

5-1-2014

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Recommended Citation

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DIGITAL MUSIC SAMPLING AND MODERN MUSIC: THE NEED FOR THE 'DE MINIMIS' EXCEPTION

Alex Lubin

Abstract

This article argues that a less rigid regulation of music sampling in copyright law, through both statute and application of the law, would promote creative artistry and benefit the music industry as a whole. Historically, sampling without gaining a license from the original copyright owner resulted in a clear infringement case. The technique of music sampling has evolved in popularity over the years, and has become an integral part of today's music in numerous genres. However, digital music samplers are faced with challenges regarding these samples due to the current structure of copyright law. A determining factor in finding whether copyright infringement has occurred is whether the claimed infringing product is substantially similar to the copyright owner's product. Since the concept of music sampling involves utilizing exact pieces from previous works to enhance or benefit a new work, this substantial similarity test is virtually impossible to overcome.

Throughout various cases, there has been an ongoing debate as to whether the requirements to obtain a music sample should be loosened. On one hand, there is an argument to be made that less regulation on music sampling would risk causing the original works to become obsolete, or lose their uniqueness. Allowing free sampling could cause original works from past generations to be only recognized for the new product, which would in a sense remove many of the rights enjoyed by the copyright owner. On the other hand, there is an argument to be made that certain forms of music sampling should be accepted, due to the fact that combining the sample with numerous other expressions arguably does not harm the original holder's copyright,

but instead creates a completely new mode of expression worthy of its own protection. This article demonstrates both sides of this debate, including the various methods of sampling and the different ways the court has chosen to handle this topic. This article concludes that although protection of original works is important, it is more vital for copyright law as a whole to promote creation and innovation. For that reason, permitting certain forms of music sampling is vital to the music industry.

I. Introduction

Since its inception in 1972, the U.S Copyright code has established which circumstances allow an owner of copyright to claim infringement.¹ One established rule in Copyright is that if a claimed infringing product is deemed to be substantially similar to the copyrighted work, it is likely that the copyright holder's claim for infringement will be upheld.² This poses a unique issue in the field of digital music sampling, since the act of digital sampling involves utilizing an exact piece of a previously created sound recording or musical composition in a different format.³ Thus, an individual who digitally samples a copyrighted work will always lose under the substantial similarity test, due to the fact that the materials being utilized are not similar to the prior art, but are in fact the prior art itself.⁴ Traditionally, the resolution for this issue is that individuals who hope to utilize a digital music sample can request and later obtain a license from

¹ 17 U.S.C.A. § 106 (West 2002)

² *Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931 (7th Cir. 1989) ("To demonstrate infringement of copyright, copyright holder must establish ownership of copyright in question, that alleged infringer had access to copyrighted work, and that there was substantial similarity between two works")

³ Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just A Bad "Rap"?*, 37 LOY. L. REV. 879, 880 (1992).

⁴ *Id.* at 37 (Demonstrating that the nature of digital sound sampling causes the substantial similarity test to be inapplicable to sound recordings).

the original copyright holder.⁵ However, the process for obtaining a license can be arduous and cost the applicant a substantial price.⁶ For this reason, advocates for digital music sampling insist on allowing certain cases of digital sampling under the copyright code, regardless of whether the substantial similarity test is satisfied.⁷

In 1972, when U.S Copyright Code was amended, the process digital music sampling was not yet being utilized in the music industry.⁸ However, in recent years, as the technology available to musicians has improved and the landscape of popular music has changed, digital sampling has become more commonplace. These modern advances have allowed aspiring musicians to sample more easily. Additionally, modern styles of music such as hip-hop and electronic music, call for numerous samples and consider the act of digital sampling as a vital aspect of the music culture.⁹ Since the inception of these modern genres of music, the increase in the frequency of digital music sampling has led to litigation regarding its legality.¹⁰

Section 114 of the U.S Copyright Code states,

The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds

⁵David Sanjek, *"Don't Have to Dj No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 621 (1992) ("Samplers should apply for the appropriate licenses, respect the rights of copyright holders, and be respected in turn as equal creators").

⁶ AL KOHN, BOB KOHN, KOHN ON MUSIC LICENSING, 4 (Aspen Law & Business, 3rd Ed., 2002).

⁷ Marjorie Heins & Aziz Huq, *An Argument Against Bridgeport Music, Inc. v. Dimension Films* (Unpublished Brief, NYU School of Law) (On file with Amici Curiae Brennan Center for Justice)

⁸ JOHN LINDENBAUM, MUSIC SAMPLING AND COPYRIGHT LAW, 13 (Woodrow Wilson School of Public and International Affairs) 1999 (stating that digital music sampling began in the late 1970's)

⁹ *Id at 16*

¹⁰ *Grand Upright Music Limited v. Warner Brother Records, Inc.* 790 F. Supp. 182 (S.D.N.Y. 1991) (finding that digital music sampling without a license was copyright infringement). *See also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (finding that a parody of a copyrighted work is acceptable under the fair use doctrine)

fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.¹¹

This statute provides that the owner of a copyright has the exclusive right to license digital samples of their work, regardless of the size or character of the sample. With the increase in popularity of digital music sampling, many individuals believe that the statute should be adjusted to provide an exception for de minimis digital sampling. In the copyright context, de minimis sampling is defined as "a technical violation of a right so trivial that the law will not impose legal consequences."¹² Proponents of this "de minimis exception" argue that it promotes creativity and innovation while also protecting the property of current copyright owners.¹³ In contrast, copyright holders argue that the sound recording in question is their personal property, and that any unauthorized use of said property is equal to stealing.¹⁴

This ongoing debate between the two parties was considered in *Bridgeport Music, Inc. v. Dimension Films*, where the Sixth Circuit of the U.S Court of appeals determined the legality of digital sampling, and whether de minimis sampling could be considered an acceptable practice.¹⁵ *Bridgeport* was a case involving a digital sample of a copyrighted sound recording. No Limit Films, the claimed infringer, utilized a small sample from a copyrighted work in their song titled "100 Miles and Runnin".¹⁶ No Limit Films did not contest it's use of the digital sample, but argued that the sample was de minimis and should not be considered an infringement of

¹¹ 17 U.S.C.A. § 114 (West 2010)

¹² *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)

¹³ *Warner Bros. Inc. v. Am. Broad. Companies, Inc.*, 720 F.2d 231, 240 (2d Cir. 1983) (Stating that the de minimis exception balances the protections of copyright laws against the stifling effect of overly enforcing those laws)

¹⁴ *Grand Upright Music Ltd.*, 780 F. Supp. at 183 (Likening digital music sampling without a license was equivalent to stealing in copyright law)

¹⁵ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005)

¹⁶ *Id at 795*

Bridgeport's copyrighted work.¹⁷ The Sixth Circuit interpreted section 114(b) to provide exclusive rights of sampling to the copyright owner, regardless of whether the sample was de minimis or full fledged pirating.¹⁸ The court's decision was heavily influenced by the availability of licensing for a potential sampler. Their argument was that the option to request a license from a copyright holder is sufficient enough to uphold the intent of copyright law, which is to strike a balance between protecting original works and promoting further creativity.¹⁹ In their opinion, this balance was protected, because obtaining a licensing agreement was easy enough as to avoid stifling innovation of aspiring musicians.

Further, the Sixth Circuit rejected the notion that a de minimis sample does not violate the copyright owner's exclusive rights. The court reasoned that original works are created through a series of decisions made by the copyright holder, or the creator of the work. Thus, all forms of sampling, regardless of the length, cause quantifiable harm to the copyright owner and impede their right to protect their original works.²⁰ Through *Bridgeport*, The Sixth Circuit established a black-letter rule that all digital music sampling done without licensing was infringement and set a precedent that is followed today.²¹

This article explores the implications of *Bridgeport* on the music industry currently, as well as the potential harms the ruling may cause the industry in the future. Part II provides background on the origins of music sampling, and explains how sampling issues have traditionally been handled by the court system. It will also discuss the role sampling played in

¹⁷ *Id* at 796

¹⁸ Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling-A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT L.J. 119, 125 (2003) ("It does not matter how much a digital sampler alters the actual sounds or whether the ordinary lay observer can or cannot recognize the song or the artist's performance of it")

¹⁹ *Id* at 801

²⁰ Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. Rev. 1660, 1667-68 (1999)

²¹ *Id* at 801

traditional American music, as well as touch upon the system of music licensing used today. Part III analyzes section 114(b) of the Copyright Code and discusses its importance in relation to digital music sampling, while also showing its role in the Sixth Circuit's holding in *Bridgeport*. Part IV discusses the more modern approaches to digital music sampling, through a detailed analysis of how sampling has changed with the introduction of the hip-hop and electronic music genres. This section also discusses the response to modern digital sampling, both from the courts as well as prior copyright holders. Finally, Part V discusses in detail the holding of the *Bridgeport* case, focusing on the future impact the holding may have on the music industry as a whole.

II. The Historical Approach to Music Sampling

The concept of music sampling has been present throughout the history of American music, even as far back as American folk music from the turn of the century.²² As music has evolved and changed throughout the generations, certain melodies and lyrical combinations have been reused and reformatted by numerous artists to appeal to a different genre or crowd.²³ Traditionally, these instances of reformatting were considered legal and largely were allowed without obtaining a license from the original creator of the musical work.²⁴ However, these traditional examples of music sampling differ from modern digital sampling due to the fact that they did not utilize the actual recording of the copyrighted work. Instead, this traditional form of music sampling imitated a previously recognized composition or melody, but did so on a different instrument, or in a different format or tempo. This distinction between imitation and

²² Lindenbaum, *supra* at 7

²³ Eric Weisbard, *Pop Music; A Simple Song That Lives Beyond Time*, N.Y Times, Nov 1994 (Referencing a song titled "In The Pines", which has recorded in over 100 different variations over time)

²⁴ *Id* at 8

literal use of copyrighted material is the main reason copyright owners believe modern digital sampling should be considered infringement in all circumstances.²⁵

A. The Origination of American Music and Music Sampling

Traditionally, American music is believed to have its origins in four genres: Blues, Folk, Bluegrass, and Country, which are known collectively as American Folk music.²⁶ These four musical genres regularly involve basic guitar riffs, rudimentary lyrical topics, and familiar baselines. Many of the more popular songs of the 1900's incorporated widely known melodies, but included a certain instrument or lyrical arrangement not originally embodied in the composition to set the new version apart.²⁷ Among musicians, this imitation of prior work was considered acceptable, due to the fact that each new rendition of the previous work was done individually, and was not an exact copy of the prior version.

As American music evolved, musicians began to be more selective and protective of their works. Unlike the traditional American folk music, newer genres such as jazz, disco, and rock and roll incorporated more distinct characteristics that provided each composition a further sense of originality. In response, Copyright laws were established to provide these musicians exclusive rights to an original work. Included in these rights were reproduction rights, which prohibited sampling of the copyrighted work by anyone other than the copyright holder.²⁸

One of the main purposes of the Copyright Code was to protect original forms of expression fixed on a tangible medium.²⁹ This means that the copyright provisions are intended

²⁵ *Id at 19*

²⁶ *Id at 7*

²⁷ *Id at 7*

²⁸ 17 U.S.C.A. § 106 (West 2002)

²⁹ 17 U.S.C.A. § 102 (West 2002)

to only protect the original expression found within a musical composition, not the composition as a whole. What this meant for musicians was that although their original works as constituted were protected, other individuals still were permitted to imitate the copyrighted material as long as the imitation was not substantially similar.³⁰ With this established, musicians continued to sample one another's work, but did so using different instruments, lyrics, or tempos to avoid the substantial similarity standard.³¹ In these circumstances, the melody being imitated was usually noticeable, but the appropriator would change one aspect sufficiently as to express the melody differently. By doing this, the musician avoided infringing on the previously copyrighted work, due to the fact that the new product was simply an imitation of the prior art, and did not sample the actual composition.

B. Modern Sampling and Licensing Agreements

As sampling has become more commonplace in modern music, the attitude towards the act of sampling between copyright holders and potential infringers has changed considerably. In order to attempt to minimize the conflict between music samplers and prior copyright holders, licensing agreements were established as a viable means for obtaining a music sample. The U.S Copyright Code provides that the owner of a copyright has the exclusive right to create or promote any derivative works.³² Therefore, an individual who aims to legally utilize a digital sample from a copyrighted work must contact the owner of the copyright and ask for permission

³⁰17 U.S.C.A. § 114 (West 2010) (stating that the exclusive rights of copyright protection do not extend to the making of another sound recording that consists entirely of independent sounds, even if the recording imitates the protected material)

³¹See CROSBY, STILLS, NASH, AND YOUNG, "*Almost Cut My Hair*", on *DEJA VU* (Atlantic: 1970); TOM PETTY AND THE HEARTBREAKERS, "*Mary Jane's Last Dance*," on *GREATEST HITS* (MCA: 1993) (Songs that incorporate a similar guitar melody as one another).

³²17 U.S.C.A. § 106 (West 2002)

to utilize the sample. The two parties establish an agreement, which usually provides the copyright owner some form of compensation in return for permitting the aspiring musician to use the sample.³³

Since the 1980's, licensing has become the optimal method for a digital sampler to legally utilize the sound recording they desire.³⁴ The traditional stance is that once a musical composition is granted copyright protection, the various sound recordings and aspects of that composition are to be considered the holder's property. These traditionalists argue that when copyrighted works are considered as tangible property, the only logical method for allowing others to use the musical compositions is through licensing agreements, due to the fact that unlicensed use of this property would be equivalent to theft.³⁵

However, licensing agreements have numerous issues as well. Due to the limited amount of agreements that were required in earlier generations, the Courts determined that such agreements did not require mandated regulations.³⁶ Instead, the belief was that licensing agreements would maintain their fairness through competitive balance.³⁷ Artists licensing their works would usually ask for no more than the market value, which ensured that those requesting a license were not treated unfairly.

With no regulations in place, the owners of copyright could potentially still request any compensation they desired with no repercussions. On one hand, one may argue that as the owner of copyright, an individual should be free to determine the value their property. However, in order for license agreements to serve their purpose, both the copyright holder and the music

³³ See *Music License Contract*, AM SYSTEM MUSIC,
<http://www.amsystem.us/AMsystemMusicLicenseContractSample.pdf>

³⁴ Sanjek, *supra* at 621

³⁵ Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and A Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 92 (1993)

³⁶ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005)

³⁷ *Id.* at 801 ("The market will control the license price and keep it within bounds")

sampler must have incentive to agree to the terms of the arrangement. If the requisite compensation is unbearable for non-copyright holders, individuals may elect to sample freely and risk being accused of infringement. This possibility would undermine the usefulness of licensing agreements, and thus render them an unsatisfactory method to limiting unlawful music sampling.

C. Music Sampling and the Courts' Response

Historically, courts have taken the stance that music sampling by imitation instead of utilization of actual copyrighted material is not infringement, as long as the substantial similarity standard is satisfied.³⁸ The courts have relied on the fact that copyright protection is limited to a specific expression of an idea, and not the idea itself.³⁹ An imitation of a previously copyrighted work constitutes a new expression of the same idea, and therefore is acceptable under copyright law. In contrast, the court has reasoned that digital sampling violates the principles of copyright law because it does not constitute new expression. Courts have argued that since the material being digitally sampled is not altered by any means, it utilizes the same mode of expression as a previously copyrighted work, thus clearly infringing upon that musical composition.⁴⁰

While this position is facially correct, this paper argues that it takes an unfair approach to digital sampling as a whole. Numerous digital samples involve utilization of a small amount of a copyrighted work, which is then incorporated into an entirely new musical composition.⁴¹ In

³⁸Griffin v. J-Records, 398 F. Supp. 2d 1137, 1143 (E.D. Wash. 2005) (Finding no copyright infringement when the actual sound recording of the plaintiff was not used)

³⁹17 U.S.C.A. § 102 (West 2002) ("In no case does copyright protection for an original work of authorship extend to any idea")

⁴⁰See United States v. Taxe, 380 F. Supp. 1010 (C.D. Cal. 1974) aff'd in part, vacated in part, 540 F.2d 961 (9th Cir. 1976) (Finding that re-recording copyrighted songs is a case of infringement), Grand Upright Music Ltd., 780 F. Supp. (Finding that digital music sampling without a license was copyright infringement).

⁴¹Abramson, *supra* at, 1667

these cases, the argument can be made that the requisite for infringement is not satisfied, as the expression of the sound recording in question has taken on an entirely new form. If the sample in question is used as a small component of a new work instead of a central aspect of it, the sample becomes unnoticed and the new work takes on a unique expression. Instances such as these differentiate from digital samplers who utilize previous sound recordings at the center of their new musical composition, since in the latter case the prior expression of the sampled sound recording is unchanged in the new composition. This difference between types of music samples is one of the rationales for a de minimis exception to the traditional approach towards music sampling.

III. Section 114(b) and its Importance to Music Sampling

Section 114 of the U.S. Copyright Code is at the center of the debate involving digital music sampling, because its wording has provided both copyright owners and music samplers an argument in their favor. The statute is included in the Code to determine the extent of the scope of each of the rights granted to copyright owners. Specifically, it provides which forms of reproductions and derivative works a copyright owner has exclusive rights to, and which forms of reproduction are not protected under copyright.⁴²

When the Copyright code was amended in 1976, section 114(b) was adjusted for clarification. The prior wording allowed reproduction of copyrighted works that included an independent fixation of other sounds. In contrast, the 1976 amendment required these reproductions to be comprised entirely of independent sounds.⁴³ This addition of "entirely" led to

⁴²17 U.S.C.A. § 114 (West 2010)

⁴³*Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800-01 (6th Cir. 2005)

questions regarding the legality of music sampling, which the shift in wording seems to directly impact.

In *Bridgeport*, the court addressed 114(b), attempting to provide clarity regarding the statutory intent behind the wording. The Sixth Circuit determined that the intent of the statute was to benefit and protect copyright owners, and to divert individuals from sampling without obtaining a licensing agreement.⁴⁴

A. Section 114 Protections for Copyright Holders

When drafting the U.S Code in 1972, section 114 was included to determine the scope of the exclusive rights that were granted to an individual through copyright protection.⁴⁵ The statute relies on section 106, which provides a list of the exclusive rights of copyright owners, and provides clarity as to how far each of those rights extends.⁴⁶ The wording of section 114(b) that is of most importance in regards to digital music sampling is the following:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."⁴⁷

⁴⁴*Id.* at 801 ("A sound recording owner has the exclusive right to sample his own recording")

⁴⁵17 U.S.C.A. § 114 (West 2010)

⁴⁶17 U.S.C.A. § 106 (West 2010)

⁴⁷*Id.*

The rights listed in clause 1 and 2 of section 106 are the right to reproduce the copyrighted work, or prepare derivative works based upon the copyrighted work.⁴⁸ Therefore, the central concern of 114(b) is to ensure that the owner of a copyright has the exclusive right to reproduce the actual sounds included within the recording. The focus is not placed upon the concept behind the recording, but instead upon the actual sequences and musicality involved with the copyrighted work. This wording creates an important distinction with regards to digital music sampling, due to the fact that the scope of these rights only involves exact copying of copyrighted works.

B. Section 114 and its Importance for Digital Music Samplers

Section 114(b) also provides that imitation of a copyrighted work is not considered infringement, so long as the imitation is not substantially similar to the protected composition.⁴⁹ According to the wording of the statute, the exclusive rights of a copyright owner do not extend to simulations of the copyrighted material that solely utilize an independent fixation of other sounds. Therefore, while a copyright owner has the exclusive right to all exact reproductions of their works, they cannot bar others from simulating said work with different instruments or fixations of other sounds.

Prior to the 1976 amendment to the statute, the wording of the statute led to confusion as to the clear legislative intent. By not clarifying that the only acceptable form of duplication of a sound recording is one that utilizes entirely independent sounds, there was a question as to whether certain forms of digital music sampling were acceptable. The argument was that in most instances of digital sampling, the sound recording being utilized or copied is then placed in a

⁴⁸*Id*

⁴⁹*Id*

larger musical composition. One example of this would be to digitally sample a set of lyrics from a copyrighted work, and then later use that digital sample as a chorus for an entirely different musical composition. By doing so, one could take the stance that the sample had been coupled with a new, independent fixation, thereby placing the use of the sample outside of the scope of the copyright holder's exclusive rights.

When the U.S. Copyright code was updated in 1976, legislation altered the wording of 114(b) to provide clarification on the ongoing debate between copyright holders and digital samplers.⁵⁰ Whereas the prior wording stated that derivative works or reproductions involving an independent fixation of other sounds were outside of the scope of an owner's exclusive rights, the 1976 revision provided that only works that consisted entirely of independent fixations of other sounds were fair use. By including "entirely" in the statute, congress subsequently rejected the argument that 114(b)'s intent was to allow for music sampling in certain contexts.⁵¹ Since all digital musical sampling involves an exact reproduction of a copyrighted work, any musical composition involving a digital sample would fail to constitute entirely independent fixations of other musical works. Therefore, a literal interpretation of section 114(b) suggests that digital music sampling is facially unacceptable.

IV. The Modern Approach to Music Sampling

When hip-hop music was introduced to American culture, it initiated an entirely new array of issues regarding music sampling. Unlike the traditional forms of sampling, hip-hop artists began utilizing actual recordings from prior works, crossing over from solely imitating

⁵⁰Latham, *supra* at, 26

⁵¹*Id* at 125

prior art, to now incorporating aspects of prior art in their own works.⁵² This change in the form of sampling initiated numerous court disputes between copyright holders and aspiring musicians, and raised many questions regarding whether the new age digital sampling should be accepted in any circumstances.⁵³

Throughout the decades, this modern form of digital music sampling has increased in popularity, and is currently a central feature of most genres of popular music.⁵⁴ This exponential increase in the use and popularity of digital samples has influenced more artists to request samples, which eventually could result in traditional licensing agreements being insufficient to respond to the demand.⁵⁵ Additionally, newer forms of music have begun to utilize smaller samples that cannot be noticed by the casual listener.⁵⁶ Thus, proponents of digital sampling have begun to suggest to legislators that certain forms of digital sampling, namely de minimis sampling, should be accepted in copyright law.

A. Hip-Hop Music and Beginning of Digital Music Sampling

In the 1970's, the birth of hip-hop music as a musical genre introduced a new method of music sampling. Hip-hop musicians began utilizing the technique now known as digital

⁵²Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 POPULAR MUSIC 41, 41 (2003)

⁵³ See Griffin v. J-Records, 398 F. Supp. 2d 1137, 1143 (E.D. Wash. 2005), Grand Upright Music Ltd., 780 F. Supp., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, (1994)

⁵⁴Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 361 (2008) (Stating that music sampling has become widespread in the professional recording industry)

⁵⁵William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989) (Arguing that the effect of stronger copyright protection could raise the cost of creating new works)

⁵⁶Tara Rodgers, *Organised Sound*, CAMBRIDGE UNIVERSITY PRESS, 313, 317 (2003) (Mentioning gain as a popular method of digital sampling in electronic music which provides a background melody)

sampling, which involves utilizing a "break" or a sample from another musical composition as an element of a newly created song.⁵⁷ Traditionally, the art of digital sampling began when hip-hop DJ's would utilize multiple records while playing, constantly mixing back and forth between two to eventually create a new melody or sound.⁵⁸ Unlike prior forms of musical sampling, a digital sample utilizes an actual element of the prior work, as opposed to imitating said work.⁵⁹ Once hip-hop became a widely popular genre in the 1980's and 90's, the popularity and frequency of digital sampling increased rapidly, and resulted in various copyright owners claiming infringement of their protected works, such as *Grand Upright Limited v. Warner Brother Records, Inc.* *Grand Upright* was the first case to consider the legality of music sampling.⁶⁰ In their holding, the *Grand Upright* trial court likened unlicensed digital music sampling to theft, famously opening their holding with the phrase "thou shalt not steal".⁶¹

Due to *Grand Upright's* negative response to digital sampling, many hip-hop artists began to resort to licensing agreements to avoid litigation.⁶² However, this has not fully resolved the issues between copyright holders and aspiring hip-hop musicians. Licensing agreements usually provide potential digital samplers a fair process for gaining the rights to a sample.

⁵⁷ David Sanjek, *"Don't Have to Dj No More": Sampling and the "Autonomous" Creator*, 10 Cardozo Arts & Ent. L.J. 607, 611 (1992) (Describing how the first hip-hop artists in American Culture established the techniques that led to sampling)

⁵⁸ *Id* at 611

⁵⁹ Baroni, *supra* at 69 (1993)

⁶⁰ *Grand Upright Music Ltd.*, 780 F. Supp.

⁶¹ *Id* at 183

⁶² Kembrew McCleod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*, Iowa Research Online. 1, 68 (2005) ("By the turn of the decade, everyone had to pay for the sounds that they sampled or risk getting sued")

However, there are potential issues regarding licensing agreements that could still cause individuals to choose to risk digitally sampling without gaining a license.

To date, provisions have not been established to determine what proper consideration is for the licensing of a sample. Thus, the owner of a copyright could potentially ask for an unjust amount of money, or for some other compensation that the individual requesting the license to sample cannot provide. Without regulations in place that determine the justifiable amount that should be requested for different categories of digital samples, the incentive for a digital sampler to adhere to the current system is minimized. If these licensing agreements were governed to ensure that the compensation required to clear a sample was not unreasonable, I believe the amount of unlicensed samples would decrease significantly.

B. The Rise of Digital Sampling in the 21st Century

At the turn of the century, a new form of music creation began to gain popularity within American culture. As the utilization of the Internet and electronics increased throughout society, musicians began to explore the possibilities of using new technology in the creation process. This exploration birthed a new genre known as "electronic music", and as its name suggests, is primarily produced using solely electronics and digital products.⁶³ This new wave of creation has brought along with it new forms of digital music sampling that are unlike those seen in hip-hop music.⁶⁴ While hip-hop artists are more prone to utilizing one recognizable sample from a prior copyrighted work, electronic music producers instead incorporate a series of minor samples within one composition to create a new work. Each sample utilized by these artists may be as

⁶³ Rodgers, *supra* at 313

⁶⁴ *Id* at 313 ("In the production of electronic music, the sampling process encompasses selecting, recording, editing and processing sound pieces to be incorporated into a larger musical work")

minor as a drum progression, guitar riff or piano chord, which is then combined with other samples of the same nature to create a comprised melody.⁶⁵

Since the majority of electronic music productions do not incorporate live music, the genre has relied on digital sampling exponentially more than any previous musical category. In the absence of live instruments, musicians in the genre utilize digital samples to emulate the effect of an actual drum set or a guitar.⁶⁶ These digital samples are then used as one of many components of a larger musical work, in contrast to being utilized as a focal point of the new composition.⁶⁷

As electronic music continues to rise in popularity, the resulting demand for digital samples will likely begin to exhaust the viability of licensing agreements. Most electronic productions involve at least one digital sample, and the majority of these samples involve an instrument or loop which represents a minor aspect of the prior copyrighted work. Under the current legislation, each aspiring musician would be required to obtain a license for each sample they desire. Requiring a licensing requirement for each sample could prove to be unreasonably arduous on an electronic musician due to the fact that the copyright holder has the right to determine the compensation for the license. For a musician who desires to use multiple samples for one recording, this could result in an irrational fee in order to gain rights to the samples he or she desire. For these reasons, as electronic music continues to increase in popularity, the viability of licensing agreements for digital music samples likely will continue to decrease.

⁶⁵ *Id* at 319

⁶⁶ Lou Carlozo, *Amped About Electronica, The Latest Musical Outlet?* Chicago Tribune, April 1, 1997

⁶⁷ *Id* at 313

V. Bridgeport Music, Inc. v. Dimension Films and its Response to Digital Sampling

Prior to the Sixth Circuit's decision in *Bridgeport*, the issues regarding de minimis digital music sampling had been left widely unaddressed by the courts. Cases such as *Grand Upright* dealt instead with such noticeable samples that the courts likened the sampling in question to piracy.⁶⁸ Piracy is evident when an individual utilizes enough of a copyrighted work to essentially create an exact replica of the prior art.⁶⁹ This differs from digital music sampling mainly because of the length and character of the material taken. Pirated material usually encompasses enough of the prior art to render the infringing material a literal duplication, such as if an individual filmed a movie with a personal camera and sold his recording as a new version of the film. Sampling, on the other hand, usually only utilizes a small portion of prior art, so that even if the sample were recognized, a listener would be able to distinguish the new composition with the original work. Most importantly, suits involving piracy are usually clear examples of infringement, and therefore provide no guidance for how to address digital music sampling concerns.

A. *Bridgeport's* Black Letter Rule against Digital Sampling

As of today, the more modern issue of de minimis digital sampling has been largely ignored by the court system. Although the Sixth Circuit elected to consider a de minimis defense in *Bridgeport*, ultimately they determined there to be no difference between a de minimis sample

⁶⁸ *Grand Upright Music Ltd.*, 780 F. Supp. at 185

⁶⁹ Houle, *supra* at 900 (Defining record piracy as "the unauthorized duplication of the sounds on copyrighted records, tapes, cassettes, compact discs or any other form of sound storage")

and a more recognizable digital sample.⁷⁰ The court elected to adhere to the traditional approach by holding that the only distinction between music sampling that is relevant is whether the sample is a direct utilization of the copyrighted work, or an imitation of it. Traditionally, once a determination can be made that the claimed infringement involves the exact sound recording found in the prior art, infringement is evident regardless of the circumstance.⁷¹

While *Bridgeport* is a modern case, it concerns itself with a digital sample found in a hip-hop recording. No Limit Films, the defendant, elected to use a digital music sample five separate times throughout the song "100 Miles and Runnin'", the claimed infringing work.⁷² Due to the noticeable nature of the sample in question, I feel that the Sixth Circuit made a correct ruling in *Bridgeport*. However, the mistake the Sixth Circuit made in the decision was the choice to entirely reject the proposition of a de minimis exception.

The concern with the precedent set in *Bridgeport* is that the Sixth Circuit did not allow room for any future acceptance of digital music sampling. The traditionalist approach of relying solely on licensing agreements to justify sampling is one that does not adhere to the current landscape of the music industry. Utilization of digital music samples is continuing to grow as a vital aspect of modern music. Current music producers are attempting to find new, non-intrusive means of digital sampling to attempt to find a balance between exclusivity for copyright holders and creative freedom of aspiring artists, among these being de minimis sampling. The courts determination in *Bridgeport* rejected the concept that a digital music sample can be allowed without harming the owner of a copyright. De minimis samples are not noticeable to the general

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

⁷¹ *Id at* 801

⁷² Jennifer R. R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 437 (2006)

public, and do nothing to impede on or take advantage of the creativity of the prior art. This is due to the fact that the sample being used is only a component to the larger work, instead of a centerpiece of it.

B. The Free-Rider Problem and Digital Music Sampling

The Sixth Circuit in *Bridgeport* reasoned that each choice made by a copyright holder in creating a musical composition is a choice of importance. Each aspect of a work of art, regardless of its role in the larger composition, was a decision made by the creator of the work and thus deserves to be protected. Thus, any illegitimate taking of a sound recording, regardless of its role in the prior art, is "a physical taking rather than an intellectual one", because the alleged copyright infringer is knowingly utilizing the prior arts' expression, instead of creating an original expression in a new work.⁷³ This distinction between physical and intellectual use is what I feel justifies an exception for modern forms of digital music sampling. The majority of hip-hop samples, such as that used in *Bridgeport*, can be clearly noticed by a casual listener. In such a circumstance, the copyright holder of said sample feels as if the intuition behind the previous work is being utilized unfairly. In a sense, it emulates what is known as the "free rider theory".

The free rider problem occurs when an individual benefits from resources or goods without providing any compensation for the benefit experienced. In relation to digital sampling, a copyright holder feels that the benefit being freely utilized is sound recognition. When an individual uses a noticeable digital sample in a new work, the benefit experienced is the familiarity the general public will have with the sample, and thus the new work. The sampler is

⁷³ *Id at* 802

able to gain popularity and awareness without working for it. This, along with the "physical taking" argument, support the argument against digital sampling of recognizable copyrighted sound recordings.

In contrast, an argument can be made that a digital sample such as those commonly used in electronic music represent more of an intellectual than a physical taking. Unlike the traditional hip-hop sample, which is prominently featured in the newly created work, electronic music samples are used more as a tool and are largely unnoticed by the average listener. For this reason, the free-rider problem is avoided because the digital sampler does not experience the benefit of immediate recognition. The electronic music sampler does not use copyrighted sound recordings for undeserved benefit, but instead does so to further their own musical creativity.

While the argument can be made that any digital music sample that is freely given is an undeserved benefit, the benefit of a de minimis sample contrasts that of a traditional sample significantly. Whereas a digital music sampler in a hip-hop song utilizes the sample as a central theme to their new work, an electronic music producer uses the sample as a background component. The only benefit achieved is a utilitarian one, and no additional recognition or public affliction is gained through the sample. Thus, the balancing act that copyright law attempts to achieve is satisfied in such a circumstance, as the copyright holder is able to protect their musical expression, and innovation and creativity of aspiring musicians is also preserved.

C. *Bridgeport's* Holding and its Impact on Copyright Law

In *Bridgeport*, the decision the Sixth Circuit was able to reach was entirely justified. However, the court also set a precedent that all forms of digital sampling should be litigated similarly.⁷⁴ To date, there has been no evidence of an infringement case regarding the more

⁷⁴ *Id* at 801

modern digital sampling techniques used by electronic musicians. While the courts have yet to address the proposition of different forms of digital sampling, it is an issue that will eventually be litigated. The justification for certain forms of digital music samples is vital to the copyright industry in order to promote further artist innovation and creativity.

As electronic music continues to increase in popularity, the majority of modern artists will continue to rely on the availability of digital music samples to create new works. If the courts determine that the *Bridgeport* black letter approach to digital sampling in electronic music, numerous aspiring musicians will be turned away due to the difficulty of obtaining the requisite materials to create new works. In contrast, an exception for "de minimis" digital samples, those which are not recognizable by the general public and which are not being used for undeserving benefits, would promote creativity while also protecting the original copyright holder's rights.

The holding reached in *Bridgeport* poses numerous dangers to the future of the music industry. For copyright law to succeed, aspiring artists and musicians must believe that they have freedom to utilize their creativity. If we allow such a rigid law against digital music sampling, eventually all sound recordings and elements of song could potentially be protected. As the music industry evolves throughout time, so should the laws governing them. The Sixth Circuit should realize and understand that digital music sampling has evolved from a rarely used tactic to now being a vital aspect of modern music. It is the responsibility of the legislators to ensure that the rules of copyright will continue to strike a balance between owners of copyright, and those aspiring to create new works. Clearly, there will be some opposition to the allowance of de minimis digital music sampling, as it is still technically a violation of a copyright holder's exclusive rights. However, the most important thing is to ensure that our laws governing the arts

will encourage musicians and artists to continue to create in the future. If this is our top priority, current copyright holders and creators of prior art must be willing to compromise. The allowance of de minimis sampling is a minor compromise, as it ensures that the individuality and uniqueness of the prior art will maintain. De minimis sampling does not threaten the popularity of prior art, but instead attempts to use music's past to help create it's future.

VI. Conclusion

For our system of copyright law to be effective, individuals who are granted protection must believe that their musical expression will be theirs alone to utilize. In essence, it is this belief that drives our society to continue to create art and music. Section 114(b) of the Copyright Code was established on this belief, and it is what fueled *Bridgport*, as well as prior decisions regarding copyright infringement. However, the acceptance of de minimis sampling would preserve this right, while also promoting continued creativity within society.

. The principle behind de minimis sampling is that the aspiring artist is using the sample more as a tool, rather than as a centerpiece of the newly created work. In modern music, and especially in the electronic genre, the use of live instruments is becoming more rare. As such, producers who desire a drum line or a guitar riff, but do not have the resources to create one organically, will use a digital sample from a prior work. The sampler then layers other instruments to the composition, thus masking the digital music sample.

This de minimis exception would require that the digital music sample being utilized is virtually unrecognizable to the general public. This standard is what will ensure that the sample being utilized will be used only in an intellectual sense, and not a physical one. By requiring that these samples be unnoticeable, de minimis sampling secures the original artists expression. If use

of a work goes unnoticed, there is no actual harm done to the copyright owner or the creator of the prior work, and the free-rider problem is avoided entirely.

The music industry is one of the more rapidly changing fields in our society. As such, it is vital that we approach the laws governing the industry with modern eyes. The original statutes that were enacted in 1972 were written to govern the music industry of the past. Legislators in 1976, when 114(b) was rewritten, did not foresee the changes that have occurred within the music industry. Instead of ignoring these changes, the proper course of action would be to consider an alternative that best furthers the protections being granted copyright provides, while also adhering and accepting the current state of music.

The traditional response to digital music samplers is that the availability of licensing agreements is a sufficient means for obtaining a digital music sample. However, the lack of regulations as well as the rapid increase in sampling requests could potentially expose licensing agreements as an unsatisfactory means for digital samplers. Copyright holders who would rather not provide a license can request an unreasonable amount from the aspiring sampler, virtually assuring that the musical work in question will not be utilized. Until this licensing issue is addressed, infringement actions will continue to be brought to the courts. In response to such high compensation requests, certain musicians will instead sample without addressing the owner of copyright, hoping that the owner will not discover the sample in the new work.

If de minimis samples were considered legal, the licensing agreement would regain its importance in the music industry. Musicians attempting to sample a sound recording that fell outside of the de minimis exception would almost certainly attempt to gain a license, since the sample in question would be recognizable and the potential for an infringement case would be

high. Potential digital samplers would likely utilize licensing agreements more frequently knowing that they had the choice to freely use a de minimis sample if they desired.

Modern genres of music, namely electronic music, have completely altered the traditional forms of music creation. These modern musicians utilize software as well as hardware to create works of art, as opposed to a guitar or drum set. As this genre gains popularity, the amount of digital samples that are requested will steadily increase, and barring any diversion from the holding in *Bridgeport*, these aspiring artists will continue to be named copyright infringers, thus placing the future of the music industry at risk.