the music industry have expressed a growing concern that sampling will inevitably stifle creativity and innovation.[8] Others have expressed precisely the opposite, claiming that strict rules against sampling will make it more difficult for beginner, nonprofessional artists to produce original works such as "mash-ups," which will in turn stifle creation.[9] Thus, there has been much controversy recently regarding artists' rights to sample.[10] How much can an artist sample without receiving a license? Can they sample at all?

The inconsistency in courts' answers to these questions has recently been recast into center stage.[11] This article aims to analyze the two main stances courts have taken regarding the right to sample, which differ in regards to their application of a de minimis exception to sound recording copyright infringement. Part II will discuss a brief history of copyright law regarding sound recordings. Part III will then elaborate on the recent split between circuits regarding these issues by first explaining the Sixth Circuit's holding in *Bridgeport Music, Inc. v. Dimension Films*, and second explaining the Ninth Circuit's more recent holding in *VMG Salsoul, LLC v. Ciccone*. Part IV will emphasize the necessity of national uniformity regarding copyright protection. Finally, Part V will discuss possible solutions to the current disparity, and will propose that the *VMG* holding, which does apply a de minimis exception to copyright infringement in sound recording contexts, should be adopted nationwide.

II. BRIEF HISTORY

It is fair to say that copyright law within this area of the music industry has been quite tumultuous. The evolution of music and the interplay of technological advances have left many wondering how exactly to treat artists' rights when it comes to musical copyrights, particularly sound recordings.[12] Because sound recordings are somewhat unique, their legal protections diverted from general copyright law.[13] Their histories are discussed below.

[8] *E.g.*, Byamugisha, *supra* note 2.

[9] *E.g.*, William W. Fisher III, *Recalibrating Originality*, 54 HOUS. L. REV. 437, 460 (2016).

[10] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877–78 (9th Cir. 2016).

[11] *See, e.g.*, *id.*

[12] *See id.* at 886.

[13] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 804 (6th Cir. 2005).

A. General Copyright Law

In general copyright law, it is well settled that proof of actual copying alone is insufficient to establish copyright infringement.[14] To establish an infringement claim, a plaintiff must prove that his or her copyrighted work has been utilized without a license, and that the copying of the work was greater than de minimis.[15] In other words, the plaintiff must prove that the user has copied to an unfair extent.[16] Typically, this is done by proving that an average listener would recognize the copied bit in the new work as a piece from a previous work.[17] If the average person would not recognize the piece, the use of the copyrighted work is de minimis and does not constitute infringement.[18] Although this analysis is somewhat fluid, common considerations in the application of the de minimis exception are: (1) the size and type of the harm done by the legal violation; (2) the cost of adjudicating the claim; (3) whether the application of the de minimis exception would materially frustrate the purpose of the legal obligation in question; (4) whether application of the exception would have a significant effect on the legal rights of third parties; and (5) the intent of the accused wrongdoer.[19] This application of copyright law is pertinent in nearly all contexts, including literary works, musical works, dramatic works, and choreographic works.[20]

The purpose of the de minimis consideration is clear; primarily, it functions to ensure that judicial resources are not wasted on petty or unimportant disputes.[21] Copyright law aims to incentivize artists to create original works.[22] By allowing creators to benefit from the fruits of their labor, the law fosters somewhat of a rewards system.[23] Creators, by obtaining a copyright, receive exclusive rights and control over their work's

[14] *VMG Salsoul*, 824 F.3d at 877.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 878.

[18] *Id.*

[19] Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 951–55 (2006).

[20] 17 U.S.C. § 102(a) (2012).

[21] Inesi, *supra* note 19, at 948.

[22] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

[23] *See* Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 191 (2004).

reproduction, derivative works, distribution, performance, and public transmission.[24] However, if a new expression or variation of a previous work is not recognizable to the average person, it is unnecessary to provide the creator with exclusive rights, because doing so does not advance copyright law's goal of incentivizing creation.[25] It is critical to understand that copyright protects the expression, not the creator's idea behind the expression.[26]

B. The Uniqueness of Sound Recordings

Sound recordings are products distinct from the musical compositions behind them.[27] Therefore, when an artist obtains a copyright for a musical composition, it does not protect the sound recording; similarly, obtaining a copyright for the sound recording does not protect the musical composition.[28] Sound recordings are therefore treated differently and are given distinct mention within the law.[29] However, this distinction did not become widespread until 1972, after Congress amended the Copyright Act by making it possible to copyright the sound recording of a copyrighted work.[30] Prior to 1971, many states had enacted statutes barring the creation of unauthorized music recordings in response to an increase in copying, which was permissible under the law at the time due to the 1908 Supreme Court holding in *White-Smith Publishing v. Apollo*.[31] In *White-Smith*, the Supreme Court stated that player-piano rolls[32] were not protected or limited by the current federal copyright statute.[33] Therefore, the creation and distribution of player-piano rolls of copyrighted works was not considered

[24] *See id.* at 192–93.

[25] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881–83 (9th Cir. 2016).

[26] 17 U.S.C. § 102(b) (2012).

[27] Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2004) (citing 17 U.S.C. §§ 102(a)(2), (7)).

[28] *Id.*

[29] *See* 17 U.S.C. § 114 (2012).

[30] Edward B. Marks Music Corp. v. Colo. Magnetics, Inc., 497 F.2d 285, 289 (10th Cir. 1974).

[31] 136 AM. JUR. *Trials* § 33 (2014).

[32] A "piano roll" was a new technology defined as "a roll of paper containing perforations such that air passing through them actuates the keys of a player piano." *Piano Roll*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001). This type of technology was comparable to a sound recording. 136 AM. JUR. *Trials* § 33.

[33] 136 AM. JUR. *Trials* § 33.

copyright infringement.[34] As a result, sound recordings, which were treated similarly, did not receive protection until various state laws and the subsequent Copyright Act were passed.

Recently, there has been much confusion surrounding the issue of sound recordings' treatment under copyright law.[35] It is unclear to what extent sound recordings are treated similarly to other types of copyrighted works, such as musical compositions.[36] Some courts believe it was Congress's intent that sound recordings receive unique treatment regarding the de minimis exception,[37] while others believe Congress had no such intention when drafting the Copyright Act.[38]

C. Early Sampling Litigation

When the practice of sound recording grew, it became clear that such works needed distinct recognition. Congress's amendments to the Copyright Act in 1971, effective 1972, played a large role in shaping the regulation of sound recordings today. Initially, sound recordings followed the traditional notions of copyright protection.[39] This meant that a work infringed upon another work if the second work was "substantially similar" to the original work.[40] However, the Copyright Act did not set forth guidance to address the issue of sound recording infringement in the area of digital sampling.[41] Therefore, courts were reluctant to interpret the existing law for such purposes.[42] This hesitation, coupled with the fact that many early lawsuits involving sampling were dismissed or settled due to high litigation expenses,[43] meant that the law on this point was sparse for many years.[44] Eventually certain courts deviated from this traditional test because

[34] *Id.*

[35] *Compare* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) *with* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798–99 (6th Cir. 2005).

[36] *Compare VMG Salsoul*, 824 F.3d at 886 *with Bridgeport Music*, 410 F.3d at 798–99.

[37] *Bridgeport Music*, 410 F.3d at 798, 803 n.18.

[38] *See VMG Salsoul*, 824 F.3d at 884.

[39] Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling*, 31 COLUM. J.L & ARTS 355, 366 (2008).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 367.

[44] *Id.* at 366–67.

digital sampling involves the physical use of a copyrighted work, rather than the mere imitation of that work.[45]

In the early 1990s, *Grand Upright Music* became the first case on digital sampling to go to trial.[46] In *Grand Upright Music*, the Southern District of New York held that the taking of merely a three-word line constituted copyright infringement.[47] The plaintiff, Grand Upright Music, sought a preliminary injunction to prevent the defendants, Warner Brothers Records, from improperly using an unlicensed composition.[48] The defendants admitted that their album *I Need a Haircut* embodied the rap recording *Alone Again (Naturally)*, which the plaintiff claimed to own.[49] Specifically, the defendants' recording sampled a three-word segment and a portion of the music from *Alone Again*.[50] The court's analysis centered on the ownership rights of the master recording of *Alone Again*.[51] Deciding in favor of the plaintiff, the court stated it was clear that the defendants were aware they violated the plaintiff's and others' rights when they engaged in sampling.[52] The defendants' awareness was evident from their intentional, physical taking of the plaintiff's work.[53] This case dramatically shifted copyright protection in the arena of hip-hop recordings.

III. A SPLIT BETWEEN THE CIRCUITS

Some circuit courts have held that sound recordings receive unique treatment; specifically, that they are not subject to the de minimis exception that other copyrighted works are.[54] Under this interpretation, any copying of the sound recording without a license, regardless of how minute, constitutes copyright infringement.[55] However, other courts have rejected this approach, and continue to treat sound recordings like other copyrighted

[45] *See id.* at 366.

[46] *Id.* at 367.

[47] Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 185.

[53] *Id.*

[54] *See* Reilly, *supra* note 39, at 369.

[55] *Id.* at 369–70.

works, holding the de minimis exception is applicable.[56] This difference in approach is significant, as it determines whether any sampling whatsoever automatically indicates that there has been copyright infringement of the sampled work.

A. Bridgeport Music, Inc. v. Dimension Films

1. Facts

The Sixth Circuit decided *Bridgeport* in 2005.[57] *Bridgeport* dealt with the use of sound recording samples without permission, specifically of a two-second sample from a guitar solo.[58] This guitar solo was lowered in pitch, and was "looped" to extend to sixteen beats, which translated to roughly seven seconds of sound.[59] In *Bridgeport*, the district court concluded that the de minimis exception applied, and that the sampling did not rise to an actionable level.[60] On appeal however, the plaintiff argued no de minimis inquiry should have applied because the defendant sampled a copyrighted sound recording.[61] The plaintiff urged that any copying of a sound recording whatsoever constituted infringement.[62] The Sixth Circuit then reversed the trial court, finding no de minimis inquiry was required where the defendant did not dispute that it had digitally sampled a copyrighted sound recording.[63] The court concluded that any digital sampling of a copyrighted sound recording without a license, no matter how minimal, constituted actionable infringement.[64]

2. Analysis

The *Bridgeport* decision was an unprecedented break from other circuit courts' holdings at the time.[65] Previously, the issue of musical copyright

[56] *Id.* at 369.

[57] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 793 (6th Cir. 2005).

[58] *Id.* at 796.

[59] *Id.*

[60] *Id.* at 797.

[61] *Id.* at 798.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (rev. ed., 2017).

would have been determined by asking, "How much is too much?" under the improper appropriation standard from *Arnstein v. Porter*.[66] However, due to the passage of the Copyright Act in 1976, the improper appropriation standard no longer applied at the time of *Bridgeport*. In reaching its decision that the de minimis exception does not apply to sound recordings, the Sixth Circuit focused mainly on the language in 17 U.S.C § 114.[67] Section 114(b) reads as follows:

> The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[68]

Primarily, the Sixth Circuit interpreted Section 114(b) to give the copyright holder the *exclusive* right to prepare a derivative of his or her sound recording.[69] The court stated that the significance of this provision was amplified by the Copyright Act's addition of the word "entirely" to this language.[70] From this section, the court reasoned that if no sounds were sampled, the new work would be exempt from liability; however if some, meaning *any*, sounds were sampled, the new work would constitute infringement.[71] So, under *Bridgeport*, any unauthorized copying of a sound recording, regardless of how minimal, is actionable.[72]

Many critics say the Sixth Circuit's reasoning failed to distinguish between imitation and duplication.[73] Thus, its analysis is improper because it failed to consider the threshold of substantial similarity, which is where the de minimis exception typically applied.[74] For decades, the traditional standards of copyright law had included the requirement of substantial

[66] *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[67] 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. INTEL. PROP. L.J. 93, 114 (2006).

[68] 17 U.S.C. § 114(b) (2012) (emphasis added).

[69] Suppapola, *supra* note 67, at 114.

[70] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–01 (6th Cir. 2005).

[71] NIMMER & NIMMER, *supra* note 65.

[72] *Bridgeport Music*, 410 F.3d at 801–02.

[73] *E.g.*, NIMMER & NIMMER, *supra* note 65.

[74] *Id.*

similarity to constitute infringement.[75] Many say that *Bridgeport* failed to consider Section 114's legislative history, and if it had done so, it would have found that Congress noted "infringement takes place whenever all or any *substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method."[76] Critics say this section indicates that Congress did not intend to break from the traditional de minimis standard.[77]

The Sixth Circuit also justified its abolition of the de minimis exception by classifying sampling as a physical taking, rather than an intellectual one.[78] The court reasoned that any taking whatsoever is clearly intentional, because creators do not "accidentally" sample.[79] The act of sampling itself, the court said, requires a conscious decision.[80] Thus, digital sampling copyright infringement should be analyzed differently than infringement of other copyrightable works.[81] To bolster its classification of sampling as a physical taking, the Sixth Circuit emphasized that when an artist samples a previous work, he or she takes something of value from the original creator of the sound recording.[82] Typically, the court noted, this practice allows the subsequent artist to save on production costs.[83] Thus, the court decided sampling should not be allowed without a license, because it is physically taking the work of a previous creator.[84]

Administratively, the *Bridgeport* court stated, a bright-line rule is more practical than employing the de minimis exception to sound recordings.[85] The difficulty lies in the fact that every case involves a different song with a different sampled section of a different length, and with different alterations made.[86] It would be extremely difficult to navigate a de minimis analysis in

[75] *Id.*

[76] *See, e.g., id.*

[77] *Id.*

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

[79] *Id.* at 801.

[80] *See id.*

[81] *See id.*

[82] *Id.* at 802.

[83] *Id.*

[84] *Id.* at 801–02.

[85] *Id.* at 802.

[86] *Id.*

this context while maintaining a fair and uniform application.[87] However, the court emphasized that administrative ease was not the only factor driving its decision.[88] It also relied on legal text writers' opinions regarding the unsuitability of the de minimis exception to digital sampling.[89] In abolishing the de minimis exception's application to sound recordings, the Sixth Circuit believed it would encourage the protection of artists' creative works more effectively than before, and incite further innovation.[90]

B. The Ninth Circuit and VMG Salsoul, LLC v. Ciccone

1. Facts

The Ninth Circuit decided *VMG* in June 2016, and created a distinct circuit split regarding the treatment of sound recording copyrights.[91] In *VMG*, the court focused on the claim that Madonna's 1990s song *Vogue*'s sampling of a horn hit from *Love Break* constituted copyright infringement.[92]

The original horn hit that was allegedly sampled appeared in two forms in *Love Break*.[93] First, there was a "single" horn hit that consisted of a quarter-note chord, which lasted for .23 seconds.[94] Next, there was a "double" horn hit that consisted of an eighth-note chord with the same notes as the "single" horn hit, followed by a quarter-note chord of those same notes.[95] VMG claimed the source of the sampling was the instrumental version of *Love Break*, in which the "single" horn hit occurred twenty-seven times, and the "double" horn hit occurred twenty-three times.[96]

In *Vogue*, the horn hit from *Love Break* appeared in both "single" and "double" form.[97] Again, the "single" horn hit consisted of a quarter-note chord comprised of four notes, and the "double" horn hit consisted of an

[87] *Id.*
[88] *Id.* at 802–03.
[89] *Id.* at 803.
[90] *See id.* at 804.
[91] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874, 877–78 (9th Cir. 2016).
[92] *See id.* at 872.
[93] *Id.* at 875.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*

eighth-note chord followed by a quarter-note chord of those same notes.[98] However, the notes the chords consisted of were "transposed."[99] In other words, the chord notes in *Vogue* were each one-half step higher than they were in *Love Break*.[100] There were two versions of *Vogue*—both a "radio edit" and a "compilation" version.[101] In the "radio edit" version, the "single" horn hit occurred once and the "double" horn hit occurred three times.[102] In the "compilation" version, the "single" horn hit occurred once and the "double" horn hit occurred five times.[103]

The district court first held that neither the sound recording nor the composition of the "horn hit" could be protected by copyright because it was not "original" for purposes of copyright law.[104] Second, the court applied the de minimis exception, stating that minimal copying did not constitute actionable infringement.[105] Thus, they held that even if the "horn hit" could have been considered "original," the copying was so trivial that it did not constitute copyright infringement.[106] On appeal, the plaintiff claimed the de minimis exception did not apply to sound recordings, and that, because of the Sixth Circuit's holding in *Bridgeport*, any copying was actionable.[107] However, the Ninth Circuit held that the de minimis exception *does* apply to sound recording infringement actions, just as it does to all other copyright infringement actions.[108]

2. Analysis

Until June 2016, the question of whether the de minimis exception applies to claims of copyright infringement regarding sound recording was unresolved in the Ninth Circuit.[109] This issue was the primary focus of the *VMG* opinion, and the court held that this exception does apply to sound

[98] *Id.* at 875–76.
[99] *Id.* at 879.
[100] *Id.* at 875 n.3.
[101] *Id.* at 876.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 874.
[106] *Id.* at 876.
[107] *Id.* at 880.
[108] *Id.* at 887.
[109] *Id.* at 878.

recordings.[110] To support this holding, the court emphasized the firm establishment the de minimis exception has in U.S. copyright law, and honed in on its justification and purpose.[111] The de minimis exception aims to protect artists' legally protected interests, while fostering innovation.[112] The court noted that the plaintiff's legally protected interest in these situations is the potential financial return, and if the general public does not recognize the "copying," the plaintiff's protected right remains intact.[113] In other words, the court said, the copier does not benefit from the original creator's content if the copying is minimal.[114]

This opinion emphasized that *Bridgeport* seemed to stand alone in holding that the de minimis exception does not apply in the context of sound recordings.[115] The Ninth Circuit relied on 17 U.S.C. § 102(a),[116] which reads as follows:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictoral, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) *sound recordings*; and (8) architectural works.[117]

This section lists sound recordings as an independent category of copyright work, but associates it with these many other types of creations; thus, the court reasoned, sound recordings should be treated identically to all other protected works.[118] The court stated that nothing within § 102

[110] *See id.* at 874, 878.

[111] *See id.* at 881.

[112] *Id.* at 881; *see id.* at 887 n.11.

[113] *See id.* at 880–81.

[114] *Id.*

[115] *Id.* at 881.

[116] *Id.*

[117] 17 U.S.C. § 102 (2013) (emphasis added).

[118] *VMG Salsoul*, 824 F.3d at 881.

indicated that sound recordings should be given any type of distinct treatment, or that Congress intended to eliminate the de minimis exception.[119]

The Ninth Circuit disagreed with the Sixth Circuit's *Bridgeport* interpretation of 17 U.S.C. § 114.[120] It stated that, instead, § 114 explains that a new recording, which *mimics* a copyrighted recording, does not infringe even if it is very closely imitated so long as there is no actual copying.[121] The inverse, the court said, that any copying at all constitutes infringement, is not equally true.[122] The Ninth Circuit believed Congress intended § 114 to limit, rather than to expand the rights of copyright holders.[123] Essentially, *VMG* stated that *Bridgeport* made many inappropriate and far-fetched inferences, and that the Sixth Circuit violated congressional intent in its interpretation.[124]

The *VMG* court further disagreed with *Bridgeport's* classification of sampling as a physical taking for three reasons.[125] First, the court reasoned, the possibility of a "physical taking" exists with respect to other copyrighted works as well.[126] Thus, because the de minimis rule still applies in situations involving other copyrighted works, there is no reason it should not apply to sound recordings. Second, any difference in the nature of sound recordings that warrants unique treatment does not mean Congress actually adopted a statute granting unique treatment.[127] And third, the fact that samplers save costs by not having to hire musicians because they are able to sample work is irrelevant and does not enhance the Sixth Circuit's argument.[128] The *VMG* court also noted that the Supreme Court has held that the Copyright Act protects only expressive aspects of a copyrighted work, not the fruits of the creator's labor.[129] This is true of all other types of

[119] *Id.* at 881–82.

[120] *Id.* at 884.

[121] *Id.* at 883.

[122] *Id.* at 884.

[123] *Id.* at 883.

[124] *See id.* at 884.

[125] *Id.* at 885.

[126] *Id.*

[127] *Id.*

[128] *Id.*

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

copyright infringement actions as well; thus, the court reasoned sound recordings should be treated similarly.[130]

IV. THE IMPORTANCE OF UNIFORMITY IN COPYRIGHT LAW: CONSEQUENCES OF *VMG*

In holding that the de minimis exception applies to sound recordings, the Ninth Circuit recognized that it was taking the unusual step of creating a circuit split by disagreeing with the Sixth Circuit in *Bridgeport*.[131] This was particularly concerning because disparate treatment creates different levels of copyright protection in various regions, even if the same infringement occurs nationwide.[132] However, the court emphasized that the need for uniformity could not override its duty to determine congressional intent, which it firmly believed was to apply the de minimis exception to sound recordings.[133]

The dissent in *VMG* criticized the majority for deviating from the Sixth Circuit's holding to follow popular treatises and district court decisions.[134] The dissent stated that *Bridgeport* had been consistently applied in Nashville for over a decade, and that it had been successful for many reasons.[135] Primarily, the dissent noted, the *Bridgeport* rule allows for easy administration, and settles policy concerns regarding uniformity and protecting artists' work.[136] The dissent characterized sampling as stealing,[137] while the majority expressed concern that implementing a harsh, bright-line rule could inhibit creativity and innovation in the music industry.[138]

This circuit split is especially concerning given today's popular culture and the extensive use of sampling in current music. For example, the practice of "mashing," which involves sampling copyrighted works, is very commonplace, particularly in genres such as hip-hop, rap and pop—

[130] *Id.*

[131] *Id.* at 886.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 888 (Silverman, J., dissenting).

[135] *Id.*

[136] *See id.* at 888–89.

[137] *See id.* at 889.

[138] *Id.* at 887 n.11 (majority opinion).

especially among emerging artists.[139] Many say this practice is an integral component of the creative process, and allows artists to unify generations of music consumers.[140] Furthermore, it may reduce costs of producing newer works by preventing the need to re-produce preexisting sounds.[141] However, many individuals within the music industry are concerned that this fundamentally violates the principle that "thou shalt not steal."[142] Some critics may say *VMG* has marred copyright law by creating this split;[143] however, I propose this may be the first of many steps towards uniformity.

V. RESOLVING THE CIRCUIT SPLIT

VMG will inevitably lead to temporary disparate copyright treatment across the nation. The Sixth Circuit continues to follow the strict *Bridgeport* approach, while the Ninth Circuit implements the *VMG* de minimis standard.[144] As the court in *VMG* expressed, many district courts have now expressly refused to follow the ruling in *Bridgeport* because of the belief that *Bridgeport* reads special treatment into Congress's intention where it does not belong.[145] This temporary disparity in treatment is concerning because it could have a chilling effect on the innovation of the music

[139] Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 845–46 (2011).

[140] *See id.*

[141] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005).

[142] *Exodus* 20:15.

[143] *See, e.g.*, Bill Donahue, *9th Circ. Throws Down The Gauntlet On Music Sampling*, LAW360 (June 4, 2016), https://www.law360.com/articles/803236/9th-circ-throws-down-the-gauntlet-on-music-sampling (acknowledging that VMG has put artists in limbo without a clear idea of what can and cannot be done); *see also* Eriq Gardner, *Madonna Gets Victory Over 'Vogue' Sample at Appeals Court*, THE HOLLYWOOD REPORTER (June 2, 2016), http://www.hollywoodreporter.com/thr-esq/madonna-gets-victory-vogue-sample-898944; Anna Berney Miller, *Is Music Sampling Back En Vogue?*, LEXOLOGY (July 12, 2016), https://www.lexology.com/library/detail.aspx?g=dcaed9bf-4fa4-48d0-8a23-28ffac026281 (stating that the *VMG* court's decision to create a circuit split was "controversial and unusual . . . as it will result in artists having different levels of protection in different jurisdictions . . .").

[144] *Compare Bridgeport Music*, 410 F.3d at 793, *with* VMG Salsoul, LLC v. Ciccone, 824 F.3d. 871, 872 (9th Cir. 2016).

[145] *See* Batiste v. Najm, 28 F. Supp. 3d 595, 625 (E.D. La. 2014); Pryor v. Warner/Chappell Music, Inc., No. CV13-04344 RSWL, 2014 WL 2812309, at *7 n.3 (C.D. Cal. June 20, 2014); Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1340–41 (S.D. Fla. 2009).

industry. Thus, it is imperative for courts to come to a consensus on where copyright law lies with regard to sound recordings, and to do so quickly.

A. The Ninth Circuit's Approach Should Be Adopted Nationwide

The Ninth Circuit's approach is more in line with the advancement of the music industry, as it seems impractical to require artists to obtain licenses for every piece of work they sample. It is a reality of today's music industry that sampling is a common practice, and that it will inevitably continue.[146] For example, *hundreds* of artists have sampled the 1984 hit *La Di Da Di*, by rappers Slick Rick and Doug E. Fresh, making it one of the most sampled songs of all time.[147] Rather than considering this theft, most of the music industry believes this is a method of celebrating previous artists' work and appreciating the source of that music.[148] To require licenses for every nominal bit sampled would stifle the ability of artists to create new music, and would further crowd the courts with burdensome litigation.

Furthermore, the practice of "sampling" music is innovative, and allowing artists to minimally copy previous works without legal penalty does not violate the six common motives of requiring originality in copyright. The six motives considered are: (1) the originality of the creation; (2) the time and labor required for the creation; (3) the skill required to create the original work; (4) the degree to which the work reflects the artist's choice; (5) the degree to which the work reflects the author's personality; and (6) the novelty of the creation.[149]

The first consideration, originality of the independent creation, aims to ensure that artists who create original works receive protection, even if they do so by sampling previous works.[150] This allows flexibility and recognizes that pieces by other artists can be rearranged, altered and compiled into completely new and original creations that are worthy of copyright protection. In the sound recording context, when an artist samples, that

[146] *See Why Would More Than 500 Artists Sample the Same Song?*, NPR (June 27, 2014), http://www.npr.org/2014/06/27/322721353/why-would-more-than-500-artists-sample-the-same-song.

[147] *The Art of Sampling: Stolen, Not Copied*, NPR (June 28, 2014), http://www.npr.org/2014/06/28/326406737/the-art-of-sampling-stolen-not-copied.

[148] *See Why Would More Than 500 Artists Sample the Same Song?*, *supra* note 146.

[149] Fisher, *supra* note 9, at 448–49.

[150] *See id.* at 438.

artist takes different sections of a previous work and alters them in significant ways.[151] This creates an entirely new piece, which is deemed an "original."[152] Because the result is unique, sampling within this context does not violate the first motive of requiring originality in copyright.

The second consideration, the amount of labor the artist puts into the creation of the new work, operates in conjunction with the first. It recognizes that if an artist puts forth great labor in creating a new work, it is likely an original piece worthy of protection.[153] In the sound recording context, if an artist expends significant time and effort creating a new work out of sampled bits, the work is considered to be more original. This practice requires considerable alteration and recompilation of the samples.[154] Sampling sound recordings to create a new song is a laborious process, and requires substantial time and skill.[155] This practice and process in general does not violate the second motive of requiring originality in the copyright context.

The third motive, the skill that is required to create the original work, recognizes that certain kinds of work, namely those that require a heightened level of skill and expertise, generally deserve more protection than others.[156] In the sound recording context, the practice of sampling is complex.[157] The process of altering and recompiling previous works takes significant skill and practice, and requires a certain level of expertise.[158] Sampling is a learned art, and because of the talent required, allowing the practice does not violate the third motive.

The fourth consideration, the degree to which the work reflects the author's exercise of choice, is not particularly applicable to sound recordings. If the artist has no choice but to use a particular mode of expression, the use of that mode is not original.[159] Artists have nearly unlimited choices when deciding their mode of expression;[160] thus, this consideration is a nullity within the sound recording context.

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[151] McGrath, *supra* note 3.

[152] *Id.*

[153] *See* Fisher, *supra* note 9, at 448–49.

[154] *Id.* at 449; *see* McGrath, *supra* note 3.

[155] *See* McGrath, *supra* note 3.

[156] *See* Fisher, *supra* note 9, at 449.

[157] McGrath, *supra* note 3.

[158] *See id.*

[159] Fisher, *supra* note 9, at 449.

[160] *Id.* at 443.

The fifth consideration, the degree to which a work reflects the artist's personality, takes self-expression into account and indicates that if an artist is reflecting his or her own personality, that work is inherently more original.[161] In the context of sound recordings, the personality of the copier must be considered to determine whether the artist using sampled recordings is doing so in a meaningful manner. Sound recordings are commonly considered to be a form of self-expression that simultaneously honors previous artists.[162] This expression is compiled in an original format, and is considered unique. Because sampling is commonly a form of expressing oneself, its practice does not violate the fifth motive.

The sixth and final consideration is novelty.[163] If a work is new or fresh, it is deemed original.[164] While sampling, artists in the music industry combine previous sound bits to create an entirely new work in an original way.[165] Although the final product is a compilation of used threads, it is a new form of expression, and thus a novel work. The final motive of requiring originality in copyright is therefore not violated.

On a large scale, it is evident that allowing minimal copying in the sound recording context, as it is allowed in all other copyright contexts, does not violate the six primary motives of requiring originality in copyright. This indicates that the de minimis requirement does not stifle originality; it actually does quite the contrary. Therefore, the *VMG* approach of allowing for a de minimis exception in the context of sound recordings should be applied nationwide.

B. Congressional Action May Be Required

Court action may be sufficient to reinstate uniformity, however it is possible that congressional action may be required to ensure equal treatment in copyright law. In fact, the court in *Bridgeport* stated that if Congress did not like the approach it took to the de minimis exception with respect to sound recordings, Congress could, and should, address it.[166] The court stated, "[i]f this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in

[161] *Id.* at 449.

[162] *See Why Would More Than 500 Artists Sample the Same Song?*, *supra* note 146.

[163] Fisher, *supra* note 9, at 449.

[164] *Id*.

[165] McGrath, *supra* note 3.

[166] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005).

the past, to go back to Congress for a clarification or change in the law."[167] Because Congress has not changed the law since *Bridgeport*, the dissent in *VMG* contended that the holding in *Bridgeport* was, in fact, Congress's intent.[168] Of course, the majority in *VMG* disagreed with this statement, and emphasized that congressional silence is not determinative.[169] Because of this widespread confusion, congressional input may be the swiftest and clearest method to ensure uniformity in copyright protection.

VI. CONCLUSION

The practice of "sampling" is undoubtedly here to stay, and therefore it is necessary for the circuit courts to come to a consensus regarding the treatment of sound recordings under copyright law. There does not seem to be any compelling justification for the continuation of the Sixth Circuit's exclusion of the de minimis exception from its infringement analysis. Allowing minimal copying of sound recordings, as the Ninth Circuit does, encourages innovation—particularly among newcomers to the industry who lack the financial capital to create musical works from scratch. The Ninth Circuit's approach also avoids wasting judicial resources on petty and unimportant claims of copying, which the general public cannot detect. Employing the de minimis exception balances copyright law's fundamental goals of encouraging innovation and protecting artists' creations. Therefore, the de minimis exception should be applied to sound recordings nationwide.

[167] *Id.*

[168] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 889 (9th Cir. 2016).

[169] *Id.* at 886.