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Article

CONFUSION IN THE DIGITAL AGE: WHY THE DE MINIMIS USE TEST SHOULD BE APPLIED TO DIGITAL SAMPLES OF COPYRIGHTED SOUND RECORDINGS

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*94 "Isn't life a series of images that change as they repeat themselves?" - Andy Warhol

"Only God creates. The rest of us just copy." - Michaelangelo

Introduction

Although the average music listener may have never heard of the term "digital sample," it is quite likely that anyone who has listened to the radio or a musical recording within the past twenty years has been exposed to one. Examples of digital music sampling in modern pop culture are plentiful, from Vanilla Ice's use of Queen and David Bowie's "Under Pressure"¹ in the much maligned "Ice Ice Baby,"² to MC Hammer's use of Rick James's "Superfreak"³ as the backbone of the 1990 hit "U Can't Touch This."⁴ A recent rise in the global popularity of hip-hop has increased the prevalence of digital sampling in modern radio hits. Indeed, *95 not only do many of today's popular artists and music producers use digital samples, but they also rely on this technology as part of the creative process.

Nevertheless, the use of digital samples does not come without a cost. As "producers have become increasingly subtle and

sophisticated in their use of samples in producing new works, they have been equally conscious of the legal ramifications of their behavior.⁷⁵ Many record companies now have “entire subdivisions dedicated to making certain that sampled works have been contractually licensed or granted ‘clearance’ from their owner.”⁷⁶ Accordingly, musicians and producers must pay large sums of money to lawyers and agents in order to negotiate and secure a clearance from a copyright holder.

If a digital “sampler” fails to obtain the proper licenses, the copyright holder may sue the sampler for copyright infringement. Possible consequences include an injunction that would remove the album from commerce, damages, or even “criminal sanctions against those who willfully copy the works of others suggested under section 506 of the Copyright Act.”⁷⁷

Thus, it is easy to see why the vast majority of samplers obtain the requisite licenses before using a sample of someone else’s work in their song. Nevertheless, if a sampler believes the cost of obtaining a license is too high or if the copyright holder simply refuses to grant a license, the sampler may choose to use the sample without authorization and risk the potentially disastrous legal ramifications. Samplers argue that use of a small, minimal portion of another artist’s song does not constitute copyright infringement.⁸ Copyright owners counter that the unauthorized appropriation of even an unrecognizable, one-second clip of a sound recording is infringement.⁹

Since the age of digital sampling is still largely in its infancy, there has been little judicial guidance thus far with respect to how much (if any) one can sample before infringing a copyright. Nevertheless, the Ninth Circuit’s recent decision in *Newton v. Diamond*¹⁰ and the Sixth Circuit’s decision in *Bridgeport Music v. Dimension Films*¹¹ have shed light on the myriad problems inherent in deciding *96 whether sampling constitutes infringement and have also provided insight into how the courts are likely to deal with the digital sampling problem in the future. Similar to other recent technology-based copyright problems such as peer-to-peer file sharing, the digital sampling dilemma has revealed the considerable difficulty courts face in attempting to reconcile new technologies with traditional copyright doctrine.

This paper attempts to explore the legality of digital sampling and the viability of de minimis use analysis in the digital sampling context. Part II discusses the Copyright Act of 1976 and how courts have traditionally analyzed a claim of copyright infringement. Part III outlines the history of digital sampling and traces the evolution of digital sampling case law leading up to the Ninth Circuit’s decision in *Newton v. Diamond*. Part IV discusses and critiques the *Newton* decision and its future relevance for digital samplers. Part V analyzes the Sixth Circuit’s decision in *Bridgeport Music v. Dimension Films* and suggests that the *Bridgeport Music* court erred in both its interpretation of the Copyright Act and its implementation of a bright-line rule that prohibits any unauthorized sampling of a sound recording. Part VI presents possible solutions to the digital sampling problem and argues for a presumption against de minimis use where a sampler fails to obtain a sound recording license. Part VII concludes.

I. The Copyright Act and Traditional Infringement Doctrine

A. Sections 102 and 106 of the Copyright Act

The U.S. Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹² Congress used this power to enact a federal Copyright Act, which has been amended several times throughout our nation’s history.¹³ The Copyright Act of 1976 is the most recent comprehensive revision to the Act.¹⁴

Copyrights are not “ultimately intended to reward the creator, but to encourage public benefits. . . . [The] reward is seen as the most effective means to secure this public benefit.”¹⁵ Speaking for the Supreme Court in *Fox Film Corp. v. Doyal*, Chief Justice Hughes noted that “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the *97 public from the labors of authors.”¹⁶ Accordingly, the aim of copyright is not to limit useable expression or to fence off particular parts of our common vocabulary and culture, but rather to “forge a balance between allowing the public to benefit and use the artistic expression, and protecting the rights of the creator sufficiently to encourage the creation.”¹⁷

Section 102 of the Copyright Act of 1976 provides copyright protection to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁸ The Act explicitly includes both “musical works, including any accompanying words” and

“sound recordings” as works of authorship that are afforded copyright protection.¹⁹ Thus, it is important to note at the outset that there are two distinct copyrightable components to digital sampling cases: the sound recording and the original musical composition itself.

For example, imagine B.B. King composes a new song entitled “Blues in G-Flat.” First, King finishes writing the song and immediately jots down the composition on a piece of paper. King now has a “musical work” fixed in a tangible medium of expression (the paper), and therefore has a copyright in that work. Next, King signs a contract with Blues Records to record “Blues in G-Flat”; the contract provides that Blues Records shall own the copyright in the sound recording. King records the song, and Blues Records produces a compact disc containing the recording. Blues Records now owns the copyright to the “sound recording” of “Blues in G-Flat.”

Section 106 of the Act grants the owner of a copyright the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work publicly, perform the work publicly, display the work publicly, and in the case of sound recordings, perform the work publicly by means of a digital audio transmission.²⁰

Using the above hypothetical, imagine that Widget Records wishes to make a compilation of the year’s top blues songs and decides to include “Blues in G-Flat.” Widget Records must obtain authorization from two copyright holders to reproduce the song. First, Widget Records must obtain a license from King to use the musical composition “Blues in G-Flat” (“mechanical license”). Next, they must obtain a license from Blues Records to use the sound recording of “Blues in G-Flat” (“master use license”). If an artist wishes to record his own version of King’s song, he ***98** need only obtain permission from King to use the composition because he will not be using any part of the sound recording.

B. Traditional Copyright Infringement

Let us further assume that both King and Blues Records refuse to license their respective copyrights to Widget Records. Undeterred, Widget Records includes the recording of “Blues in G-Flat” on the compilation album. Both King and Blues Records immediately file suit against Widget Records for copyright infringement. Specifically, King and Blues Records claim that Widget Records has infringed upon the copyright owners’ exclusive right to reproduce and distribute the work pursuant to § 106.²¹

1. Establishing Ownership of a Valid Copyright and Actual Copying 2. To establish infringement, a plaintiff must first prove that his work is copyrightable under § 102 and that his ownership of the copyright is valid. Next, “a successful claim of copyright infringement must satisfy two factual inquiries--‘[actual] copying and improper appropriation.’”²² Actual copying can be proven “by either direct evidence or circumstantial proof that the alleged infringer had access to the original work and that the new work bears a ‘probative similarity’ to the copyrighted work.”²³

A finding of actual copying, however, does not necessarily give rise to infringement; the plaintiff must still prove the “improper appropriation” inquiry. Although “courts and statutes define the rights of copyright holders as absolute or exclusive, even blatant copying does not constitute infringement if such copying creates a derivative work that is not substantially similar to the original.”²⁴

2. De Minimis Use: The Substantial Similarity Test

The principle that trivial copying does not constitute actionable infringement has long been a central tenet of copyright law. Indeed, Judge Learned Hand observed over 80 years ago that “[s]ome copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.”²⁵ “This principle reflects the legal maxim, *de minimis non curat lex*, [often translated as] ‘the law does ***99** not concern itself with trifles.’”²⁶ “De minimis use means that a copying ‘has occurred to such a trivial extent as to fall below the quantitative [and qualitative] threshold of substantial similarity’”²⁷

Courts use the “substantial similarity” test to ensure that infringement will be found only where “the part taken was something of value that ‘is pleasing to the ears of lay listeners,’ not an abstract idea or insignificant fragment.”²⁸ “This standard is met when the protected elements of the work would cause an average lay observer to ‘recognize the alleged copy as having been appropriated from the copyrighted work.’”²⁹ In proving whether the works are substantially similar, “there are no bright line rules and both qualitative and quantitative determinations are often relevant.”³⁰ An appropriation of a small amount of material from another work does not constitute infringement if it falls below the quantitative and qualitative

threshold of substantial similarity.³¹

“[U]sing a few words of one song’s lyrics in another song may result in a work that is so dissimilar that the law does not recognize the impropriety of the appropriation.”³² Similarly, taking a mere three notes from a forty-five note pattern is also unlikely to constitute infringement. If a use falls below this *de minimis* threshold, a claim for infringement will not be successful. Thus, the “substantial similarity inquiry balances the benefits of the use of copyrighted material in a new creation with potential harm to the rights of the copyright holder.”³³

3. The Fair Use Test

Generally, if a work fails both the “actual copying” and “*de minimis*” inquiries, it will be deemed an infringement. Nevertheless, “the fair use doctrine grants an infringement exemption to certain types of copying, as an affirmative defense.”³⁴ Section 107 of the Copyright Act allows a court to find a nonactionable infringement after weighing the following factors: “the purpose and character of the use,” “the nature of the copyrighted work,” “the amount and substantiality of the portion *100 used,” and “the effect of the use on the potential market for or value of the copyrighted work.”³⁵

It is important to note that fair use is an affirmative defense that can best be described as an “excused infringement,” whereas *de minimis* analysis focuses entirely on “whether the copying amounts to a level that constitutes an infringement” in the first place.³⁶ Thus, *de minimis* use should be addressed “before one reaches the affirmative defense of fair use analysis; fair use analysis, on the other hand, should only be applied after substantial similarity is found.”³⁷

C. The Digital Sampling Problem

To revisit the original hypothetical, there is little doubt that a court would find Widget Records’ appropriation of “Blues in G-Flat” to be infringing. First, King has a valid ownership of the musical composition copyright and Blues Records has a valid ownership of the sound recording. Second, there is no question that the recording was actually copied by Widget Records and distributed to the public via the compilation album. Finally, an argument of *de minimis* use would ultimately fail. Widget Records copied the entire song; not only is the recording substantially similar to King’s composition and Blues Records’ recording, but it is identical.

Nevertheless, Popstar (who unfortunately did not hear of Widget Records’ recent defeat) wishes to use a small, fragmentary portion of King’s “Blues in G-Flat” in his next hip-hop composition. Popstar digitally alters a six-second portion of King’s opening blues riff, adding digital echo and altering the pitch from G-flat to D, and then loops³⁸ the sample throughout his three minute long song, “I Got Billz.” Popstar attempts to obtain licenses from both King and Blues Records, but both refuse. King believes that Popstar’s form of “gangster rap” is demeaning to women and refuses to be associated with it. Blues Records has similar concerns. Undaunted, Popstar releases “I Got Billz” without obtaining any licenses.

There is no question that King and Blues Records own valid copyrights, and Popstar freely admits to actually copying the sample straight from the King recording. Popstar argues, however, that he only copied a mere six seconds of King’s five minute long song, and thus the copying is a *de minimis* use. It is currently unclear whether a court would find Popstar’s sample to be infringing. Modern sampling technology has provided “endless possibilities,” and these “possibilities make *101 it difficult to determine how much of the new expression should be attributed to the original work and how much is created by the person utilizing this technology.”³⁹ The few digital sampling cases that have been decided have provided little guidance for future courts to follow. Indeed, the “technology involved in [the process of sampling] and the mixing between old and new works makes music sampling copyright questions very difficult determinations for courts to make.”⁴⁰

II. The History of Digital Sampling and Early Judicial Decisions

A. Brief History of Digital Sampling Technology

In short, digital music sampling is the act of taking a previously recorded piece of music and inserting it into a new recording, thereby effectively creating a new piece of music. Sampling is a process that “consists of three steps: digital recording, computer sound analysis, and playback.”⁴¹ A digital sample machine can receive music in the form of analog waves and “transfigure them as computer code.”⁴² Modern sampler technology can then “copy and manipulate these digital computer

codes to change pitch, tempo, and timbre, and make a number of other alterations.”⁴³ Producers “feed their samplers all manner of sounds: new ones made by studio musicians or electronic synthesizers, and old ones gleaned from other records.”⁴⁴

Digital sampling first became widespread when the digital MIDI synthesizer was introduced to the market in 1981.⁴⁵ The MIDI synthesizer gave producers and musicians the ability to “digitally record, alter, and play back sound recordings.”⁴⁶ Samplers once cost “tens of thousands of dollars,” but the price of the equipment steadily declined thereafter; consumers can now purchase a sampler for less than a hundred dollars.⁴⁷ Accordingly, the low production costs of sampling have resulted in its widespread use in contemporary music. “Today, popular music is filled with artists who rely on this technology.”⁴⁸ Although sampling has had an effect on all *102 styles of music, hip-hop and rap music have “often been cited for [] heavy reliance on music sampling.”⁴⁹

B. The Evolution of Digital Sampling Case Law

Although there has been limited judicial guidance with respect to the copyright ramifications of digital sampling thus far, a handful of sampling cases from the 1990s and early twenty-first century provide insight into the evolution of digital sampling analysis leading up to the high profile Newton and Bridgeport Music cases. An overview of these early cases demonstrates the gradual “erosion of wholesale judicial dismissal of sampling in exchange for a more subtle and sophisticated legal analysis.”⁵⁰

1. Grand Upright Music Ltd. v. Warner Bros. Records, Inc.

The first digital sampling case, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, was brought in the District Court for the Southern District of New York in 1991.⁵¹ Rap artist Biz Markie looped three words and a portion of a sound recording from Gilbert O’Sullivan’s 1970s ballad “Alone Again (Naturally)”⁵² throughout a song on his album *I Need a Haircut*.⁵³ Markie asked O’Sullivan for permission to use the copyrighted material, but O’Sullivan denied Markie’s request.

Judge Kevin Thomas Duffy began his opinion by quoting the Seventh Commandment: “‘Thou shalt not steal.’ has been an admonition followed since the dawn of civilization.”⁵⁴ Upon finding that the plaintiff owned the copyright of the sampled song, Judge Duffy refused to conduct an analysis on de minimis copying or fair use.⁵⁵ Instead, Judge Duffy declared that Markie had shown “callous disregard for the law” and granted injunctive relief to the plaintiff, requiring Markie to remove all of his albums containing the O’Sullivan sample from the marketplace.⁵⁶ Furthermore, Judge Duffy referred the matter to federal prosecutors for consideration of criminal prosecution under § 506(a) of the Copyright Act.⁵⁷

*103 The *Grand Upright* opinion, “if read literally, seemingly holds that any and all sampling of music constitutes automatic copyright infringement.”⁵⁸ The decision initially caused a “chilling effect throughout the recording industry, causing increased internal policing of sampling for fear of adverse and inconsistent judicial treatment.”⁵⁹ Nevertheless, *Grand Upright* has since been criticized by courts and commentators alike, and has largely been disregarded by subsequent digital sampling decisions.⁶⁰

2. Jarvis v. A&M Records

Two years after *Grand Upright*, “the New Jersey District Court provided a more [useful] analysis and began to define the parameters of copyright ownership in the sampling context.”⁶¹ In *Jarvis v. A&M Records*,⁶² the defendants recorded a song entitled “Get Dumb! (Free Your Body)”⁶³ that featured a sample of Boyd Jarvis’s “The Music’s Got Me.”⁶⁴ Specifically, the defendants had extracted a keyboard riff and the lyrics “ooh, move, free your body” from the plaintiff’s song and sampled them throughout both the bridge and the final few minutes of “Get Dumb!”⁶⁵ The defendants obtained authorization to use the sound recording of “The Music’s Got Me,” but failed to obtain a license to use the musical composition from Jarvis. Jarvis filed suit and the defendants moved for summary judgment, claiming that the songs were not substantially similar and therefore they could not be held liable for copyright infringement.⁶⁶

In his opinion, Judge Harold Ackerman introduced the substantial similarity test to determine whether the digital sample infringed the plaintiff’s work. Judge Ackerman held that once copying has been established, the analysis should center on whether “the defendant appropriated, either quantitatively or qualitatively, ‘constituent elements of the work that are original.’”⁶⁷ Quoting Professor David Nimmer, Judge Ackerman characterized the defendant’s sample as an example of *104 “fragmented literal similarity,” a term used to describe the literal, verbatim copying of portions of a sound recording.⁶⁸

In denying the defendants' motion for summary judgment, the court found that the plaintiff's lyrical phrase and keyboard riff was not only "an expression of an idea that was copyrightable," but that the sampled portion was "attention-grabbing" and thus qualitatively significant to the plaintiff's work: "It is certainly not clear as a matter of law that the portions copied from plaintiff's song were insignificant to the plaintiff's song."⁶⁹

In short, Jarvis carved out a factual circumstance that would survive a summary judgment claim; if a sampler uses a portion of the plaintiff's work that is both quantitatively and qualitatively insignificant to the plaintiff's work as a whole, the infringement may not be actionable.⁷⁰ Jarvis would become the first of two cases that hinted toward non-infringement for the de minimis use of a digital sample leading up to the Ninth Circuit's decision in Newton.

3. Williams v. Broadus

Ten years after Grand Upright, the District Court for the Southern District of New York once again tackled the issue of digital sampling. In Williams v. Broadus, Judge Michael Mukasey faced the unenviable task of deciding whether a sample of another sample of an original recording could constitute infringement.⁷¹

The plaintiff, Marlon Williams, sampled without permission from the copyright owner two measures of Otis Redding's "Hard to Handle"⁷² in his rap song "The Symphony."⁷³ The sample consisted of a ten note pattern that was looped in 124 of 140 measures in the song.⁷⁴ Ten years later, rapper Calvin Broadus (better known to the world as Snoop Dogg) used a portion of "The Symphony" in his song "Ghetto Symphony"⁷⁵ without obtaining a license.⁷⁶ Williams sued Broadus for misappropriation.

***105** Perhaps seeing some irony in the fact that Williams himself had not obtained a license from Otis Redding, Broadus offered a fruit of the poisonous tree defense in his motion for summary judgment. Broadus argued that the plaintiff did not have a valid copyright because Williams had unlawfully used copyrighted material in "The Symphony."⁷⁷

Judge Mukasey denied Broadus's motion, holding that "[a] reasonable finder of fact could find that because the lyrics of 'The Symphony' do not use the copied portion of 'Hard to Handle' and because the lyrics are the most significant portion of 'The Symphony,' it follows that 'Hard to Handle' does not pervade plaintiffs' composition."⁷⁸ Judge Mukasey also "not[ed] that the plaintiff had only copied two of the fifty-four measures of Redding's original composition, and that the substantial similarity test inquires whether the sample is a substantial portion of the preexisting work, not a substantial portion of the infringing work."⁷⁹

Perhaps the most important aspect of the Broadus decision is Judge Mukasey's recognition of both the quantitative and qualitative inquiries of the substantial similarity test where there is a fragmented literal similarity. By following the Jarvis analysis in lieu of Grand Upright, the Broadus decision "increased the possibility that the recurring use of a small sample could avoid copyright infringement--especially if the sample is qualitatively unimportant to the original composition."⁸⁰ Three years later, the Ninth Circuit would use a similar analysis to find non-infringement in the groundbreaking Newton v. Diamond decision.⁸¹

III. Newton v. Diamond: A Small Victory for Digital Samplers and the Public Domain

In 1978, influential jazz flutist James Newton composed a four-and-a-half-minute long improvisational jazz piece entitled "Choir."⁸² Composed for flute and voice, "Choir" incorporated a variety of musical styles, including "African-American gospel music, Japanese ceremonial court music, traditional African music, and classical music."⁸³ In 1981, Newton performed and recorded "Choir" and ***106** "licensed all rights in the sound recording to ECM Records for \$5000."⁸⁴ The license to ECM only covered the sound recording of "Choir" and Newton retained all rights to the musical composition itself.⁸⁵

In 1992, the rap and hip-hop group Beastie Boys "obtained a license from ECM Records to use portions of the sound recording of 'Choir' in various renditions of their song 'Pass the Mic' in exchange for a one-time fee of \$1000."⁸⁶ Beastie Boys failed, however, to obtain a license from Newton to use the underlying musical composition.

Pursuant to their license from ECM Records, Beastie Boys "digitally sampled the opening six seconds of Newton's sound recording," and "'looped' this six-second sample as a background element throughout their song 'Pass the Mic.'"⁸⁷ The

sampled portion consisted of a “vocalization technique described in the notated musical composition that required the performer to finger a higher octave C on the flute while simultaneously singing the same note, ascending a half step to D-flat, and then descending back down to the original C.”⁸⁸ The six-second sample appeared over forty times in the song, and was digitally altered such that the pitch was lowered slightly from the original recording.⁸⁹

Newton filed suit against Beastie Boys, alleging that the group’s use of the six-second sample of “Choir” infringed his copyright in the musical composition.⁹⁰ Beastie Boys responded with a motion for summary judgment, arguing that the appropriated three-note portion of “Choir” was not distinctive and thus not copyrightable, and even if the small pattern was copyrightable, the Beastie Boys’ appropriation was *de minimis* and therefore not actionable.⁹¹

A. The District Court Decision: Originality and De Minimis Sampling

Judge Nora Manella of the District Court for the Central District of California heard the case.⁹² First, Judge Manella found that the three-note sample of the “Choir” composition could not be copyrighted because it was not original as a matter *107 of law.⁹³ Newton explained that the “particular approach to the technique of vocalization included a method of ‘overblowing’ the underlying C note to produce an effect of ‘multiphonics,’ a process that modified tone color to produce an effect that was uniquely his own.”⁹⁴ This “technique,” Newton argued, was a unique approach to jazz flute playing and thus should be considered “original” and protectable under copyright law.⁹⁵

Nevertheless, Judge Manella correctly noted that the “copyrighted score of ‘Choir’ does not delineate the techniques necessary to reproduce Plaintiff’s ‘unique sound.’”⁹⁶ Furthermore, Newton had explicitly included notations to “overblow” in other musical compositions.⁹⁷ Finally, Newton’s own expert had conceded that the “vocalization technique” was not entirely unique to Newton, and was instead a “relatively common performance practice in the avant-garde music which grows out of the cultivated Western music tradition.”⁹⁸ As a “result of this evidence, the court found that the absence of notation for his original style of performance precluded copyright protection for this small part of his musical composition.”⁹⁹

Since the court held that the three-note segment was not sufficiently original to be copyrightable, the issue of whether Beastie Boys’ appropriation constituted a *de minimis* use became irrelevant. Nevertheless, Judge Manella took the opportunity to analyze the sample pursuant to the Jarvis test and held that even if the appropriated segment was copyrightable, Beastie Boys’ appropriation was *de minimis* and thus not actionable.¹⁰⁰

Echoing Judge Ackerman’s Jarvis analysis, Judge Manella explained that in cases involving fragmented literal similarity, it is necessary for a court to analyze both quantitative and qualitative elements to find whether the defendant utilized a substantial portion of the plaintiff’s work.¹⁰¹ First, the court noted that Beastie Boys had “quantitatively” used only two percent of “Choir,” and thus Newton would have to rely on “qualitative factors” to prove that the taking was not *de minimis*.¹⁰² With respect to the “qualitative” inquiry, Judge Manella determined *108 that “[n]either the . . . three-note sequence, the common vocalization technique, nor the combination thereof imparts qualitative importance or distinctiveness to the six-second excerpt.”¹⁰³ Accordingly, Beastie Boys’s use of the sample was *de minimis*.¹⁰⁴

Although Judge Manella did not need to delve into *de minimis* use analysis after granting summary judgment to the Beastie Boys on the “originality” argument, her opinion continued the trend toward liberalizing the use of digital samples that had begun nine years earlier in Jarvis. On appeal, Chief Judge Mary Schroeder’s affirming opinion would result in the first major victory for digital samplers on the circuit court level.

B. The Ninth Circuit Decision: De Minimis Sampling Does not Constitute Infringement

In affirming the district court ruling, the Ninth Circuit reiterated the need to filter the expressive, copyrightable elements contained in Newton’s score from any expressive qualities that exist in the sound recording (which the Beastie Boys were authorized to use).¹⁰⁵ First, Judge Schroeder agreed with the district court that the plaintiff could not claim that the unique qualities of his flute playing are copyrightable if they were not written into the score itself.

A crucial problem with the testimony of Newton’s experts is that they continually refer to the “sound” produced by the “Newton technique.” A sound is protected by copyright law only when it is “fixed in a tangible medium.” Here, the only time any sound was fixed in a tangible medium was when a particular performance was recorded. . . . Thus, regardless of whether

the average audience might recognize the “Newton technique” at work in the sampled sound recording, those performance elements are beyond consideration in Newton’s claim for infringement of his copyright in the underlying composition.¹⁰⁶

Nevertheless, the Ninth Circuit moved on to the issue of whether Beastie Boys’ unauthorized use of six seconds of the composition was substantial enough to sustain an infringement action.¹⁰⁷ First, Judge Schroeder explained that because there will always be a high degree of similarity in cases of “fragmented literal similarity,” the “dispositive question is whether the copying goes to trivial or substantial elements.”¹⁰⁸ To make this determination, a court must measure “the qualitative *109 and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole.”¹⁰⁹

Judge Schroeder noted that it is necessary to focus on substantiality with respect to the plaintiff’s work (and not the defendant’s work) because the “fundamental question” is whether the value of the original is “sensibly diminished” or the labors of the plaintiff are appropriated by another to an injurious extent.¹¹⁰

Courts . . . focus on the relationship to the plaintiff’s work because a contrary rule that measured the significance of the copied segment in the defendant’s work would allow an unscrupulous defendant to copy large or qualitatively significant portions another’s work and escape liability by burying them beneath non-infringing material in the defendant’s own work, even where the average audience might recognize the appropriation.¹¹¹

Turning to the facts of the case, the Ninth Circuit held that “no reasonable juror could find the sampled portion of the composition to be a quantitatively or qualitatively significant portion of the composition as a whole. Quantitatively, the three-note sequence appears only once in Newton’s composition. When played, . . . the segment lasts six seconds and is roughly two percent of the four-and-a-half-minute ‘Choir’ sound recording . . .”¹¹²

Qualitatively, the court found that the sampled portion “is no more significant than any other section.”¹¹³ Judge Schroeder seemed to conclude that the portion was not particularly “significant” because the majority of the composition calls for improvisation. Apart from the improvisational sections, “with the exception of two notes, the entirety of the scored portions of ‘Choir’ consist of notes separated by whole and half-steps from their neighbors and is played with the same technique of singing and playing the flute simultaneously.”¹¹⁴

Moreover, although Newton’s experts offered testimony that the performance of the “Newton technique” on the sound recording was qualitatively significant, the court found that he “failed to offer any evidence to rebut [the defendants’] testimony that the sampled section is not a quantitatively or qualitatively significant portion of the ‘Choir’ composition.”¹¹⁵ In sum, Beastie Boys’ use of the composition *110 was *de minimis*.¹¹⁶ Newton appealed the Ninth Circuit’s decision to the U.S. Supreme Court which denied certiorari.¹¹⁷

C. Judge Gruber’s Dissent and the Merits of Newton

Judge Gruber dissented from the Ninth Circuit decision, noting that he found “the composition, standing alone, [to be] distinctive enough for a fact-finder reasonably to conclude that an average audience would recognize the appropriation of the sampled segment and that Beastie Boys’ use was therefore not *de minimis*.”¹¹⁸ Judge Gruber also believed that the majority had erroneously discounted the testimony of Newton’s experts.¹¹⁹ He pointed out that the experts were implying that “any flautist’s performance of the sampled segment would be distinctive and recognizable, because the score itself is distinctive and recognizable.”¹²⁰

Judge Gruber noted that Newton’s experts effectively rebutted Beastie Boys’ qualitative argument by testifying that Newton’s unique style of playing is “not found anywhere else in the notated music literature, and [it is] unique and distinctive in [its] sonic/musical result.”¹²¹ Thus, Gruber argued, “[a] fact-finder [should] be entitled to find either that the sampled passage is trivial and trite (Beastie Boys’ expert) or, instead, that it is ‘unique and distinctive’ in the musical literature (Newton’s expert).”¹²²

Nevertheless, Judge Gruber’s “qualitative” analysis misses its mark in one major respect. First, assuming arguendo that Newton’s “unique” performance was explicitly included in the score, the fact that the six-second portion was “distinctive in musical literature” and “sonic result” is largely irrelevant to the qualitative analysis. Both of the aforementioned characteristics would certainly be useful to prove that the segment was original such that it should be protected by copyright. However, the segment’s originality in the context of musical literature has little to do with whether it is significant to the

plaintiff's work as a whole.

For example, assume John Williams were to compose a two-hour symphony, which contains a three-second flurry of notes that had never before been heard in classical music. Assume further that the symphony had several repeating "hooks" throughout, yet the three-second segment was a rather unmemorable, non-distinct *111 fragment during a bridge section. The fact that the segment may have been unique in the context of musical literature should have little bearing on whether someone else's use of the segment is *de minimis*. In other words, the segment is so unimportant to the overall value of the entire symphony that an appropriation will not "sensibly diminish" the value of the symphony, nor will it appropriate the labor of Williams to an "injurious extent." If copyright law were to fully protect every unique and innovative musical idea, there would be very few ideas left in the public domain to build upon.

Accordingly, while one can validly criticize the majority decision in *Newton* for being overly subjective and promoting uncertainty in the law with respect to digital sampling, *Newton* should also be lauded for attempting to strike a balance between protecting the copyright interests of authors and allowing the public access to musical ideas. Although copyright owners may not like the idea of samplers using portions of their art without paying for a license, it is difficult to argue that allowing *de minimis* use of a musical composition will have a significant adverse effect on an artist's incentive to create. For example, "it is unlikely that an artist will omit crucial qualitative elements from a composition" for fear that someone may freely sample an insignificant portion somewhere down the line.¹²³ In sum, although far from perfect, the *Newton* analysis correctly tipped the scales back from *Grand Upright*'s overprotection of musical works toward a more access-oriented, albeit hazy, middle ground.

D. The Legacy of *Newton*

When viewing *Newton* in light of the *Jarvis* and *Broadus* decisions that came before it, the majority's conclusion that digital samplers may escape liability by avoiding the use of quantitatively or qualitatively significant portions of someone else's work is not altogether surprising. The Ninth Circuit's acceptance of the *de minimis* test in the digital sampling context might best be viewed as the culmination of prior case law that had hinted at non-infringement for digital samplers. Nevertheless, although digital samplers are certainly warranted in applauding the decision, *Newton* is not exactly the major victory for digital samplers that some commentators believe it to be.

For example, it is unlikely that a recording artist who samples will consciously refuse to obtain a mechanical license merely because he or she believes that a sample is not "qualitatively" significant to the original work. Conversely, the fact that *Newton* was a split decision should serve as "a useful warning to other performers who are considering sampling a sound recording to purchase a license to use both the sound recording and the underlying composition in order to avoid *112 claims of copyright infringement."¹²⁴ Moreover, *Newton* underscores the inherent "difficulty in having judges unpredictably weigh the persuasiveness of the testimony of paid musical experts."¹²⁵

Furthermore, although the *Newton* decision struck a blow to copyright holders who believe that *Grand Upright* was decided correctly and that all sampling should constitute infringement, the case also left many questions unanswered. Specifically, while *Newton* held that *de minimis* use of a musical composition may preclude a finding of infringement, the decision left open the question of whether unauthorized *de minimis* use of a sound recording might also escape infringement. The "sound recording" issue would be addressed for the first time in *Bridgeport Music, Inc. v. Dimension Films*.¹²⁶

IV. Bridgeport Music: All Unauthorized Digital Sampling of a Sound Recording Constitutes Infringement

In 2001, *Bridgeport Music*, *Westbound Records*, and "several other plaintiffs brought suit in Tennessee alleging approximately 500 counts of copyright infringement against approximately 800 defendants, including *No Limit Films*, arising out of the defendants' use of samples in rap recordings."¹²⁷ *Westbound* owned the copyright in the sound recording to George Clinton's "Get Off Your Ass and Jam"¹²⁸; *Bridgeport Music* owned the copyright in the musical composition.¹²⁹

The recording of "Get Off" opens with an unaccompanied, three-note combination solo guitar "riff" that lasts four seconds.¹³⁰ A rap group sampled this opening riff in their song "100 Miles and Runnin'."¹³¹ "Specifically, a two-second sample from the guitar solo was copied, the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats."¹³² Each looped segment lasts approximately *113 seven seconds, and the sample appears in "100 Miles" in five different places.¹³³

In 1998, No Limit Films included “100 Miles” in its film *I Got the Hook-Up*.¹³⁴ The movie was released on VHS, DVD, and cable television.¹³⁵ Although No Limit Films received a license from Bridgeport Music to use the “Get Off” composition, they failed to obtain a license from Westbound to use the sound recording.¹³⁶ In response to the plaintiffs’ lawsuit, “No Limit Films moved for summary judgment, arguing (1) that the sample was not protected by copyright law because it was not ‘original’; and (2) that the sample was legally insubstantial and therefore does not amount to actionable copying under copyright law.”¹³⁷

A. The District Court Grants Summary Judgment

Unlike the district court in Newton, the Bridgeport district court found “that a jury could reasonably conclude that the way the arpeggiated chord is used and memorialized in the ‘Get Off’ sound recording is original and creative and therefore entitled to copyright protection.”¹³⁸ Thus, the outcome of Bridgeport I would hinge entirely upon whether use of the sample was de minimis.

Turning next to the issue of de minimis copying, the district court concluded that, regardless of “whether the sampling is examined under a qualitative/quantitative de minimis analysis or under the so-called ‘fragmented literal similarity’ test, the sampling in this case did not ‘rise to the level of a legally cognizable appropriation.’”¹³⁹ The district court granted summary judgment to No Limit Films on all claims of infringement, noting that “the purposes of copyright law would not be served by punishing the borrower for his creative use.”¹⁴⁰ Bridgeport Music and Westbound Records appealed, arguing “that the district court erred both in its articulation of the applicable standards and its determination that there was no genuine issue of fact precluding summary judgment on this issue.”¹⁴¹

***114 B. The Sixth Circuit Rejects the De minimis Defense to Infringement of a Sound Recording**

The Sixth Circuit unanimously reversed the district court decision.¹⁴² In doing so, the court referred to the statutory language of the Copyright Act to distinguish de minimis use of a sound recording from de minimis use of a musical composition.¹⁴³

Writing for the court, Judge Guy held that “[t]he analysis that is appropriate for determining infringement of a musical composition copyright is not the analysis that is to be applied to determine infringement of a sound recording.”¹⁴⁴ Judge Guy cited Section 114(b) of the Copyright Act, which states that the owner of a copyright in a sound recording has the exclusive “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.”¹⁴⁵ “The court read this and other statutory language as a congressional grant of an unmitigated right to the owner of a copyright in a sound recording to sample or otherwise copy his recording.”¹⁴⁶ There are probably any number of reasons why the decision was made by Congress to treat a sound recording differently from [other forms of intellectual property] . . . [n]one the least of them certainly were advances in technology which made the “pirating” of sound recordings an easy task. . . . [Section 114(b)] means that the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made.¹⁴⁷

After interpreting Section 114(b) to give the copyright holder the exclusive right to prepare a derivative of his sound recording, the court deduced that no one can “lift” or ‘sample’ something less than the whole” of the sound recording without infringing the copyright.¹⁴⁸ Thus, any unauthorized copying of a sound recording, no matter how minimal, constitutes infringement.¹⁴⁹

Although the Sixth Circuit’s analysis “beg[an] and largely end[ed]” with the statute,¹⁵⁰ “the court also relied on a number of policy arguments to recommend a stricter reading of the sound recording copyright statute than of the musical copyright *115 composition statute.”¹⁵¹ First, the court cited “ease of enforcement” as a beneficial outgrowth of the bright-line rule.¹⁵² Judge Guy explained as follows:

Get a license or do not sample. We do not see this as stifling creativity in any significant way. . . . [I]f an artist wants to incorporate a “riff” from another work . . . he is free to duplicate the sound of that “riff” in the studio. Second, the market will control the license price and keep it within bounds. . . . Third, sampling is never accidental. . . . When you sample a sound recording you know you are taking another’s work product.¹⁵³

Next, Judge Guy explained why an artist should be allowed to take a de minimis sample from a musical composition but not from a sound recording. First, Judge Guy succinctly noted, “this result is dictated by the applicable statute.”¹⁵⁴ “Second, even when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both.”¹⁵⁵ In short, the taking of the sampled sounds is a “physical taking rather than an intellectual one.”¹⁵⁶

Moreover, Judge Guy offered both judicial and market economy rationales for a bright line rule: “When one considers [the vast number of different samples in the marketplace], the value of a principled bright-line rule becomes apparent.”¹⁵⁷ With respect to the “music industry” economy, Judge Guy argued that it would be cheaper to license than to litigate: “[M]any artists and record companies have sought licenses as a matter of course,” and thus fears of a bright-line rule “stifling creativity” are unfounded.¹⁵⁸ If an artist refuses to obtain a license, “there is a large body of pre-1972 sound recordings that is not subject to federal copyright protection.”¹⁵⁹ Furthermore, Judge Guy argued that the recording industry and artists have “the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose.”¹⁶⁰

*116 Finally, in a somewhat awkward concluding paragraph, the Sixth Circuit seemed to acknowledge that Congress may not have intended for sound recordings to be treated differently than musical compositions, but defended its interpretation by noting, “there is no Rosetta stone for the interpretation of the copyright statute.”¹⁶¹ Should the record industry disagree with the court’s interpretation, “it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law.”¹⁶²

C. Comparison to Newton

To put the two digital sampling circuit court decisions in context, Newton stands for the proposition that a sampler may escape liability for infringement of a musical composition by proving that his use of the copyrighted work is de minimis; Bridgeport II, however, stands for the proposition that any use of a sound recording in a digital sample constitutes actionable infringement, no matter how insignificant. Nevertheless, it is difficult to reconcile the two decisions with one another.

For example, let us imagine two different hypothetical scenarios. First, assume that Popstar has obtained a sound recording license from Blues Records, but has not obtained a musical composition license from B.B. King. Popstar samples a de minimis portion of the opening note in King’s “Blues in G-flat.” If a court were to follow the Ninth Circuit’s analysis in Newton, Popstar would likely escape liability due to his de minimis use of the sample.

Let us now imagine the opposite scenario. Popstar has obtained a musical composition license from King, but fails to obtain the sound recording license from Blues Records. Again, Popstar samples a de minimis portion of King’s song. In this situation, if a court were to follow the Sixth Circuit’s analysis in Bridgeport II, Popstar would likely be found liable for copyright infringement, despite the fact that he used the same amount of King’s work as in the previous scenario. Thus, the question that arises is as follows: are Bridgeport II and Newton reconcilable? If not, which decision should be followed by future courts in digital sampling cases?

D. Why the Sixth Circuit Erred in its Bridgeport II Analysis

1. The Legislative History of Section 114(b)

Perhaps the least satisfying aspect of the Bridgeport II decision is the Sixth Circuit’s failure to adequately distinguish between a copyright in a musical composition and a copyright in a sound recording for the purposes of de minimis analysis. Admitting that it constructed the new bright-line sound recording rule in the face of “no existing judicial precedent,” the Sixth Circuit’s analysis relied almost entirely *117 on the text of the copyright statute to justify its holding.¹⁶³ Nevertheless, there is nothing in the statute’s legislative history or textual language that prohibits a de minimis inquiry from applying to a sound recording.¹⁶⁴

As the Sixth Circuit correctly observed, § 114 of the Copyright Act provides that a copyright holder’s exclusive right in a

sound recording is “limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”¹⁶⁵ The court, however, seemed to disregard the key word: limited. It is important to note that Title 17 of the Copyright Act “grants all copyright owners, including owners of musical composition copyrights, the exclusive right to ‘prepare derivative works. . .’”¹⁶⁶ Nevertheless, courts such as Newton have still required a showing of substantial similarity before finding actionable infringement.¹⁶⁷ Thus, § 114 is “best understood as limiting the rights in a sound recording from all other types of derivative activity such as public performances, not as granting a sound recording copyright holder a stronger or additional right.”¹⁶⁸

In fact, the legislative history of § 114 reveals that Congress did envision a substantial-similarity inquiry with respect to sound recordings.¹⁶⁹ According to a House report, Congress adopted § 114 to “avoid the danger of confusion between rights in a sound recording and rights in the musical composition or other works embodied in the recording.”¹⁷⁰ In other words, Congress merely wanted to ensure that the owner of a sound recording did not believe he also owned the right to the underlying musical composition. Furthermore, the report states that a right in a sound recording is infringed “whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced . . .”¹⁷¹

In sum, when considering the statute’s legislative history, the most logical interpretation of § 114 is that the owner of a sound recording should have no more right to prevent de minimis use than the owner of a musical composition; at the very least, the statute is inconclusive with respect to whether de minimis use of a sound recording should be allowed.

***118** Finally, the Sixth Circuit panel argued that if its interpretation of the Copyright Act is wrong, the record industry can simply lobby Congress for a change in the law.¹⁷² Apart from over-simplifying the process of lobbying for a change in the law, the court fails to explain why the record industry would ever choose to lobby Congress for less protection in sound recordings. While some artists might argue for this change (or at least those who do not fear having their own work sampled), it would indeed be paradoxical for the record industry to take part in such a campaign.

2. Judicial and Market Economy Arguments

Many of the Sixth Circuit’s “policy” based rationales for a bright-line rule are equally unavailing. First, the court’s judicial economy argument is applicable to almost any copyright dispute; there is little reason to believe that “a court could more easily apply substantial similarity to a musical composition, a computer program, or a painting than to a sound recording.”¹⁷³

Second, the court argues, “the market will control the license price and keep it within bounds.”¹⁷⁴ This argument, however, completely ignores the factual circumstances of Bridgeport. In that case, the defendant did not perform unauthorized sampling because he could not afford the license; conversely, the plaintiffs refused to grant the defendant a license. In fact, one could argue the doctrine of de minimis use was actually designed to remedy situations in which a copyright holder steadfastly refuses to license out a portion of his or her work, thus effectively fencing off any use of the work by other artists.

The Sixth Circuit’s retort is that there are plenty of “pre-1972” sound recordings that may be used.¹⁷⁵ To bring this line of reasoning to its logical conclusion, an artist should simply sample “What a Wonderful World”¹⁷⁶ if they are unable to use “Free Bird.”¹⁷⁷ Such an argument clearly disregards the artistic selection process inherent in sampling. It is just as absurd to limit a musician’s access to a particular group of songs because others are available as it is to limit a painter’s access to certain paints because others are available. Both situations cut against the promotion of creation, which is the very essence of copyright law.

***119** Third, the Sixth Circuit argues that sampling is “never accidental.”¹⁷⁸ While this may be true, the court again fails to distinguish why a non-accidental, de minimis use of a sound recording should be treated differently from a de minimis, non-accidental use of a musical composition. In both situations, the artist knows that he is appropriating a portion of another’s work. Furthermore, whether an appropriation was “accidental” should have no bearing on substantial similarity analysis; if a taking is so minimal that it does not cause any meaningful injury to the plaintiff or the plaintiff’s work, the fact that the defendant was aware of the taking is irrelevant.

3. “Physical” vs. “Intellectual” Taking

Although many of the Sixth Circuit’s arguments are unconvincing at best, the court’s distinction between a “physical” and an “intellectual” taking may have some merit. If one were to take the “physical taking” argument literally, it would seemingly fail because sampling is no more a “physical” taking than reproducing part of a musical score.¹⁷⁹ For example, “courts apply a

de minimis analysis even when actual, physical artwork is used in a movie, television show, or play.”¹⁸⁰ Similarly, the court’s argument that de minimis use of a sound recording is distinguishable because it “add[s] something new to the recording”¹⁸¹ is equally unavailing; indeed, “why else would someone build a new composition around part of a previous composition, if not to add to the music?”¹⁸²

Nevertheless, Judge Guy’s reference to the fact that even a small part taken from a sound recording “is something of value” because it would “save costs” hints at a possibly valid distinction between sound recordings and musical compositions.¹⁸³ In short, “requiring substantial similarity to prove infringement of a musical composition copyright allows for the creation of new works while a de minimis exception for copying a sound recording subsidizes the production of a new work.”¹⁸⁴ One could view the entire concept of digital sampling as merely a way to reduce production costs; instead of hiring a studio musician to recreate a particular sound, a producer can simply copy the sound directly from another recording. Comparatively, “reproducing some of the notes and rhythms of a composition facilitates *120 the creation of a new work but does not permit a similar reduction in production costs.”¹⁸⁵

Thus, the Sixth Circuit might argue, digital sampling does not promote creation, but rather simply saves costs. Should Popstar want to use the opening blues lick to “Blues in G-flat,” he can simply hire a studio musician or King himself—he does not need the sound recording to follow his artistic vision.

In Bridgeport II, the court was “skeptical that copying part of a recording is ever necessary to build something new.”¹⁸⁶ For example, “100 Miles” could not have been created without the de minimis standard as applied to the musical composition copyright, because the artist needed the sequence of notes and harmonies from Clinton’s original composition.¹⁸⁷ Conversely, applying the de minimis standard to the appropriation from the sound recording would “simply subsidize the song’s production.”¹⁸⁸ The former is an “intellectual” taking necessary to further the goals of copyright, while the latter is a “physical” taking that merely saves cost.

Nevertheless, this distinction ignores the fact that a musician may not always be able to re-create a particular sound. If a musician is inspired by the sounds on a recording irrespective of, for example, their rhythm or sequence, sampling the sounds may create an expression the musician may not otherwise be able to articulate. . . . [U]nlike a concerto composed in longhand, this new expression does not exist independently from the sounds used to create it.¹⁸⁹

Although the musician may incidentally save production costs by using a sample, it “does not follow that sampling was chosen for the purpose of reducing these costs or that the sounds can be precisely reproduced at all.”¹⁹⁰

For example, Popstar may be able to hire a studio musician to reproduce the notes of King’s blues lick, but even a great guitar player may not be able to truly emulate the staccato, emotion and “touch” of King’s distinctive playing. Indeed, one does not become B.B. King merely by picking up a guitar.

For all of its problems, the intellectual/physical taking distinction provides a much sounder rationale for distinguishing between musical compositions and sound recordings than a faulty interpretation of an unclear statute.¹⁹¹ There may indeed *121 be situations in which allowing de minimis use of a sound recording does not further the purpose of copyright law. Nevertheless, Bridgeport II erred by drawing a bright-line rule “where one may not naturally exist.”¹⁹²

V. Possible Solutions to the Digital Sampling Dilemma

It is unclear at this time whether other circuits will follow the Sixth Circuit’s Bridgeport II analysis, thereby prohibiting even de minimis unauthorized uses of copyrighted sound recordings. One could persuasively argue that Bridgeport II was decided incorrectly, and thus other courts should disregard the Sixth Circuit’s erroneous analysis when analyzing future digital sampling cases. Nevertheless, if Bridgeport II was wrong, how should courts treat de minimis copying of a sound recording?

At one end of the spectrum is the Bridgeport II bright-line rule, under which there could be no unauthorized copying of any portion of a sound recording. The problem with this approach has been outlined above.

At the other end of the spectrum, courts may choose to afford the same amount of protection to copyrighted sound recordings as is given to musical compositions. Pursuant to this option, the Newton de minimis use test would apply to both sound

recordings and musical compositions equally. Under the Newton analysis, the defendants in Bridgeport II would likely escape liability. Nevertheless, as inferred in the Bridgeport II opinion, applying the Newton analysis in its entirety to sound recordings would allow some digital samplers to take portions from a sound recording merely to save cost. If a sampler can create the same sounds on his own, even at a higher cost, applying the *de minimis* standard to an unauthorized sample from a sound recording would simply subsidize the song's production, and thus not spur creation in accord with the aims of copyright law. In short, the *de minimis* standard may excuse unjust enrichment in certain cases without countervailing policy reasons for the excusal.

Thus, courts may be better off carving out a middle ground between the Bridgeport II prohibitory approach and the Newton permissive approach with respect to the digital sampling of sound recordings. Perhaps the most intriguing "middle ground" option is allowing a *de minimis* use defense to sound recording infringement, but instituting a presumption against such a finding.

A. Presumption Against De minimis Use for the Unauthorized Sampling of a Sound Recording

One method by which courts could effectively compromise the Bridgeport II and Newton cases is by instituting a built-in legal presumption against a finding of *122 *de minimis* use of sound recordings. For example, assume Popstar obtains a mechanical license from King but fails to obtain a license from Blues Records before sampling a recording of King's song. Blues Records sues Popstar for infringement, and Popstar claims *de minimis* use of the recording.

At trial, Blues Records would need to initially prove three things: (1) the sampled portion of the recording was sufficiently "original" to be copyrightable, (2) Blues Records actually owns the copyright to the sound recording, and (3) Popstar actually copied a portion of the recording. Nevertheless, Blues Records would not have to prove that Popstar unfairly appropriated a significant portion of the work. Assuming that Blues Records proves the first three elements, the burden would shift to Popstar and his experts to show that his use of the sound recording was *de minimis* and therefore not actionable.

Since *de minimis* use analysis and the accompanying qualitative/quantitative components often come down to a battle of musical experts, the proposed burden shifting could have a significant effect on the outcome of a digital sampling case. Specifically, Popstar's experts need no longer merely effectively rebut Blues Records' experts on the issue of qualitative/quantitative significance; to the contrary, Popstar's experts must now prove by a preponderance of the evidence that the sampled segment was not qualitatively/quantitatively significant.

Unfortunately, instituting a presumption of infringement against the defendant in sound recording sampling cases will not cure the subjective uncertainty inherent in deciding whether two works are substantially similar. It will, however, provide at least some avenue by which *de minimis* samplers can escape a finding of infringement, which the Bridgeport II analysis does not.

Accordingly, allowing the *de minimis* use defense in the context of sound recordings will have a reverse chilling-effect on both music licensing and sampling. Samplers will be more likely to make creative uses of small, insignificant portions of recordings without fear of strict liability. In turn, sound recording copyright holders will be less likely to sue, or in the alternative, more likely to settle such cases if defendants retain the prospect of a successful *de minimis* defense. Finally, reluctant record companies will be more likely to license out samples if a sampler is likely to make use of the recording anyway, as it would certainly be in the copyright holder's interest to at least profit from the use.

Moreover, the presumption against *de minimis* use in the sound recording context may effectively deter samplers who merely want to save production costs. If Popstar can either spend 200 dollars on a studio musician or risk thousands of dollars in legal fees defending an infringement suit where the initial presumption is against him, he certainly would be wise to take the former approach. Accordingly, Judge Guy's concern with "physical" takings is largely alleviated and the *de minimis* use doctrine would once again serve to protect the incentive to create, not provide a license to free-ride.

*123 Finally, where artists such as Popstar are specifically inspired by a sound that cannot be reproduced without use of the recording (such as King's unique opening riff), they are free to take a limited portion of the recording to create a new work, even in situations where the copyright holder refuses to grant a license. Admittedly, due to the inherent unpredictability of the substantial similarity test, some artists may choose to abandon their musical idea rather than face excessive litigation fees down the road. Nevertheless, the Bridgeport II chilling effect would at least be diminished, and the objective of copyright

law, to provide an incentive to create, would not be subverted by a bright-line rule prohibiting all copying.

B. The “Economic Approach”

Professor William M. Landes has proposed a balancing test that balances the costs of copyright protection against the deterring effects of non-protection.¹⁹³ Landes’s test was designed for “appropriation art” cases where an artist uses a number of copyrightable images from other artists to create a new work of art.¹⁹⁴ Landes’s analysis may therefore be of relevance to the digital sampling problem.

Landes groups “the cost of copyright protection into two major categories: (1) access costs and (2) administrative and enforcement costs.”¹⁹⁵ Overprotection of a work in the form of high access costs may deter consumers from accessing the work, and deter other creators from building upon prior works “because they are unwilling to pay the price the copyright holder demands.”¹⁹⁶ By the same token, under-protection of a work “can deter creation because it offers no economic reward.”¹⁹⁷ Thus, Landes proposes, courts should look at economic costs to determine whether a use advances or frustrates the attempt of copyright law to strike a balance between these two extremes.¹⁹⁸

For example, in the Newton context, the court should ask the following:

When James Newton composed “Choir,” did he consider that an artist might use a six-second piece of the recording in a future work? Did the Beastie Boys’ use of Newton’s sample discourage or frustrate his efforts? Does this use discourage other artists from composing? If the copy does not discourage or frustrate the plaintiff’s efforts, if there is no direct negative effect on the plaintiff’s work, and if this use does not discourage other artists from composition, the purpose of copyright law suggests that such a small sampling *124 does not amount to a copyright violation—it should be considered de minimis use.¹⁹⁹

Although Landes’s effort to formulate a workable “appropriation art” analysis is admirable, his “economic” test is at best no better than the original Newton analysis, and at worst largely unworkable. Not only is the Landes test “ambiguous” and prone to an “ad hoc analysis,” but all of the aforementioned inquiries are largely impossible to prove.²⁰⁰ In short, economic analysis offers little help with respect to de minimis use because the substantial similarity test inherently focuses on the substance of the artwork itself.

Nevertheless, after a court finds that a sample has failed the de minimis test, and is therefore infringing, economic analysis becomes central to the affirmative defense of fair use. The fair use question is intriguing with respect to digital sampling. One could argue that the Bridgeport II and Newton inconsistencies are irrelevant, because using a digital sample to create a new work is inherently transformative and therefore a defendant will always win under a fair use defense. As of this writing, no court has yet answered the question of whether digital sampling constitutes fair use.

C. Should Digital Samplers Rely on Fair Use?

“[T]he fair use doctrine has been hailed as a powerful check on the limited monopoly that a copyright grants. Fair use, we are told, protects public access to the building blocks of creation and advances research and criticism.”²⁰¹ In sum, the fair use doctrine is theoretically used to ensure that copyright protection does not come at the expense of important First Amendment freedoms such as comment and criticism. For example, a book reviewer is entitled to quote particular copyrighted passages of a book in order to comment on and/or criticize the book in question. Thus, fair use is an affirmative defense that can best be described as an “excused infringement.”²⁰²

It is important to note at the outset that a finding of de minimis use will result in a finding of no infringement; in contrast, fair use analysis is an affirmative defense that will only be conducted after infringement is found. Perhaps due to the fact that the “substantial similarity” test in de minimis analysis and the “transformative” *125 test in fair use analysis are similar in many respects, many commentators have erroneously confused the two.²⁰³

It is also noteworthy that there has yet to be a digital sampling case in which fair use has been discussed. This could be due to a variety of reasons. First, perhaps copyright holders are concerned about the merits of a fair use defense and the possibility that all digital samples might be found transformative, and therefore they strategically decide to settle cases following a

victory on summary judgment. Another possibility is that individual artists who lose on summary judgment push for a settlement because they simply cannot afford to continue defending themselves against the enormous legal teams of multi-billion dollar record companies. In any event, it is worth briefly looking into whether fair use could be used as a viable defense in a digital sampling case.

1. Brief Fair Use Analysis of Digital Sampling

“Under the fair use doctrine, courts can find the infringement of a work to be nonactionable after weighing the following factors laid out by the Copyright Act: ‘the purpose and character of the use,’ ‘the nature of the copyrighted work,’ ‘the amount and substantiality of the portion used,’ and ‘the effect of the use on the potential market for or value of the copyrighted work.’”²⁰⁴

In short, a court might analyze a claim of fair use in the digital sampling context as follows: first, the “purpose and character” of a digital sample is commercial, but may be considered “transformative” because a sampler adds new material and “comments” on the original work to some extent; second, the “nature” of a song is generally considered fictional, and thus this factor would also cut against fair use; third, “the amount and substantiality of the portion used in relation to the original work” is very similar to de minimis analysis, therefore a sample that fails the substantial similarity test will likely fail this inquiry as well; and fourth, “the effect of the use” is not likely to have a large impact “on the market for the original.” It is unlikely that a new song featuring a sample will displace the original song; in fact, a sample may actually “make a plaintiff better off economically by generating increased exposure for commercially passé artists” such as George Clinton and James Brown.²⁰⁵ Thus, this factor would likely cut in favor of the defendant.

If this analysis is correct, then a court would probably find for fair use on the fourth “market” factor, but against fair use with respect to the second and third factor. Thus, the outcome of a court’s fair use analysis may largely depend on whether a court views a digital sample as “transformative.” At least one commentator, however, doubts that most courts would view a digital sample as transformative because *126 “current doctrine generally refuses to recognize noncritical recontextualization as fair use.”²⁰⁶

2. Transformative Use and the Criticism Requirement

Generally, courts will almost always find that a parody, which appropriates a number of copyrightable elements to criticize the original work, constitutes fair use. For example, in the highly publicized *The Wind Done Gone*²⁰⁷ case, a court found that Alice Randall’s critical re-write of Margaret Mitchell’s *Gone With the Wind*²⁰⁸ was fair use despite the fact that it appropriated numerous copyrightable elements from Mitchell’s original work.²⁰⁹ Since the parody creatively added new material to criticize the “myth of white gentility” in the original work, Randall’s free speech rights effectively trumped the copyright holder’s exclusive right to create a derivative work.²¹⁰

Nevertheless, courts have traditionally refused to confer “transformative” status on works that add new creative material but fail to criticize the original work. For example, courts have refused to recognize coursepack photocopying, which involves “copying portions of books and articles and joining them with other excerpts,” as transformative.²¹¹ Similarly, one court held that “using the Louis Armstrong classic ‘What a Wonderful World’ to contrast with scenes of violence and pain requires licensing, because that use just comments on the negative aspects of the world portrayed rather than commenting on the song itself.”²¹²

Some commentators believe that fair use privilege should be expanded to both critical and non-critical transformative uses that “add new meaning to a copyrighted work,” as limiting the fair use privilege to only critical works “ignores the value of participating by affirming or agreeing with someone else’s words.”²¹³ While there is certainly merit to this argument, courts have thus far failed to protect such works under the doctrine of fair use.

Thus, it is doubtful that a court would find a digital sample to be “transformative.” Like coursepack photocopies and the use of the Louis Armstrong’s song, digital samples do not generally criticize the original recording. Although digital *127 samples often add new meaning to the original work, courts have traditionally refused to view works as “transformative” on this ground alone.

Finally, some courts and commentators have argued that “transaction cost minimization” should be central to a fair use analysis.²¹⁴ Under this rationale, courts should apply fair use where transaction costs would otherwise be excessive.²¹⁵ It would

seem that digital sampling cases would fail this fair use test as well. In the absence of fair use, transaction costs would remain relatively low for digital samplers because they need obtain only two licenses--one for the musical composition and one for the sound recording.

Although the fair use status of digital samples is far from certain, digital samplers would be ill-advised to rely on a fair use defense at this time. With the uncertainty surrounding fair use in the digital sampling context, the de minimis use analysis becomes integral to a digital sampler's chances of escaping liability.

D. Digital Sample Licensing

Yet another possible solution to the digital sampling problem lies in a form of compulsory licensing "that allows anyone to copy anything as long as the copyright owner receives some payment, perhaps managed by a collective licensing group like [the American Society of Composers, Authors, and Publishers]."²¹⁶ On the one hand, a copyright owner could no longer prevent a digital sampler from making use of a copyrighted work; on the other hand, a digital sampler would no longer be able to freely appropriate a de minimis portion of a work without paying the copyright owner a fee.

"Presently, an individual may record a cover, or an entirely new recording of a protected musical composition, by complying with statutory fee requirements. The licensee must pay the greater of 2.75 cents per sale or 0.5 cents per minute of playing time per sale. The original copyright holder, however, has no right of refusal and must allow anyone to cover his or her work, as long as the new version does 'not change the basic melody or fundamental character of the work.'"²¹⁷

Although there is currently very little case law clarifying what constitutes a "change" in the basic melody or fundamental character of a work, a work containing a digital sample would almost certainly result in such a "change." Indeed, it would be ironic for digital samplers to suddenly argue that their works are fundamentally the same as the works they sample from when they have traditionally argued *128 that their works are not "substantially similar" to the originals. Thus, digital sampling currently falls outside of the compulsory licensing statutory scheme.

Many commentators have argued that Congress should apply an adapted version of § 115 to digital sampling.²¹⁸ The benefits of compulsory licensing would include the following: (1) copyright owners would continue to be compensated for their works, creating "further incentives for the creation of original works"²¹⁹; (2) a licensing scheme would reduce the transaction costs involved in sampling, allowing for "streamlined access to original works"²²⁰; and (3) compulsory licensing would simplify the licensing process, thereby "decreasing major transaction costs," removing many digital sampling disputes from litigation, and "curtailing asymmetrical bargaining power between record labels and producers."²²¹

More importantly, a compulsory licensing scheme would eliminate the primary problem underlying the disputes in both *Newton* and *Bridgeport II*: a copyright owner could no longer refuse to license their work for a particular use. "The only barrier to copying would come from insufficient funds," and "[n]o one need be restrained from speaking by the prospect that a court will disagree with a fair use claim."²²²

Nevertheless, a compulsory licensing scheme for digital samples is also problematic in many respects. From a natural rights perspective, a copyright holder would be losing his or her right to keep others "from manipulating the meaning of their artistic expressions."²²³ Moreover, a large-scale compulsory licensing scheme in the digital sampling context would actually expand a copyright owner's rights to unprecedented levels. Professor Rebecca Tushnet explains this problem as follows:

[T]he most disturbing thing about large-scale compulsory licensing is that it eliminates unfair uses by eliminating fair uses and gets rid of infringement by getting rid of noninfringing acts. Everybody pays for everything, including [things] which were never before part of the copyright owner's rights. Indeed, such proposals raise the possibility of potentially infinite demands for compensation. Why stop at quotation? Why not add in payment for discussion, or for inspiration?²²⁴

Although there are myriad utilitarian and natural rights arguments both for and against a system of compulsory licensing, such a system would at least avert *129 the problem of unpredictability in the courts. Whether a workable compulsory licensing system could actually be applied in the digital sampling context is a question that reaches beyond the confines of this paper. Nevertheless, the recording industry and digital samplers would be remiss if they fail to at least consider this possibility.

Conclusion

Clearly, there is no easy solution to the digital sampling problem. If the Newton and Bridgeport II decisions have proven anything, it is that traditional copyright doctrine is ill-equipped to deal with new technologies that present new copyright problems unique to the digital age.

“As Marcel Duchamp pointed out at the beginning of the last century, . . . ‘the act of selection can be a form of inspiration as original and significant as any other.’”²²⁵ “With the rise of digital technology and the potential for new forms of appropriation (and new forms of art based upon the act of appropriation),”²²⁶ the need for some type of legal safe-haven for transformative uses such as digital sampling has increasingly come into focus. Indeed, “[d]igital technology has enabled a world of new transformative uses in the arts likely to remain unexploited due to the threat of copyrights’ limits on derivative works.”²²⁷

Where does all of this leave digital sampling? Courts have been unwilling to expand the doctrine of fair use to include non-critical transformative works, and a compulsory licensing system for digital samples is far from inevitable. Thus, de minimis use analysis remains the best (and perhaps only) hope for digital samplers to escape liability for copyright infringement. Unfortunately, the subjective, ad hoc nature of de minimis use analysis has resulted in unpredictability and confusion for digital samplers and copyright holders alike.

Although there may not be any definitive answer to the problems facing the practice of digital sampling, the Newton case provides the best guidance with respect to how future courts should analyze a digital sampling dispute. In cases where a sampler has obtained a license to use a sound recording but fails to obtain a mechanical license for use of the underlying composition, courts should use the “fragmented literal similarity” de minimis use analysis as set forth in Newton.²²⁸ In cases where a sampler either: (1) obtains the musical composition license but fails to obtain the sound recording license, or (2) fails to obtain both licenses, I would *130 suggest that a court use the Newton analysis, but institute a presumption against a finding of de minimis use, thereby shifting the burden of proof to the defendant.

In sum, if the purpose of copyright law is “[t]o promote the Progress of Science and useful Arts,”²²⁹ it is imperative that all artists be given the opportunity to access existing works for the purpose of facilitating new creations. If copyright holders are allowed to effectively fence off their works from de minimis use by future artists, the public domain, and art in general, will suffer accordingly.

Footnotes

¹ Queen & David Bowie, Under Pressure, on Hot Space (EMI Records 1982).

² Vanilla Ice, Ice Ice Baby, on To the Extreme (SBK Records 1990).

³ Rick James, Superfreak, on Street Songs (Motown Records 1981).

⁴ MC Hammer, U Can’t Touch This, on Please Hammer Don’t Hurt ‘Em (Capitol Records 1990).

⁵ Chris Johnstone, Note, Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society, 77 S. Cal. L. Rev. 397, 402 (2004).

⁶ Id.

⁷ Id.

⁸ See, e.g., Sheila Rule, Record Companies Are Challenging ‘Sampling’ in Rap, N.Y. Times, April 21, 1992, at C13.

⁹ See *id.*

¹⁰ 388 F.3d 1189 (9th Cir. 2004), cert. denied, 125 S. Ct. 2905 (2005).

¹¹ 410 F.3d 792 (6th Cir. 2005).

¹² U.S. Const. art. I, § 8, cl. 8.

¹³ See generally 17 U.S.C. (2000).

¹⁴ David S. Blessing, Note, Who Speaks Latin Anymore?: Translating De Minimis Use for Application To Music Copyright Infringement and Sampling, 45 Wm. & Mary L. Rev. 2399, 2405 (2004).

¹⁵ *Id.* at 2406.

¹⁶ 286 U.S. 123, 127 (1932).

¹⁷ Blessing, *supra* note 14, at 2406.

¹⁸ 17 U.S.C. § 102(a) (2000).

¹⁹ 17 U.S.C. § 102(a)(2), (7).

²⁰ 17 U.S.C. § 106.

²¹ *Id.*

²² Recent Case, Copyright Law--Sound Recording Act--Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright-- Bridgeport Music, Inc. v. Dimension Films, 118 Harv. L. Rev. 1355, 1358 (2005) (alteration in original) (quoting *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946)).

²³ Johnstone, *supra* note 5, at 405.

²⁴ Harvard, *supra* note 22, at 1358.

²⁵ *Newton v. Diamond*, 388 F.3d at 1193.

²⁶ *Id.* (quoting *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997)).

²⁷ Blessing, *supra* note 14, at 2408.

²⁸ Harvard, *supra* note 22, at 1358 (quoting *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946)).

²⁹ Johnstone, *supra* note 5, at 405 (quoting *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir. 1980)).

³⁰ *Id.* See Part IV(B) of this Note for further elaboration on the “quantitative” and “qualitative” analysis with respect to the use of digital samples.

³¹ *Id.* at 406.

³² Harvard, *supra* note 24, at 1358.

³³ *Id.* at 1359.

³⁴ Blessing, *supra* note 14, at 2409.

³⁵ 17 U.S.C. § 107.

³⁶ Blessing, *supra* note 14, at 2409-10.

³⁷ *Id.* at 2410

³⁸ “Looping” is a term of art used by samplers that refers to taking a small portion of a recorded song and digitally altering it such that the portion repeats interminably throughout the sampler’s new composition.

³⁹ Blessing, *supra* note 14, at 2403.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Michael W. Miller, High-Tech Alterations of Sights and Sounds Divides the Arts World, *Wall St. J.*, Sept. 1, 1987, at P1.

⁴⁵ Blessing, *supra* note 14, at 2403.

⁴⁶ Id. at 2403-04.

⁴⁷ Miller, *supra* note 44, at P1.

⁴⁸ Blessing, *supra* note 14, at 2404.

⁴⁹ Id. at 2405.

⁵⁰ Johnstone, *supra* note 5, at 406.

⁵¹ 780 F.Supp. 182 (S.D.N.Y. 1991).

⁵² Gilbert O'Sullivan, *Alone Again (Naturally)*, on *Himself* (Grand Upright Music Ltd. 1972).

⁵³ Biz Markie, *I Need a Haircut* (Cold Chillin' Records 1995); *Grand Upright*, 780 F. Supp. at 183.

⁵⁴ *Grand Upright*, 780 F. Supp. at 183 (footnote omitted).

⁵⁵ Id. at 183-84.

⁵⁶ Id. at 185.

⁵⁷ Id.

⁵⁸ Johnstone, *supra* note 5, at 406.

⁵⁹ Id. at 407.

⁶⁰ Id.

⁶¹ Id.

⁶² 827 F. Supp. 282 (D.N.J. 1993).

⁶³ The Crew, *Get Dumb!* (*Free Your Body*), on *Get Dumb! (Free Your Body)* (Vendetta Records 1990).

⁶⁴ Boyd Jarvis, *The Music's Got Me*, on *The Music Got Me* (Prelude Records 1983); Jarvis, 827 F. Supp. at 286.

⁶⁵ Jarvis, 827 F. Supp. at 291.

⁶⁶ Id. at 288.

⁶⁷ Id. at 291 (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

⁶⁸ Jarvis, 827 F. Supp. at 289 (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13.03[A] n.3.2).

⁶⁹ Id. at 292.

⁷⁰ Id.

⁷¹ *Williams v. Broadus*, 60 U.S.P.Q.2d (BNA) 1051 (S.D.N.Y. 2001).

⁷² Otis Redding, *Hard to Handle*, on Otis (Atlantic Records 1979).

⁷³ Marley Marl, *The Symphony*, on *The Symphony* (Cold Chillin' Records 1988); *Broadus*, 60 U.S.P.Q.2d at 1052.

⁷⁴ *Broadus*, 60 U.S.P.Q.2d (BNA) at 1053-54.

⁷⁵ Snoop Dogg, *Ghetto Symphony*, on *Top Dogg* (Priority Records 1999).

⁷⁶ *Broadus*, 60 U.S.P.Q.2d at 1052.

⁷⁷ Id. See also 17 U.S.C. §103(a) (“protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully”).

⁷⁸ *Broadus*, 60 U.S.P.Q.2d at 1056.

⁷⁹ Johnstone, *supra* note 5, at 409

⁸⁰ Id. at 410.

⁸¹ 388 F.3d 1189, 1191 (9th Cir. 2003).

⁸² James Newton, *Choir*, on *Axum* (ECM Records 1982).

⁸³ 388 F.3d at 1191.

⁸⁴ Id.

⁸⁵ Id.

86 Id.

87 Newton, 388 F.3d at 1192.

88 Johnstone, *supra* note 5, at 411.

89 Newton, 388 F.3d at 1192.

90 Newton v. Diamond, 204 F. Supp. 2d 1244, 1247 (C.D. Cal. 2002).

91 Id.

92 Id.

93 Id. at 1253.

94 Johnstone, *supra* note 5, at 411.

95 Id.

96 Newton, 204 F. Supp. 2d at 1251.

97 Id. at 1252.

98 Id. at 1250.

99 Johnstone, *supra* note 5, at 411.

100 Newton, 204 F. Supp. 2d at 1256.

101 Id. at 1257.

102 Id. at 1258.

103 Id. at 1259.

104 Id.

105 Newton v. Diamond, 388 F.3d 1189, 1193-94 (9th Cir. 2003).

106 *Id.* at 1194 (citation omitted).

107 *Id.*

108 *Id.* at 1195.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 1195-96.

113 *Id.* at 1196.

114 *Id.*

115 *Id.*

116 *Id.*

117 Newton v. Diamond, 125 S. Ct. 2905 (2005).

118 Newton v. Diamond, 388 F.3d 1189, 1197 (Graber, J., dissenting).

119 *Id.* at 1198.

120 *Id.*

121 *Id.*

122 *Id.*

123 Johnstone, *supra* note 5, at 413.

124 Jeffrey M. Sears, Beastie Boys are in the Clear over Choir Sample, *World Copyright Law Report*, Feb. 10, 2005.

¹²⁵ Johnstone, *supra* note 5, at 413.

¹²⁶ 410 F.3d 792 (6th Cir. 2005) [hereinafter Bridgeport II].

¹²⁷ Harvard, *supra* note 22, at 1355-56.

¹²⁸ Funkadelic, *Get Off Your Ass and Jam*, on *Let's Take it to the Stage* (Westbound Records 1975).

¹²⁹ Harvard, *supra* note 22, at 1356.

¹³⁰ Bridgeport II, *supra* note 126, at 796.

¹³¹ N.W.A., '100 Miles and Runnin'', on *100 Miles and Runnin'* (Priority Records 1990); Bridgeport II, *supra* note 126, at 796.

¹³² *Id.*

¹³³ *Id.* The sample appears at 0:49, 1:52, 2:29, 3:20, and 3:46.

¹³⁴ *I Got the Hook-Up* (Dimension Films 1998); Bridgeport II, *supra* note 126, at 796.

¹³⁵ Bridgeport II, *supra* note 126, at 796.

¹³⁶ *Id.*

¹³⁷ *Id.* at 796-97.

¹³⁸ Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002) [hereinafter Bridgeport I].

¹³⁹ Bridgeport II, *supra* note 126, at 797 (citing Bridgeport I, *supra* note 138, at 841).

¹⁴⁰ Bridgeport I, *supra* note 138, at 842-43.

¹⁴¹ Bridgeport II, *supra* note 126, at 797.

¹⁴² *Id.* at 798.

¹⁴³ See *Id.* at 798-801.

¹⁴⁴ *Id.* at 798.

¹⁴⁵ Id. at 799.

¹⁴⁶ Harvard, *supra* note 22, at 1356.

¹⁴⁷ Bridgeport II, *supra* note 126, at 800 (citation omitted).

¹⁴⁸ Id.

¹⁴⁹ Id. at 803.

¹⁵⁰ Id. at 799.

¹⁵¹ Harvard, *supra* note 22, at 1357.

¹⁵² Bridgeport II, *supra* note 126, at 801.

¹⁵³ Id. (footnote omitted).

¹⁵⁴ Id.

¹⁵⁵ Id. at 801-02 (footnote omitted).

¹⁵⁶ Id. at 802.

¹⁵⁷ Id.

¹⁵⁸ Id. at 804.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id. at 805.

¹⁶² Id.

¹⁶³ Harvard, *supra* note 22, at 1358-59.

¹⁶⁴ Id. at 1359.

¹⁶⁵ 17 U.S.C. § 114(b) (emphasis added).

¹⁶⁶ Harvard, *supra* note 22, at 1359 (emphasis added).

¹⁶⁷ *Id.* at 1355, n.4.

¹⁶⁸ *Id.* at 1359.

¹⁶⁹ *Id.* at 1360.

¹⁷⁰ H.R. Rep. No. 94-1476, at 107 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5722.

¹⁷¹ *Id.* at 106, 1976 U.S.C.C.A.N. at 5721 (emphasis added).

¹⁷² Bridgeport II, *supra* note 126, at 805.

¹⁷³ Harvard, *supra* note 22, at 1360.

¹⁷⁴ Bridgeport II, *supra* note 126, at 801.

¹⁷⁵ *Id.* at 804.

¹⁷⁶ Louis Armstrong, *What a Wonderful World*, on *What a Wonderful World* (ABC Records 1968).

¹⁷⁷ Lynyrd Skynyrd, *Free Bird*, on *Pronounced Leh-Nerd Skin-Nerd* (MCA Records 1973).

¹⁷⁸ Bridgeport II, *supra* note 126, at 801.

¹⁷⁹ Harvard, *supra* note 22, at 1360.

¹⁸⁰ *Id.*

¹⁸¹ Bridgeport II, *supra* note 126, at 802.

¹⁸² Harvard, *supra* note 22, at 1360.

¹⁸³ Bridgeport II, *supra* note 126, at 802.

¹⁸⁴ Harvard, *supra* note 22, at 1360-61 (emphasis added).

185 Id. at 1361.

186 Id.

187 Id.

188 Id.

189 Id. at 1362 (footnote omitted).

190 Id.

191 Id.

192 Id.

193 William M. Landes, Copyright, Borrowed Images, and Appropriation Art: An Economic Approach, 9 Geo. Mason L. Rev. 1, 6-7 (2000).

194 Id. at 1.

195 Blessing, *supra* note 14, at 2420.

196 Id.

197 Id. at 2421.

198 Id.

199 Id. at 2421-22.

200 Id. at 2422.

201 John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. Davis L. Rev. 465, 466 (2005).

202 Blessing, *supra* note 14, at 2409-10.

203 See, e.g., Tehranian, *supra* note 201.

204 Id. at 2410 (quoting 17 U.S.C. §107).

205 Blessing, *supra* note 14, at 494.

206 Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 583 (2004).

207 Alice Randall, *The Wind Done Gone* (Houghton Mifflin 2001).

208 Margaret Mitchell, *Gone With the Wind* (Macmillan Publishers 1936).

209 Tushnet, *supra* note 206, at 551.

210 *Id.*

211 *Id.* at 583.

212 *Id.*

213 *Id.* at 546, 548.

214 David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 Ariz. L. Rev. 61, 73 (2005).

215 *Id.*

216 Tushnet, *supra* note 206, at 587.

217 Johnstone, *supra* note 5, at 424 (quoting 17 U.S.C. § 115(a)(2)).

218 See, e.g., *id.*

219 *Id.*

220 *Id.*

221 *Id.* at 426.

222 Tushnet, *supra* note 206, at 589.

223 Johnstone, *supra* note 5, at 431.

²²⁴ Tushnet, *supra* note 206, at 589-90 (footnotes omitted).

²²⁵ Tehranian, *supra* note 201, at 493 (quoting Negativland, Fair Use, <http://www.negativland.com/fairuse.html> (last visited April 28, 2006)).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004).

²²⁹ U.S. Const. art. I, § 8, cl. 8.