FROM MOZART TO HIP-HOP: THE IMPACT OF *BRIDGEPORT V. DIMENSION FILMS* ON MUSICAL CREATIVITY

Lauren Fontein Brandes*

* J.D. 2007, UCLA School of Law, Managing Editor, UCLA Law Review; B.A. 2002, Dartmouth College. I thank Professor Mark Grady for his guidance and incredible kindness in helping me to develop this piece. I thank Dr. Petr Janata, who allowed me to embrace this topic at Dartmouth. I also thank my mom, Caroline, Peter, Andrew, and Greg for inspiring me to write.

I. INTRODUCTION

Throughout history, composers such as Bach, Handel, Mozart, Beethoven, and Tchaikovsky borrowed from their predecessors to create new compositions.[1] These musicians reused melodies, harmonies, and rhythms from their predecessors' works in the name of musical progress. Composers considered borrowing to be an effective form of composition, and listeners delighted in hearing how composers reinvented popular tunes and adapted them to new musical styles.[2] Likewise, rap artists today digitally sample from past works in their compositions.[3] They sample to pay homage to past musicians, to comment on past music, and to achieve a certain musical aesthetic.[4] From (at least) the time that music was first recorded on sheet paper, sampling has been an integral part of musical composition, and it continues to be integral to the development of music.[5]

The Sixth Circuit's decision in *Bridgeport v. Dimension Films* threatens the practice of musical borrowing and the development of rap music. On June 3, 2005, the Sixth Circuit issued its final ruling in the *Bridgeport* case.[6] The court departed dramatically from precedent and set forth a new rule for digital sampling of sound recordings: "[g]et a license or do not sample."[7] It held that all unauthorized sampling of sound recordings is copyright infringement, regardless of the nature of the sample or how small the sample may be in relation to the sampled work as a whole.[8] Fourteen years earlier, the court in *Grand Upright*

---

[1] *See generally Borrowing*, in THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 5-41 (Stanley Sadie, ed., 2d ed. 2001).

[2] *See* Sherri Carl Hampel, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity*, 1992 U. ILL. L. REV. 559, 584 (1992).

[3] Sampling is the process of using a portion of a previous sound recording in a new recording. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 217, 273 (1996).

[4] *See* TRICIA ROSE, BLACK NOISE 78-79 (1994).

[5] *See Borrowing*, *supra* note 1.

[6] Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) [hereinafter *Bridgeport II*].

[7] *Id.* at 801.

[8] *Id*

Music Ltd. v. Warner Bros. Records, Inc. issued a similar ruling, holding for the first time that unauthorized sampling was copyright infringement.[9] The *Grand Upright* decision had a tremendous impact on the rap music industry. It drastically reduced the incidence of sampling, impeding the creation of new works and the development of the rap music genre.[10] The *Bridgeport* decision will further stunt the growth of rap music. By barring unauthorized *de minimis* sampling, it directly contravenes the purpose of copyright law, which is to promote the progress of arts and science.[11] It will make the type of musical borrowing practiced by Bach, Handel, Mozart, Beethoven, Tchaikovsky, and other composers impossible in the rap arena due to the prohibitive costs and difficulties of obtaining sampling licenses.

This comment argues that the *Bridgeport* rule, by prohibiting *de minimis* use of sound recording samples, is based on a misreading of the applicable statute, contradicts the purpose of copyright law, and overlooks the creative value of sampling in rap music. Part II of this comment discusses the *Bridgeport* decision and the court's underlying reasoning. Part III asserts that digital sampling in rap music is part of a broad musical and artistic tradition of borrowing from earlier works, spanning from classical composers to the present day. It further asserts that the *Bridgeport* holding, if widely adopted, will greatly inhibit the development of new artistic works. Part IV argues that the *Bridgeport* holding is based on an erroneous reading of the Copyright Act. Part V argues that substantial similarity is required for all copyright infringement claims. It further argues that *Bridgeport's* prohibition of the *de minimis* defense thwarts the purpose of copyright law, and that the *de minimis*/substantial similarity analysis is the best paradigm for evaluating digital sampling cases, because it furthers the goals of copyright law by allowing reuse of prior work for the benefit of society. Part VI analyzes fair use as a possible defense to unlicensed *de minimis* sampling. Part VII of this comment argues that *Bridgeport* failed to account for the importance of sampling to the rap music aesthetic in reaching its decision. Part VII also argues that several of the policy reasons that the *Bridgeport* court relied on in reaching its holding are invalid, given the current sample licensing regime in the music industry.

---

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

[10] SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 150 (2001).

[11] U.S. Const., art. I, § 8, cl. 8.

II. *BRIDGEPORT V. DIMENSION FILMS*

In May 2001, Bridgeport Music ("Bridgeport") and Westbound Records ("Westbound") waged war against the practice of unauthorized sampling in rap music. Bridgeport and Westbound owned musical composition and sound recording copyrights, respectively, in several works by George Clinton,[12] one of the most sampled artists in hip-hop.[13] They brought an action in the Middle District of Tennessee, alleging nearly 500 counts of copyright infringement against approximately 800 defendants for the unauthorized use of samples in rap music recordings.[14] The district court severed the original complaint into 476 separate actions, based on the allegedly infringing work, one of which involved defendants Dimension Films, Miramax Films, and No Limit Films.[15] Bridgeport owned the musical composition copyright and Westbound owned the sound recording copyright in "Get Off Your Ass and Jam" ("Get Off") by George Clinton,[16] which the rap group NWA digitally sampled in their song, "100 Miles and Runnin'" ("100 Miles").[17] "100 Miles" was included on the soundtrack of the motion

---

[12] MUSIC AND COPYRIGHT 150 (Simon Frith & Lee Marshal eds., 2d ed. 2004). Bridgeport holds copyrights to many musical compositions by Clinton and other 1970s artists, who have been particularly important to the rap genre. *Id.*

[13] *See* Vaidhyanathan, *supra* note 10, at 137-38 (stating that at least 180 recordings by more than 120 artists contain samples by funk godfather George Clinton's P-Funk school, which includes the 1970s bands Funkadelic and Parliament); http://www.secondhandsongs.com (listing George Clinton and his bands, Parliament and Funkadelic, as among the most sampled artists).

[14] *Bridgeport II*, 410 F.3d 792, 795 (6th Cir. 2005). The original complaint also included related plaintiffs Southfield Music and Nine Records, who were dismissed because they had no ownership interest in the copyrights at issue in this case. *Id.* at 795-96. The lawsuit is somewhat ironic, given that Clinton himself has released a multi-volume compact disc to facilitate sampling of his works entitled, "Sample Some of Disc, Some of D.A.T.," which contains sound bites from his works and instructions on how to get sample clearance. Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 490 n.211 (2005).

[15] *Bridgeport II*, 410 F.3d at 795. The claims against Dimension and Miramax were dismissed pursuant to a settlement agreement. *Id.* at 795 n.1.

[16] *Id.* at 796. Under the Copyright Act, musical compositions and sound recordings are separate works with their own distinct copyrights. 17 U.S.C. § 102(a)(2), (7). Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as discs, tapes, or other phonorecords, in which they are embodied." 17 U.S.C.§ 101. Thus, a sound recording of a copyrighted musical work embodies two distinct copyrights: one for the musical composition and another for the sound recording. Musical composition copyrights are typically held by the songwriter, or more often in the music industry, an assignee, usually a publishing company. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U.L. REV. 1660, 1669 (1999). Sound recording copyrights are typically assigned to a record label. *Id.* at 1669-70.

[17] *Bridgeport II*, 410 F.3d at 795.

picture "I Got the Hook Up," which defendant No Limit Films released to movie theaters in 1998.[18] The district court dismissed Bridgeport's claim regarding the musical composition copyright, finding that No Limit had been granted a license to use the musical composition of "100 Miles" in the soundtrack.[19] The district court also granted summary judgment for No Limit on Westbound's claim regarding the sound recording copyright on the grounds that the alleged infringement was *de minimis* and therefore not actionable, and Westbound appealed.[20]

The sample at issue was a two-second snippet of the solo guitar riff that began the recording of "Get Off."[21] The riff consisted of a three-note arpeggiated chord played on an unaccompanied electric guitar.[22] NWA copied the sample and slowed down the tempo, resulting in a lowered pitch, to match the tempo and arrangement of "100 Miles."[23] The sample was looped, so that it lasted seven seconds and appeared five times in "100 Miles."[24] The total running time of "100 Miles" was approximately four and a half minutes.[25] According to the district court, "[q]ualitatively, the looped segment bears only a passing resemblance to the original chord that was copied."[26] "Get Off" was a celebratory song, and, in the song, the sampled segment produces a high-pitched, whirling sound that creates a rising sense of anticipation of what is to follow.[27] In contrast, the mood of "100 Miles" is angry and anxious, as NWA conveys the story of a police chase. The sample produces a sense of tension and resembles the sound of police sirens.[28] It has been so modified and re-contextualized in "100 Miles" that, listening to the sample in "Get Off" and then in "100 Miles" back to back, it is very difficult to discern where the sample appears in "100 Miles." In fact, the district court found that "no reasonable jury, even one familiar with the works of George Clinton. . . would recognize the source of the sample without having been told of its source."[29]

---

[18] *Id.* at 796.

[19] *Id.*

[20] *Id.* at 795.

[21] *Id.* at 796.

[22] *Id.* A chord is arpeggiated when its notes are played one after another rather than simultaneously. WIKIPEDIA, *Musical Terminology*, http://en.wikipedia.org/wiki/Musical_terminology#b (last visited Nov. 27, 2005).

[23] Bridgeport Music v. Dimension Films, 230 F.Supp. 2d 830, 841 (M.D. Tenn. 2002) [hereinafter *Bridgeport I*].

[24] *Bridgeport II*, 410 F.3d at 796.

[25] *Bridgeport I*, 230 F.Supp. 2d at 841.

[26] *Id.* at 841.

[27] *Id.* at 839, 842.

[28] *Id.* at 841-42.

[29] *Id.* at 842.

Despite this, the court of appeals reversed the lower court's grant of summary judgment for the defendant.[30] The court stated that it would uphold the district court's holding, were it to apply the *de minimis* analysis.[31] However, the court departed from the *de minimis* analysis and set forth a new rule for sampling of sound recordings: "[g]et a license or do not sample."[32] The court based its holding on a broad reading of Section 114(b) of the Copyright Act, which describes the scope of exclusive rights of sound recording copyright holders, and on policy reasons.

The court purportedly took a literal reading approach to interpreting Section 114(b), explaining that there was no relevant legislative history because digital sampling did not exist when the statute was enacted.[33] The court first explained that the Copyright Act grants sound recording copyright holders the exclusive right to prepare derivative works based on the copyrighted work.[34] Section 114(b) of the Copyright Act provides that the exclusive right of sound recording copyright holders to prepare derivative works applies only to works in which "the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[35] Because the statute grants sound recording copyright holders the exclusive right to make derivatives that encompass part of the actual sound recording, the court held that "a sound recording owner has the exclusive right to 'sample' his own recording."[36] Therefore, the statute precludes application of the substantial similarity analysis for sound recordings, and

---

[30] *Bridgeport II*, 410 F.3d 792, 805 (6th Cir. 2005).

[31] *Id.* at 798 n.4. In prior sampling cases involving musical composition copyrights, courts have found no infringement where the defendant's use of the plaintiff's work was *de minimis*. *Infra* Part V.B. Courts have held the defendant's use to be *de minimis* where the sample was not quantitatively and qualitatively significant to the plaintiff's work. *Id.*

[32] *Id.* at 801.

[33] *Id.* at 805.

[34] *Id.* at 799; 17 U.S.C. § 106(2).

[35] 17 U.S.C. § 114(b).

[36] *Bridgeport II*, 410 F.3d at 801. The court further supported its holding by pointing out that Section 114(b) provides that the exclusive rights of sound recording copyright holders "do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." *Id.* at 800; 17 U.S.C. § 114(b) (emphasis added). In other words, it does not infringe a sound recording copyright to recreate and rerecord the sounds independently. The court reasoned that Congress's use of the word "entirely," which was not included in a prior draft of the statute, reserved for sound recording copyright holders the exclusive right to make recordings that include part of the copyrighted sound recording. *Bridgeport II*, 410 F.3d at 801.

any sampling of a sound recording, no matter how *de minimis*, constitutes copyright infringement.[37]

The court also relied on several policy reasons to support its interpretation of Section 114(b). The court noted that enforcement of the new rule is easy.[38] It asserted that a bright-line rule is preferable to the current substantial similarity regime, which results in unpredictable outcomes and makes it cheaper to license than to litigate.[39] Additionally, the court noted that sampling is intentional copying.[40] The court implied that sampling is more odious than other types of copyright infringement, because it allows producers and artists to save time and money when creating new works and because it is a physical, rather than an intellectual taking.[41]

The court further claimed that its holding would not necessarily stifle creativity.[42] First, artists are free to imitate and re-record the sounds on a sound recording.[43] Therefore, the market will keep the price of samples "within bounds," because copyright holders cannot charge more for licenses than it would cost to recreate the sound recording in a studio.[44] Second, the record industry has the ability and know-how to establish workable guidelines and a schedule of license fees.[45] Third, many artists and record companies obtain licenses as a matter of course.[46] Fourth, rap artists are free to sample from pre-1972 sound recordings that are not subject to copyright protection.[47]

---

[37] *Id.* at 800-01. The court cited to two sources that support its interpretation of Section 114(b). *See* Susan J. Latham, Note, Newton v. Diamond: *Measuring the Legitimacy of Unauthorized Compositional Sampling – A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING, 1486-87 (3d ed. 2002). However, this comment argues that, for the reasons discussed below, these sources, like the *Bridgeport* court, misinterpreted the copyright statute. *See infra* Part IV.

[38] *Bridgeport II*, 410 F.3d at 801.

[39] *Id.* at 802.

[40] *Id* at 801-02. It is not clear why the court found this relevant, because copyright infringement claims do not require intent. *E.g.*, in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, the court found infringement even though the defendant did not consciously copy the plaintiff's work. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 178-81 (S.D.N.Y. 1976). In contrast, in *Campbell v Acuff-Rose Music, Inc.*, the court held that fair use is a defense to copyright infringement, regardless of whether the copying was intentional. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[41] *Bridgeport II*, 410 F.3d at 801-02, 801-802 n.14.

[42] *Id.* at 804.

[43] *Id.* at 801; *see supra* note 36.

[44] *Bridgeport II*, 410 F.3d at 801.

[45] *Id.* at 804.

[46] *Id.*

[47] *Id.* Sound recordings were not protected by copyright until February 15, 1972, pursuant to the Sound Recording Amendment. Pub. L. No. 92-140, § 3, 85 Stat. 391 (1971).

Based on its readings of Section 114(b) and the policy reasons set forth above, the court held that the *de minimis* defense does not apply where there is unauthorized sampling of a sound recording.[48] Thus, it reversed summary judgment for the defendant and remanded the case to the trial court.[49] Notably, the court left open the possibility of a fair use defense.[50]

III. Sampling From Medieval Times to the Present

Sampling is part of a broad musical and artistic tradition of borrowing from and elaborating on prior works.[51] Just as rap artists borrow samples of sound recordings from past artists, composers throughout history have borrowed themes, musical phrases, and ideas from their ancestors.[52] The practice of musical borrowing began, at the latest, during the Medieval period when the first large bodies of music were fixed in notation.[53] During the Medieval period, composers of Byzantine, Roman and Ambrosian religious music borrowed melodies and texts from existing songs to pay tribute to or compete with the prior works.[54] There was no sense of ownership or deference to the original compositions; rather, composers were encouraged to borrow from and expand on concepts used in earlier works.[55] The practice of borrowing continued into the Renaissance, where composers quoted and reworked earlier melodies in religious masses and secular music.[56] Renaissance composers valued inventiveness, not in the creation of wholly original material, but in the transformation of existing material.[57] During this period, composers such as William Byrd cultivated the practice of composing variations on borrowed songs and motifs, which continues to be one of the most common forms of musical borrowing to the present day.[58]

---

[48] *Id.* at 798.

[49] *Id.*

[50] *Id.* at 805.

[51] *See generally, Borrowing, supra* note 1, at 5-41. *The New Grove Dictionary* recognizes rap music as part of the centuries-long tradition of musical borrowing. *Id.* at 35. *See also* Andrew Bartlett, *Airshafts, Loudspeakers, and the Hip Hop Sample: Contexts and African-American Musical Aesthetics*, 28 Afr. Am. Rev. 639, 650 (1994) (explaining that rap producers have claimed that sampling is part of the popular musical tradition of recycling source material).

[52] *Borrowing, supra* note 1, at 5.

[53] *Id.* at 8.

[54] *Id.* at 8-9.

[55] *Id.* at 12.

[56] *Id.* at 13-20.

[57] *Id.* at 19.

[58] *Id.* at 21.

In the Baroque era, from the 1600s to the mid-1700s, composers such as Bach and Handel continued to borrow liberally from prior works.[59] Skillful recycling of past material was considered a valid form of composition, so long as the new composers improved upon their predecessors' works.[60] By the mid-eighteenth century, however, the focus began to shift from continuity and imitation toward originality and individuality.[61] By the start of the Romantic era in the early 1800s, musicians favored originality and genius in new musical compositions over direct borrowing.[62] Despite this shift, many of Mozart's most popular works from the mid- to late-1700s are variations on popular songs, opera arias, and dances by prior composers.[63] Even his last work, his *Requiem*, was based on Haydn's *Requiem* in instrumentation and style.[64] During the 1800s, borrowing itself ironically became linked with individuality, as composers borrowed from regional, exotic, and folk music.[65] In accordance with Romantic interest in common folk and nationalist movements, Tchaikovsky, Beethoven and Brahms borrowed and paraphrased melodies from folksongs and other national melodies.[66] Composers continued to create variations on past works. For example, Chopin composed variations on a work by Mozart, while Brahms composed variations on works by Handel and Haydn.[67] Moreover, the nineteenth-century Bach revival spawned works by Liszt, Schumann, Beethoven, Mendelssohn and others based on Bach's works.[68] Composers adopted earlier styles and incorporated past material to forge a connection with the past, to pay homage, or to rival other composers.[69]

This practice continued into the twentieth century, when neoclassicist composers, such as Stravinsky, Debussy, Schoenberg and Britten referenced older styles and specific musical pieces, drawing on works by Wagner, Schubert, Mozart and others.[70] During the first half the 1900s, Bartok incorporated traditional Hungarian folk tunes into his works, and many other modern composers, including Satie, Copland, Debussy, and Pousseur, extensively imitated and quoted previous mu-

---

[59] *See Id.* at 24-25; Hampel, *supra* note 2, at 584.
[60] *Borrowing, supra* note 1, at 25-26; Hampel, *supra* note 2, at 584.
[61] *Borrowing, supra* note 1, at 26.
[62] *Id.*.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 27.
[66] *Id.* at 27-28.
[67] *Id.* at 27.
[68] *Id.* at 28.
[69] *Id.* at 28-29.
[70] *Id.* at 29-31; Hampel, *supra* note 2, at 584;

sic.[71] During that period, Charles Ives created the style of collage, which combined various quotations and paraphrased tunes.[72] Similarly, in the 1940s, "musique concrete" composers cut, spliced, and manipulated pre-recorded tapes of musical and non-musical sounds to create a sonic collage.[73] As twentieth-century composers experimented with new musical forms and tonalities, they referenced the past to highlight the divide between past aesthetics and modern atonality.[74] In the second half the twentieth century, composers incorporated prior, often familiar, musical material in new and radical ways. For example, John Cage electronically extracted and manipulated material from past recordings.[75] Recognizing that modern listeners are familiar with a variety of music styles, modern composers continue to sample from many different kinds of music to create new musical works.[76]

Borrowing from past works is also prominent in many popular music styles. American popular songs and hymns of the 1800s often shared melodies, and American songwriters at the start of the twentieth century often quoted familiar tunes in their works.[77] Jazz musicians in the mid-1900s used past music to create new works by borrowing from and improvising on standard themes.[78] Likewise, rock n' roll has had a long tradition of building on previous works.[79] Musicians such as Buddy Holly and The Beatles were open about the fact that they borrowed extensively from past materials and went on to influence many other rock n' roll musicians.[80] To the present day, familiar chord progressions, rhythms, and melodies are continually recycled and represent an important feature of popular music.[81] Rap artists have followed in the footsteps of their musical ancestors by reinventing past works in a new musical context. Past musicians themselves have recognized that rap represents just one point in time along the continuum of

---

[71] Hampel, *supra* note 2, at 584-85.

[72] *Borrowing*, *supra* note 1, at 30.

[73] A. Dean Johnson, Note, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U.L. REV. 135, 139, 139 n.23 (1993).

[74] *Borrowing*, *supra* note 1, at 33.

[75] *Id.* at 32-33.

[76] *Id.* at 33.

[77] *Id.* at 33-34.

[78] *See* Bartlett, *supra* note 51, at 648-49.

[79] Hampel, *supra* note 2, at 560.

[80] *Id.* at 560, 586.

[81] *Id.* at 586. "Pop music is based on borrowing, and the same type of chord progressions, rhythms and melodies keep recurring. What makes something catch our ear is the way an artist takes something that's sort of familiar and makes it sound fresh again." Don Snowden, *Sampling: A Creative Tool or License to Steal?*, L.A. Times, Aug. 6, 1989, at 61.

musical works based on the past.[82] Just as Bach, Handel, Mozart, Bartok, and countless others quoted extensively from their predecessors to pay homage to the past and to create innovative musical styles, rap artists use sampling to archive past styles and as a form of creative musical composition.

Outside of the musical arena, some have characterized rap music as part of the postmodern art movement.[83] Postmodernism blurs the boundaries between everyday objects and fine art and between high culture and popular culture and transgresses traditional concepts of authorship.[84] Rap music embodies the postmodern concepts of discontinuity and the diminishing authority of authors.[85] Within the postmodern movement, rap can be viewed as a form of pastiche, which is mimicry without satire.[86] Artists use pastiche "to critique and refute the very idea that original creation exists in current commercial society."[87] Rap can also be viewed as a form of postmodern appropriation art.[88] Appropriation art involves the direct taking and reuse of commonplace objects, images or even prior works of art to comment on contemporary society.[89] The style can be traced back to cubist collages by artists such as Pablo Picasso, and readymade art, which used actual objects, such as an ordinary men's urinal, in the early 1900s.[90] The trend continued throughout the twentieth century, encompassing surrealism and 1950s pop art that incorporated everyday objects.[91] In more recent years, American artists, such as Jeff Koons, continue to replicate

---

[82] As one past musician, whose works are frequently sampled, remarked, ". . . I like to think that some of the music I did was kind of timeless and just needs to be adapted to today. And that's what these rappers have done." Steve Morse, *Setting the New Market in Sampling; Sellers are Looking to Make a Deal, but Buyers are Wary*, BOSTON GLOBE, Mar. 3, 2002, at LI (quoting Galt MacDermot, a former Broadway songwriter).

[83] *See, e.g.*, Matthew G. Passmore, Note, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM. & ENT. L.J. 833, (1998), at 841-42; Rose, *supra* note 4, at 21; Tate Online, Glossary: Postmodernism, http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=230 (last visited Nov. 4, 2005).

[84] *See* Tate Online, *supra* note 83.

[85] *See* 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, 594 (2004).

[86] Szymanski, *supra* note 3, at 281 n. 37.

[87] Passmore, *supra* note 83, at 842 (quoting A. Michael Warnecke, Note, *The Art of Applying the Fair Use Doctrine: The Postmodern Art Challenge to the Copyright Law*, 13 REV. LITIG. 685, 690-92 (1994)).

[88] *See* Szymanski, *supra* note 3, at 288-89.

[89] *Id.* at 288 n. 54.

[90] *See* Tate Online, Glossary: Appropriation, http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=23 (last visited Nov. 4, 2005).

[91] *Id.*

common objects,[92] while others, such as Sherrie Levine, actually reproduce prior works of art as their own works in order to give the works new meanings and contexts.[93] Consequently, rap music is not alone in its use of previous material to create new art. If *Bridgeport*'s bright-line rule against unauthorized use of past material was controlling in years past, many groundbreaking musical and artistic developments may never have occurred. Therefore, rap artists, like their artistic predecessors, should be allowed to build on the works of the past through *de minimis* sampling.

IV. *BRIDGEPORT* MISREAD SECTION 114(B) OF THE COPYRIGHT STATUTE

The *Bridgeport* court misread Section 114(b) as an expansion, rather than a limitation, on the exclusive right of sound recording copyright holders to prepare derivative works. In 1971, Congress amended the Copyright Act to provide copyright protection to sound recordings that were fixed on or after February 15, 1972.[94] The amendment was largely in response to technological advances which facilitated pirating of sound recordings.[95] The Copyright Act grants all copyright holders the exclusive right to prepare derivative works based on the copyrighted work.[96] While other types of copyright holders have the exclusive right to prepare derivative works that recast, transform, or adapt their work in any way,[97] sound recording copyright holders only have the exclusive right to prepare derivative works in which "*the actual sounds fixed in the sound recording* are rearranged, remixed, or otherwise altered. . . ."[98] Congress included Section 114(b) as a limitation on the rights of sound recording copyright holders "in view of the expressed intention not to give exclusive rights against imitative or simu-

---

[92] Like his rap counterparts, Koons has come under legal fire for his use of prior materials in his artwork. In *Rogers v. Koons*, he was sued for copyright infringement for creating a three-dimensional sculptural version of the plaintiff's black-and-white photograph. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992). The court found that the defendant's work was substantially similar to the plaintiff's and was therefore infringing, because a lay observer would recognize defendant's work as having been appropriated from the plaintiff's work, and the defendant used the identical expression of the idea that the plaintiff had created. *Id.* at 308.

[93] Tate Online, *supra* note 90.

[94] Pub. L. No. 92-140, § 3, 85 Stat. 391 (1971).

[95] *Bridgeport II,* 410 F.3d at 800.

[96] 17 U.S.C. § 106(2).

[97] Section 101 of the Copyright Act defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or *any other form in which a work may be recast, transformed, or adapted.*"; 17 U.S.C. § 101 (emphasis added).

[98] 17 U.S.C. § 114(b) (emphasis added).

lated performances or recordings."[99] Because the purpose of Section 114(b) was to limit the scope of a sound recording copyright holder's right to prepare a derivative work, and the language of the statute clearly conveys this purpose, the right of sound recording copyright holders to prepare derivative works is narrower than the corresponding right for other types of copyright holders. Therefore, the proper interpretation of Section 114(b) is that a sound recording copyright owner's exclusive right to reproduce copies and make derivative works is limited to the actual sounds on the recording. In contrast, other copyright holders have the right to create derivative works that are based on, but do not incorporate, their actual copyrighted works.[100]

Even though owners of other types of copyrights enjoy a broader right to prepare derivatives than holders of sound recording copyrights, courts assessing the former category of copyrights have required that the copying is more than *de minimis* (or that the two works are substantially similar) in order to find copyright infringement.[101] The House Report for Section 114(b) reflects Congress's intent to recognize the *de minimis* doctrine for sound recordings. It states that "Subsection (b) of section 114 makes clear that . . . infringement [of a sound recording copyright] takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced . . ."[102] This implies that infringement does not occur when an unsubstantial portion of a sound recording is reproduced, and therefore, the *de minimis* defense is available in sound recording copyright infringement claims. Consequently, in contrast to the *Bridgeport* court's reading of section 114(b), the section limits the exclusive right of sound recording copyright holders to prepare derivative works. Thus, derivatives or copies of copyrighted sound recordings should not be subject to a more stringent rule than other types of copyrighted

[99] House Report No. 94-1476.

[100] *See* Matthew R. Brodin, Comment, Bridgeport Music, Inc. v. Dimension Films: *The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims – The Sixth Circuit's Flawed Attempt at a Bright-Line Rule*, 6 MINN. J. L. SCI. & TECH. 825, 861 (2005).

[101] See *infra* Part V.A. As detailed below, the *de minimis* defense is the flip side of the requirement that two works must be substantially similar in order for the latter work to infringe the former's copyright. *Id.* Substantial similarity is a requisite element for all actionable copyright claims. The *Bridgeport* court cited to a law review note by Susan Latham to support its interpretation of Section 114(b) as precluding the *de minimis* defense for sound recordings. *Bridgeport II*, 410 F.3d at 801 n.10. Latham asserted that the statute precludes *de minimis* defense, "[s]ince the exclusive right [to prepare derivatives of sound recordings] encompasses rearranging, remixing, or otherwise altering the actual sounds. ." Latham, *supra* note 37, at 125. Latham's statement is inconsistent with the extensive case law supporting application of the *de minimis* defense. *See infra* Part V.A.

[102] House Report No. 94-1476 (emphasis added).

works, but should be assessed under the substantial similarity framework, as discussed below.

V. Substantial Similarity is a Required Element of Copyright Infringement and Furthers the Purpose of Copyright Law

A. *The Substantial Similarity Analysis*

The *Bridgeport* court's bright-line prohibition against sampling is inconsistent with the common law rule that substantial similarity is a required for actionable copying. *Bridgeport* held that any unauthorized copying of a sound recording, no matter how minimal, constitutes copyright infringement. In contrast, copyright law has long recognized that some copying is allowed and that trivial copying does not constitute copyright infringement.[103] Copyright infringement requires not only that the defendant copied the plaintiff's work, but that the defendant's copying constituted improper appropriation.[104] A plaintiff can prove copying by either direct evidence of copying or circumstantial evidence (usually evidence of access) from which the trier of the fact may reasonably infer copying.[105] Because of the nature of digital sampling, it is usually evident that the defendant copied, and the plaintiff does not often have to prove copying. Thus, the focus of the legal analysis shifts to the second prong of the analysis, whether the defendant took so much of the plaintiff's work as to constitute improper appropriation.[106]

The test for whether the defendant has improperly appropriated the plaintiff's work is whether the two works are substantially similar. "[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial."[107] Thus, for a defendant's use of the plaintiff's work to constitute copyright infringement, there must be substantial similarity between the plaintiff's and defendant's works.[108] The test of substantial similarity depends

---

[103] Judge Learned Hand observed over 90 years ago: "Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent." Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003) (citing West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909)).

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

[105] *Id.*

[106] *See* Johnstone, *supra* note 85

[107] *Newton*, 349 F.3d at 594.

[108] *Id.*; *see also* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997). The substantial similarity analysis applies both to determine whether a defendant's work infringes the plaintiff's work and to determine whether the defendant's work is a derivative work of the plaintiff's work. *See* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 3.01 (2005) (stating that a work is only a derivative work if it "has substantially

upon the response of an ordinary lay listener or observer.[109] There is no bright-line rule as to what quantum of similarity constitutes substantial similarity.[110] Rather, in assessing substantial similarity, courts conduct a fact-specific inquiry to determine whether "an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[111] Two works may be substantially similar even if there are differences between the two works, so long as the similarities exceed the dissimilarities or the similar points are qualitatively or quantitatively important to the original work.[112] For musical compositions, the test is "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."[113]

Within the substantial similarity framework, courts recognize that the principle of *de minimis non curat lex* ("the law cares not for trifles") can be applied as a defense to copyright infringement.[114] *De minimis* infringement is the flip side of substantial similarity; to say that a use is *de minimis* is to say that the works are not substantially similar.[115] Nimmer distinguishes between two different types of similarity: (1) comprehensive nonliteral similarity and (2) fragmented literal similarity.[116] Comprehensive nonliteral similarity exists where the defendant's work copies the fundamental essence or structure of the plaintiff's work, but where there is no word-for-word or other literal similarity.[117] In cases of comprehensive nonliteral similarity, courts have found in-

---

copied from a prior work."). Thus, to say that an unauthorized work is a derivative of a prior work is essentially to say that the work infringes the copyright of the prior work (by infringing the copyright holder's right to prepare derivatives). This comment refers to the substantial similarity/*de minimis* analysis as the test for copyright infringement, both where the two works are derivative works and where the second work would not be considered a derivative.

[109] *Arnstein*, 154 F.2d at 468.

[110] Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987). In fact, courts and commentators have repeatedly noted that the test for substantial similarity is difficult to define and vague to apply. Jarvis v. A&M Records, 827 F. Supp 282, 290 (D.N.J. 1993).

[111] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[112] Rogers, 960 F.2d at 308.

[113] *Arnstein*, 154 F.2d at 473.

[114] *Bridgeport I,* 230 F.Supp. 2d at 839-40.

[115] *Newton*, 349 F.3d at 595; *Ringgold, 126 F.3d* at 74 ("*de minimis* can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.").

[116] 4 Nimmer, *supra* note 108, §13.03[A].

[117] *Id.* § 13.03[A][1].

fringement when the defendant's work appropriated the "total concept and feel" of the plaintiff's work.[118]

In contrast, fragmented literal similarity exists where the defendant copies plaintiff's work exactly or nearly exactly, but not the fundamental substance or overall scheme of the work.[119] Thus, digital sampling cases are instances of fragmented similarity, because the defendant has literally copied a portion of the plaintiff's work, but the defendant's song as a whole does not copy the overall essence or structure of the plaintiff's song. In cases of fragmented literal similarity, even though there is some actual similarity between the works, courts still require substantial similarity between the two works.[120] The question in these cases is whether the similarity relates to material that constitutes a substantial portion of the plaintiff's work.[121] Thus, in sampling cases, courts consider whether the copied material is quantitatively and qualitatively important to the plaintiff's work as a whole.[122] Even if the sample is quantitatively small, the trier of fact may find substantial similarity if it is qualitatively important to the plaintiff's work.[123] The focus on a sample's relation to the plaintiff's work as a whole embodies the fundamental question in any infringement action: whether "so much is taken[ ] that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another."[124]

B. *Substantial Similarity and the De Minimis Defense in Digital Sampling Cases*

In contrast to the *Bridgeport* court's bright-line prohibition against sampling of sound recordings, Nimmer explicitly states that the substantial similarity analysis should apply to digital sampling cases.[125]

---

[118] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977).

[119] 4 Nimmer, *supra* note 108, § 13.03[A][2]. For example, fragmented literal similarity exists when the defendant copies only a line, a few pages, or a chapter of plaintiff's work. *Id.*

[120] *See e.g.*, Williams v. Broadus, 2001 WL984714, at *14 (S.D.N.Y. 2001); *Newton*, 349 F.3d at 596-97.

[121] 4 Nimmer, *supra* note 108, § 13.03[A][2][a]. The focus is *not* whether such material constitutes a substantial portion of defendant's work. *Id.*

[122] *Id.*

[123] *Id.* Nimmer explains that there is no minimum quantitative threshold for finding substantial similarity – though a single note could never suffice, there is no foundation for the belief among musicians that borrowing three measures or less could never constitute infringement. *Id.*

[124] Newton v. Diamond, 349 F.3d 591, 596-97 (9th Cir. 2003) (citing Folsom v. Marsh, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841)).

[125] 4 Nimmer, *supra* note 108, § 13.03[A][2][b] ("[T]he practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis: to the extent

Further, several courts have applied the substantial similarity test to digital sampling cases. Although the prior sampling cases that applied the substantial similarity framework have dealt with infringement of musical composition copyrights, the substantial similarity analysis should also apply to sound recording copyrights for the reasons detailed below.[126] In *Newton v. Diamond*, the Ninth Circuit applied the substantial similarity test to determine whether the defendant's work, which included a digital sample of the plaintiff's composition, infringed the plaintiff's musical composition copyright.[127] The defendants, the Beastie Boys, digitally sampled a segment of a sound recording of the plaintiff performing his composition, "Choir," in the defendants' song, "Pass the Mic."[128] The defendants obtained a license to use the sound recording, but did not license the musical composition.[129] The sample was six seconds long in the plaintiff's recording.[130] The court recognized that the substantial similarity requirement applies to cases of digital sampling, and that the question in such cases is whether the sample is quantitatively and qualitatively significant to the plaintiff's work.[131] The court found that the sample was not quantitatively significant, because it is played only once in the plaintiff's work and it comprises only six seconds of the plaintiff's four-and-a-half-minute composition.[132] The court found that the sample was not qualitatively significant because the plaintiff provided no evidence as to the segment's particular significance in the composition as a whole.[133] Because the sampled portion of the plaintiff's work was neither quantitatively nor qualitatively significant to the plaintiff's composition as a whole, the court held that the defendants use of plaintiff's composition was *de minimis* and, therefore, not actionable.[134]

---

that the resulting product is substantially similar to the sampled original, liability should result.").

[126] *See infra* Part V.D.

[127] *Newton*, 349 F.3d at 594.

[128] *Id.* at 592.

[129] *Id.*

[130] *Id.* at 593.

[131] *Id.* at 596.

[132] *Id.* at 597.

[133] *Id.* The court also relied on its finding that the sample consisted of three notes separated by a half-step over a background C note, and the musical score for this segment did not contain stylistic direction. *Id.* at 593. Thus, the court determined that the sound recording was largely the product of the plaintiff's performance techniques rather than a generic performance of the composition, and that it went beyond the musical score. *Id.* at 595.

[134] *Id.* at 598. The Second Circuit has applied the same analysis in cases of digital sampling. *See, e.g.*, Jarvis v. A&M Records, 827 F. Supp 282 (D.N.J. 1993); Williams v. Broadus, 2001 U.S. Dist. LEXIS 12894, 2001 WL 984714 (S.D.N.Y. 2001). The court in *Jarvis v. A&M Records* applied the substantial similarity test, where defendants digitally sampled a portion

Similarly, the lower court in *Bridgeport I* applied the quantitative/qualitative fragmented literal similarity analysis to determine whether the defendant's and plaintiff's works were substantially similar.[135] The court found that the George Clinton sample was not quantitatively significant, because it comprises only two seconds of the original work, even though it comprises about forty seconds of the defendant's song.[136] The court relied on the fact that the rap artists had transformed the sample almost beyond recognition in finding that the sample was not qualitatively significant to the plaintiff's work.[137] The court stated that the sample was not recognizable to a lay observer, even one familiar with Clinton's work, as being appropriated from the plaintiff's work.[138] It reasoned that the purpose of copyright law would not be served by punishing the borrower for his creative use if even an aficionado of Clinton's music would not realize that his music had been borrowed.[139] Thus, the court recognized that creative and transformative uses of samples may outweigh claims to copyright ownership in order to further the aims of copyright law[140] and granted summary judgment for the defendant.[141]

C. *The De Minimis Defense in Other Types of Cases*

Outside of the digital sampling realm, courts also apply the substantial similarity analysis and allow *de minimis* use of prior works even where the defendant has used the plaintiff's entire work. For example, in *Sandoval v. New Line Cinema Corp.*, the plaintiff sued for copyright infringement of his photographs after the defendants showed the pho-

---

of plaintiff's work and incorporated it into their song. *Jarvis*, 827 F. Supp. at 288. The court stated that "the proper question to ask is whether the defendant appropriated, either quantitatively or qualitatively, 'constituent elements of the work that are original,' such that the copying rises to the level of an unlawful appropriation. . . .[T]he question is whether the value of the original work is substantially diminished by the copying." *Id.* at 291. Because it was unclear as a matter of law whether the sample was quantitatively and qualitatively significant to the plaintiff's work, the court denied defendant's motion for summary judgment as to the musical composition copyright. *Id.* at 292. The court granted summary judgment on the sound recording copyright, because plaintiff failed to establish ownership. *Id.* at 292-93.

[135] Bridgeport I, 230 F.Supp. 2d 830, 840-41 (M.D. Tenn. 2002).

[136] *Id.* at 841. Substantial similarity depends on whether the part that was taken was quantitatively and qualitatively important to the plaintiff's work, not whether it is quantitatively or qualitatively important to the defendant's work. 4 Nimmer, *supra* note 116, § 13.03[A][2][a].

[137] *Bridgeport I*, 230 F.Supp 2d at 841-42.

[138] *Id.* at 842.

[139] *Id.*

[140] MUSIC AND COPYRIGHT, *supra* note 12, at 151.

[141] *Bridgeport I*, 230 F. Supp. 2d at 842-43.

tographs in the motion picture "Seven" as part of the set decoration.[142] The Second Circuit pointed out that "where unauthorized use of a copyrighted work is *de minimis*, no cause of action will lie for copyright infringement. . . ."[143] The court found that the plaintiff's photographs appeared fleetingly, were out of focus, and were "virtually unidentifiable" in the defendant's motion picture, because they were not displayed with sufficient detail to enable a lay observer to identify even the subject matter of the photographs.[144] Therefore, the court held that the defendants' use was *de minimis* and affirmed the district court's grant of summary judgment for the defendants.[145] Similarly, in *Gordon v. Nextel Communications and Mullen Advertising, Inc.*, the Sixth Circuit found that the defendants' use of the plaintiff's dental illustrations in their advertisement was *de minimis* because the illustrations appeared fleetingly and out of focus.[146]

D. *The Substantial Similarity Analysis is the Best Paradigm for Evaluating Digital Sampling Cases and Furthers the Purpose of Copyright Law*

The cases discussed above demonstrate that the *de minimis* analysis is a workable paradigm for evaluating whether sampling constitutes copyright infringement. It is also the best way to protect authors' copyright interests while allowing for the development of new works. By obliterating the substantial similarity requirement for sound recordings, the *Bridgeport* court has thwarted the purpose of copyright law and vastly expanded copyright protection for sound recording copyright holders. The purpose of copyright law is to promote the progress of arts and science by providing an economic incentive for artists to create.[147] While the immediate effect of copyright law is to provide an

---

[142] Sandoval v. New Line Cinema Corp., 147 F.3d 215, 216 (2d Cir. 1998).

[143] *Id.* at 217.

[144] *Id.* at 218.

[145] *Id.*

[146] Gordon v. Nextel Commc'n, 345 F.3d 922 (6th Cir. 2003). *See also* Jackson v. Washington Monthly Co., 481 F. Supp. 647, 650-51 (D.D.C. 1979) (holding that the defendant's verbatim copying of two sentences of the plaintiff's work was *de minimis*). *But see* Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 76-77 (2d Cir. 1997). In *Ringgold* the court rejected the defendants' *de minimis* defense. The court found that the use was quantitatively significant, because the plaintiff's work was shown for an aggregate of about 30 seconds in defendant's television episode. *Id.* at 76. The court found that the use was qualitatively significant, because plaintiff's work was displayed in such a way that the average lay observer could recognize the plaintiff's style and the subject of her work. *Id.* at 77.

[147] The Constitution grants Congress the power to afford copyright protection "[t]o promote the Progress of Science and useful Arts." U.S. CONST., art. I, § 8, cl. 8. U.S. copyright law, whose overall purpose is to benefit the public, contrasts with the aims of European copyright law, which protects authors' inherent moral rights in their creations. *See* Matthew

economic incentive for author's creativity, the ultimate aim is to stimulate creativity for the public good.[148] The limited scope of copyright holders' rights and the limited copyright duration required by the Constitution reflect a balance between copyright holders' limited monopoly over their works and copyright's goal of promoting creation for the public benefit.

The substantial similarity requirement promotes this goal by balancing copyright protection for authors against the stifling effect that such protection may have on artistic development.[149] The *de minimis* defense is available throughout copyright law, because courts recognize that they must sometimes subordinate the interests of copyright holders in order to further the goals of copyright law.[150] By allowing new artists to borrow small amounts from prior works to create new works, the *de minimis* defense promotes artistic development. As Justice Story explained over 150 years ago, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."[151] Because borrowing from past works is integral to the development of new material, the *de minimis* defense is the best way to promote the creation of new works, in the rap music arena and beyond, thereby furthering the purpose of copyright law.

Courts have allowed the *de minimis* defense in cases where the defendants appropriated the plaintiffs' works in their entirety and used

---

G. Passmore, Note, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM. & ENT. L.J. 833, 846 (1998).

[148] Jisuk Woo, *Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 54 (2004).

[149] Bridgeport I, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002).

[150] *See* Brodin, *supra* note 100, at 830 ("courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry." (quoting Berlin v. E.C. Publ'n, Inc., 329 F.2d 541, 544 (2d Cir. 1964)). "[T]he interests of authors must yield to the public welfare where they conflict." Passmore, *supra* note 147, at 846 (citing STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961)). Similarly, Congress recognizes that broad access to and use of copyrighted works benefits the public by providing for compulsory licenses for cover recordings. *See* 17 U.S.C. § 115.

[151] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (citing Emerson v. Davies, 8 F.Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845). Likewise, "artistic progress is possible only if each author builds on the works of others. . .Once a work has been written and published, any rule requiring people to compensate the author slows progress in literature and art, making useful expressions 'too expensive,' forcing authors to re-invent the wheel, and so on." Nash v. CBS, 899 F.2d 1537, 1540 (7th Cir. 1990).

the plaintiffs' works without any transformation, as in *Sandoval* and *Gordon*.[152] In contrast, the *Bridgeport* sample was only a two-second portion of George Clinton's two-and-a-half minute song.[153] The pitch and tempo of the sample were altered and the sample was embedded within other musical material, so that the sample was unrecognizable as having been appropriated from Clinton's work.[154] Both the district court and the court of appeals agreed that the sample was neither quantitatively nor qualitatively significant and therefore *de minimis*.[155] The district court recognized that prohibiting the defendant's sample of the plaintiff's work would not further the purpose of copyright law, because even a Clinton aficionado would not realize that his music had been borrowed.[156] In such cases, the potential harm to the original author is likely to be minimal in relation to the potential gain to society from dissemination of the defendant's work. Consequently, allowing the use of samples that are *de minimis* promotes the development of music and furthers the purpose of copyright law.

VI. Digital Sampling as a Non-Infringing Fair Use

The fair use defense may also be a useful mechanism for allowing the creative use of samples in rap music. Like the *de minimis* defense, fair use is a defense to copyright infringement where the benefit to be gained by society from the defendant's use of the plaintiff's work outweighs the harm to the plaintiff from such use.[157] Fair use promotes the creation of new works by recognizing that some uses should not be infringement. The Supreme Court recognized that the fair use defense can be applied to digital sampling in *Campbell v. Acuff-Rose,* holding that the defendant's rap parody of the plaintiff's song, "Pretty Woman," may constitute a non-infringing fair use.[158] In addition, several scholars have suggested that digital sampling should be protected via a broadening of the fair use doctrine.[159]

---

[152] Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998); Gordon v. Nextel Commc'n, 345 F.3d 922 (6th Cir. 2003).

[153] Bridgeport I, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002).

[154] *Id.* at 841-42.

[155] *Id.* at 842; Bridgeport II, 410 F.3d 792, 798 n.4 (6th Cir. 2005).

[156] *Bridgeport I,* 230 F. Supp 2d at 842.

[157] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (stating that the fair use doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster" (citing Stewart v. Abend, 495 U.S. 207, 236 (1990)).

[158] *Campbell,* 510 U.S. at 594.

[159] *See, e.g.*, Vaidhyanathan, *supra* note 10, at 145; Woo, *supra* note 148, at 67.

The Copyright Act directs courts to consider four factors when evaluating whether a defendant's work is a fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[160] No one factor is determinative; rather, courts must assess each factor in relation to the others in light of the purposes of copyright.[161]

When analyzing the first fair use factor, courts ask "whether the new use merely 'supersede[s] the objects' of the original creation or instead adds something new."[162] This factor favors the defendant when the new use is non-commercial or when it is transformative, adding new expression to the plaintiff's work.[163] Sampling is often transformative, and does not merely supersede the objects of the original creation, because rap artists use samples as building blocks to create new works that are often very different from the original works. Rap artists add new expression to the original, in the form of accompanying music and lyrics. Additionally, rap artists use sampling to comment on past musicians, musical styles, and urban culture.[164] Thus, it is possible that sampling, as a transformative use or form of commentary, would weigh in favor of a finding of fair use under the first factor.[165]

---

[160] 17 U.S.C. § 107.

[161] *Campbell*, 510 U.S. at 578.

[162] *Id.* at 579 (quoting Folsom v. Marsh, 9 F. Cas. 342 (Cir. Ct. D. Mass. 1841)).

[163] *Id.* at 579. The Copyright Act provides that uses such as criticism, comment, news reporting, teaching, scholarship, or research may favor the defendant under the first fair use factor. *Id.* at 578-79; 17 U.S.C. § 107. However, this list is neither exhaustive nor dispositive. *Campbell*, 510 U.S. at 577.

[164] *See infra* Part VII.B.1.

[165] Yet, courts have suggested that the original work must be the object of the defendant's commentary, criticism or other type of transformative use in order to qualify as a fair use. *See Campbell*, 510 U.S. at 580-81; Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992). For example, in *Rogers*, the defendant claimed that his sculptural version of the plaintiff's photograph was a fair use, because it was a commentary on society as a whole. *Rogers*, 960 F.2d at 309. The court rejected the defendant's claim, pointing out that the plaintiff's work must be the object of the defendant's commentary to constitute fair use, so that the audience is aware that there is an original and separate expression underlying the defendant's work. *Id.* at 310. "If an infringement. . .could be justified as a fair use solely on the basis of infringer's claim to a higher or different artistic use – without insuring public awareness of the original work – there would be no practicable boundary to the fair use defense." *Id.* This reasoning would limit the applicability of fair use defense to digital sampling, where new works do not typically comment on or parody the works they sample from. *But see Campbell*, 510 U.S. at 580 n.14 (stating that taking aim at the original work is less important when there is little or no risk of market substitution); MUSIC AND COPYRIGHT, *supra* note 12, at 149 (asserting that, unlike with a parody, the musical effects of sampling are not always dependent on recognition of or identification of the original source of the samples employed).

The second factor favors the plaintiff when the original work is creative or fictional and favors of the defendant when the original work is factual or noncreative.[166] Because rap artists sample from creative musical works, this factor weighs in favor of the copyright holders.[167] Thus, the second factor does not support use of the fair use defense in sampling cases.

The third factor asks whether the amount and substantiality of the portion used in relation to the work as a whole is reasonable given the purpose of the copying.[168] This factor may also have a bearing on the other factors; a high degree of similarity between the works may reveal a lack of transformative character or purpose under the first factor and a greater likelihood of market harm under the fourth factor.[169] The analysis under the third factor is similar to the substantial similarity analysis. Courts consider the qualitative and quantitative importance of the copied material to the original work.[170] Thus, the third factor would likely favor application of the fair use defense in cases of *de minimis* sampling.

The fourth factor, effect on the potential market for or value of original, is the most important factor.[171] Courts assessing this factor take into account not only the harm to the original work but also harm to the market for derivative works.[172] The more transformative the new use is, the less likely it is that courts will find market harm.[173] However, courts have found market harm, even where the new use was transformative, in cases where the new use fills a market niche that the original copyright holder would "in general develop or license others to develop."[174] Conversely, where the new use is not of the type the original copyright holder would likely develop or license other to develop, the copyright owner "may not preempt exploitation of transformative markets."[175] Thus, in cases of digital sampling, the question is whether

---

[166] *See Campbell*, 510 U.S. at 586.

[167] However, the Court in *Campbell* suggested that the fact that the plaintiff's work is creative does not weigh against a finding of fair use where the use is parody. *Id.*

[168] *Id.* at 586.

[169] *Id.* at 587.

[170] *Id.*

[171] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

[172] *Campbell*, 510 U.S. at 592.

[173] *Id.*

[174] *Campbell*, 510 U.S. at 591; *see e.g.*, Castle Rock Entm't v. Carol Publ'g Group, 150 F.3d 132, 145-46 (2d Cir. 1998) (finding that defendant's book, which contained trivia questions based on the plaintiff's television series, "Seinfeld," caused market harm to the plaintiff's work and was therefore not a fair use, because the trivia game was the type of use the plaintiffs would *in general* develop, even though plaintiffs had no intention of doing so).

[175] *Castle Rock*, 150 F.3d at 146 n. 11 (citation omitted); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (finding that defendant's use of plaintiff's

the new work harms the plaintiff's market for licensing samples.[176] In rap music, sampling often increases the value of the original by sparking interest in a long-forgotten song or artist.[177] As a result, an instance of *de minimis* or fair use sampling could actually increase the demand to license samples from the original work by introducing the work to new artists who may then utilize more than a *de minimis* sample from that work in their new creations, generating license fees for the copyright holders.[178] Even though unlicensed *de minimis* sampling could actually enhance the market for licensing the original work, it is unclear whether courts would find that *de minimis* sampling is sufficiently transformative so as not to cause market harm to the original work or whether they will find that any unlicensed sampling, including *de minimis* sampling, harms the potential market for the original by depriving copyright holders of licensing fees.

Defendants in digital sampling cases have not heretofore availed themselves of the fair use defense, outside of the *Acuff-Rose* case where the defendant's new work was parody of the original. Despite this, the *Bridgeport* court left open the possibility of a fair use defense, even though the defendant's use did not comment on or parody the original.[179] This, as well as the analysis above, suggests that the fair use defense may be available to rap artists who use *de minimis* samples where the new use is transformative. However, sampling artists may have difficulty convincing courts that sampling does not harm the potential market for the original works if courts find that sampling is the type of use copyright holders would *in general* license others to develop. No court has yet considered this issue.

VII. The Policy Reasons Underlying *Bridgeport*'s Bright-Line Rule Do Not Reflect the Current Sample Licensing Regime

A. *The Development of Rap Music and the Effect of* Grand Upright

Sampling has been an integral part of rap music since its inception. Rap music was developed on street corners and at parties in urban New York in the mid-1970s by DJs who spoke over popular dance themes of

---

artwork in a book on the Grateful Dead did not cause market harm to the plaintiff's work and was a fair use, even though plaintiff had licensed its artwork for other uses, because the defendant's use was "markedly more original" than the other uses the plaintiff had licensed).

[176] *See Campbell*, 510 U.S. at 593.

[177] Vaidhyanathan, *supra* note 10, at 144.

[178] Samples that are more than *de minimis* require licenses from the original copyright holders or would otherwise be infringing.

[179] Bridgeport II, 410 F.3d 792, 805 (6th Cir. 2005).

the time.[180] Jamaican DJ Kool Herc is credited with introducing modern rap music and the practice of sampling to the U.S.[181] While deejaying parties in the South Bronx, Herc discovered that the crowd enjoyed dancing to a combination of beats from different records while he talked over them.[182] He used a turntable to sample from previous recordings, combining various records to create new rhythms and arrangements.[183] Other DJs quickly followed Herc's lead, and became increasingly creative in their use of turntables, adding new dimensions to the rap aesthetic. They began "scratching" records to create new rhythm tracks, rapping in American street slang, and incorporating popular R&B riffs and breaks into their rap – making the music more appealing because listeners recognized the underlying beats.[184] These sampling techniques required skillful manual dexterity, and DJs became musicians, using turntables as musical instruments.[185] In 1979, the Sugarhill Gang's "Rapper's Delight" became the first rap record to gain mainstream popularity.[186] "Rapper's Delight" sampled the instrumental track from CHIC's "Good Times," a disco hit that served as the backing track for many early rap works.[187]

The advent of the digital sampler in the early 1980s streamlined the process of sampling. A digital sampler is a computer that digitally copies sounds and then can manipulate the tempo or pitch of the sounds, loop them or re-sequence them, and replay them.[188] During the early 1980s, samplers quickly became cheap and easily available, vastly expanding the ability of rap artists to incorporate samples into their work. Instead of "cutting" and "mixing" with a turntable, rap artists were able to use digital samplers to easily extract and copy snippets of sound.[189] Samplers became "the quintessential rap production tool."[190]

---

[180] Vaidhyanathan, *supra* note 10, at 135.

[181] *Id.* at 136.

[182] *Id.*

[183] Matthew S. Garnett, Note, *The Downhull Battle to Copyright Sonic Ideas in Bridgeport Music*, 7 VAND. J. ENT. L. & PRAC. 509, 511 (2005).

[184] Vaidhyanathan, *supra* note 10, at 136.

[185] Garnett, *supra* note 183, at 511.

[186] Vaidhyanathan, *supra* note 10, at 132.

[187] *Id.*

[188] Rose, *supra* note 4, at 73.

[189] Hines, *supra* note 14, at 489.

[190] Rose, *supra* note 4, at 73. Digital sampling is not only used in hip-hop, but in many forms of contemporary music, and musicians and producers regard it as "indispensable to the music industry." Szymanski, *supra* note 3, at 278 (quoting Howard Reich, *Send in the Clones, The Brave New Art of Stealing Musical Sounds*, CHI. TRIB., Feb. 15, 1987, § 13 (The Arts Magazine), at 8).

Rather than simply regurgitating previous material, rap artists use samplers to create a musical collage of sorts. Rappers sample for a variety of reasons: to achieve a particular sound or feel, to remake past hits, to incorporate bits and pieces of cultural signposts, or to express appreciation of, debt to, or influence of past artists.[191] Rap artists use sampling both to create the underlying beat and to create melodic lines, often incorporating material that is recognizable to the listener. By using familiar samples, rap artists benefit from listeners' familiarity with and affinity towards the sampled works.[192] In addition to musical material, rap artists often sample nonmusical sounds, such as gunshots and police sirens, to add realism to the music. By combining highly disparate sound bites, rap artists create dense textures, which they use to emphasize and amplify the emotion they convey through their lyrics. From the late 1970s until the early 1990s, most rap songs followed the formula of "Rapper's Delight," rapping over an underlying musical montage composed of unauthorized samples.[193] Rap producers, who were not yet concerned with copyright issues, used samples liberally.[194] Groups such as Public Enemy and the Beastie Boys were known for their multi-layered sound tapestries, composed of a large number of samples woven together to form coherent musical compositions.[195]

As the 1990s rolled in, everything began to change. Industry leaders, lawyers, and older songwriters learned of the prevalence of sampling and the potential monetary gain from challenging it, and quickly began enforcing their copyrights.[196] In 1991, the District Court for the Southern District of New York held for the first time that unauthorized sampling was copyright infringement in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*[197] The court began its opinion with the Biblical pronouncement, "Thou shalt not steal."[198] The defendant, rapper Biz Markie, attempted to license plaintiff's musical composition for use in the defendant's new work, but the plaintiff refused permission because the defendant's use did not maintain the integrity and meaning of the original.[199] The defendant went ahead and released his work with-

---

[191] *See infra* Part VII.B.1.

[192] *See* Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the* Ringgold *and* Sandoval *Approach to Digital Samples,* 18 CARDOZO ARTS & ENT. L.J. 227, 228 (2000).

[193] Vaidhyanathan, *supra* note 10, at 132-33.

[194] NELSON GEORGE, HIP HOP AMERICA 94 (1998).

[195] *See id.* at 95.

[196] Hines, *supra* note 14, at 464.

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

[198] *Id.* at 183; *Exodus* 20:15 (King James).

[199] *Grand Upright*, 780 F. Supp. at 184; Vaidhyanathan, *supra* note 10, at 142.

out the plaintiff's permission and the plaintiff sued.[200] The *Grand Upright* court granted a preliminary injunction to plaintiff without any *de minimis* analysis, apparently setting forth a bright-line rule against unauthorized sampling.[201] The hip-hop industry recognized that this decision would have a tremendous impact on the practice of sampling. One of the plaintiff's lawyers proclaimed that the decision justly marked the end of unauthorized sampling, stating that "[s]ampling is a euphemism that was developed by the music industry to mask what is obviously thievery." On the other side, Dan Chamas, an executive with the rap label Def American Records, warned that the ruling would "kill hip-hop music and culture."[202]

The *Grand Upright* decision changed the landscape of rap music. By holding that sampling may constitute copyright infringement, *Grand Upright* shifted the law in favor of established artists and record companies and against emerging ones.[203] Since the case was decided, there has been a severe decrease in the amount of sampling in rap works.[204] As industry leaders and older songwriters sought to enforce their copyrights, artists became fearful of using unauthorized samples. Their field of potential samples shrunk, because they were forced to sample from works published or produced by their own companies and labels, works with lower licensing prices, or works that were not well-known.[205] The decreased amount of available source material retarded the creative process.[206] Moreover, up-and-coming rap artists often lacked the financial resources to pay license fees for samples and were forced to choose between decreasing their use of samples or not releasing new music.[207] Artists like Public Enemy, who employed thousands of samples in their works, were most affected. They had to change their entire style from a sonic wall of various sounds to a more simplified compilation of sounds.[208]

Consequently, the oppressive legal climate and the cost of obtaining sampling licenses severely inhibited artists' abilities to create

---

[200] *Grand Upright*, 780 F. Supp. at 183.

[201] *Id.* at 185. After the ruling, the parties settled. Markie's record company agreed to remove the song from future printings of the album and paid monetary damages to the plaintiff. Vaidhyanathan, *supra* note 10, at 143.

[202] *Id.*

[203] *Id.* at 133.

[204] *Id.* at 143.

[205] *Id.* at 140.

[206] *Id.*

[207] *Id.* at 133.

[208] *See* Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, STAY FREE!, Fall 2002, available at http://www.stayfreemagazine.org/archives/20/public_enemy.html (last visited Nov. 7, 2005).

new works.[209] Sampling after *Grand Upright* became "nontransgressive, nonthreatening, and too often clumsy and obvious."[210] Many of today's popular rap songs contain only one hook or primary sample instead of a collage of different sounds.[211] Despite the decrease in the use of sampling, rap music, once described as "the most startlingly original and fastest-growing genre in popular music," remains at the cutting edge of contemporary music.[212] Rap continues to top the Billboard charts and lead the music industry in album sales each year.[213] From rap's inception, sampling has been an important element of rap music. Despite the reduction in the number of samples used in rap works today, sampling continues to be indispensable, both culturally and artistically, to the rap aesthetic.[214] Yet, as *Grand Upright* has done over the past fourteen years, the *Bridgeport* rule will inhibit artistic creativity and impede the progress of rap music. Although *Grand Upright* did not expressly authorize *de minimis* sampling, rap artists in its wake continued to rely on the *de minimis* defense, which is recognized throughout copyright law, to freely sample small sound bites. *Bridgeport* precludes use of the *de minimis* defense and will further limit artists' abilities to use samples in their works by forcing them to license all samples, even those that are too small or too modified to be recognizable. Because of this, and the policy reasons discussed below, *Bridgeport's* prohibition against unlicensed *de minimis* sampling severely harms the rap industry and frustrates the objectives of copyright law.

B. Bridgeport's *Reasoning is Bad Policy for Rap*

1. Sampling is a Form of Musical Composition and is Essential to the Rap Aesthetic

The *Bridgeport* court cited several policy reasons in support of its holding. Many of these reasons overlook the problems of the current sample licensing regime and the importance of sampling to the rap music aesthetic. First, the court noted that rap artists and producers utilize

---

[209] MUSIC AND COPYRIGHT, *supra* note 12, at 147.

[210] *Id.* at 143.

[211] McLeod, *supra* note 208.

[212] Hampel, *supra* note 2, at 576.

[213] Johnstone, *supra* note 85, at 401; *see* Billboard.com, Hot 100, http://www.billboard.com/bb/charts/hot100.jsp (showing that, as of Nov. 5, 2005, rap singles account for four out of the top ten singles); Christina Hoag, *Music: Who's Next in the Touring World? As Big Draws Age, Industry Looks for Replacement Performers,* KAN. CITY STAR, Oct. 19, 2005, at F3 (stating that hip-hop music generates the most record sales in the music industry).

[214] See *infra* Part VII.B.I for a discussion of the importance of sampling to the rap music aesthetic.

samples to save time and money.[215] However, sampling does not necessarily save time. Rather, finding and manipulating samples can be more time-consuming than recreating the sample with live instruments, because rap artists and producers must meticulously listen to records to find a particular sample.[216] Selecting samples requires artistic judgment.[217] Like someone creating a collage or compilation, rap artists must listen to a wide variety of available materials and choose the sounds that will best suit their new work. Rap artists use samples as building blocks to create new and original works, often transforming the samples from melody or harmony in the original work into part of the rhythm track in the new work.[218] Thus, digital sampling is not a time-saving device, but is a way to compose music from an array of different sounds, even though it may be more similar to computer programming than to jamming with live instruments.[219]

The *Bridgeport* court also claimed that rap artists are free to sample from pre-1972 sound recordings, which are not protected by copyright.[220] However, in disallowing *de minimis* sampling of post-1972 sound recordings, the *Bridgeport* court overlooked the cultural reasons behind the practice of sampling. Rap artists sample as way to pay homage to their predecessors and as a means of archiving musical and cultural history.[221] Sampling allows rap artists to draw upon both the musical qualities and the cultural associations of the sampled work to form a direct connection with their listeners.[222] By conjuring up works of past musicians such a DJ Kool Herc, Grandmaster Flash, and Kurtis Blow, in new works, rap artists signify the important influence that those musicians have had on the development of rap music, and they

---

[215] Bridgeport II, 410 F.3d 792, 798 n. 7 (6th Cir. 2005) (citing Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?,* 1 J. HIGH TECH. L. 179, 179 n. 9 (2002)) ("using music samples saves a considerable amount of time when compared to the traditional recording methods because another artist already recorded the underlying music").

[216] *See* Rose, *supra* note 4, at 72; Wilson, *supra* note 215, at 190 n.140. Chuck D and Hank Shocklee, members of the rap group Public Enemy, described sampling as a highly creative process of selecting sound bites to accompany and complement the rapped lyrics. McLeod, *supra* note 208. They considered sampling as a form of arranging sounds to create music, just as other musicians use traditional instruments to create and arrange sounds. *Id.*

[217] Rose, *supra* note 4, at 78.

[218] *Id.* at 88; *see* Vaidhyanathan, *supra* note 10, at 131.

[219] *See* Szymanski, *supra* note 3, at 279 n.34.

[220] Bridgeport II, 410 F.3d 792, 804 (6th Cir. 2005).

[221] Rose, *supra* note 4, at 79. Rose described rap music as a "complex cultural reformulation of a community's knowledge and memory of itself." *Id.* at 95.

[222] *See* DAVID METZER, QUOTATION AND CULTURAL MEANING IN TWENTIETH CENTURY MUSIC 2 (2003); Vaidhyanathan, *supra* note 10, at 137.

introduce the past musicians to a new generation of listeners.[223] Because the vast majority of rap music was created post-1972, the *Bridgeport* holding effectively prohibits rap artists from using *de minimis* samples of prior rap works without permission. Additionally, rap artists use sampling as a form of social commentary. They appropriate sound bites from popular culture to comment on urban life and the mainstream society that often excludes them.[224] Rap music "is mainly social commentary providing the world with a useful and artistic depiction of life in the Black community."[225] Furthermore, musical styles continually evolve and new musicians emerge. Rap musicians must have access to post-1972 works to continue using sampling as social commentary and to archive past works. However, the current copyright term is the life of the author plus seventy years.[226] Thus, under *Bridgeport*, rap artists will not be able to sample from post-1972 sound recordings without paying licensing fees until at least seventy years from their creation. This drastically limits the field of available samples for current artists who cannot afford licensing fees. By prohibiting *de minimis* sampling of sound recordings, the *Bridgeport* rule severely impairs rap artists' abilities to anthologize, pay homage to, and comment on music created after 1972.

Furthermore, rap artists use samples to achieve a certain sonic aesthetic. The *Bridgeport* court noted that rap artists can avoid infringing sound recording copyrights by recreating the sound recordings themselves.[227] However, the court overlooked the fact that sampling allows artists to achieve a different aesthetic and textual dimension than if they were to record the sounds themselves, because it enables rap artists not only to borrow melodies, rhythms and harmonies, but to borrow actual sounds.[228] As one commentator stated, "[r]ap's sample-heavy sound is digitally produced, but cannot be digitally created."[229] For example, rap artists cannot necessarily recreate the sounds of a James Brown drum kick or bass line.[230] The sounds of past recordings are essential to the feel of rap music, and rap artists choose to adopt such sounds, rather than to rerecord the sounds, to achieve a particular

---

[223] *See* Szymanski, *supra* note 3, at 287 n.48.

[224] Passmore, *supra* note 83, at 845.

[225] Evans C. Anyanwu, *Let's Keep It on the Download: Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Music from Infringement Claims*, 30 RUTGERS COMPUTER & TECH. L.J. 179, 186 (2004).

[226] 17 U.S.C. § 302.

[227] *See supra* note 36.

[228] *See* Metzer, *supra* note 222, at 164.

[229] Rose, *supra* note 4, at 78.

[230] *Id.*

sonic aesthetic and to "increase the range of sound possibilities."[231] Hank Shocklee, a member of the rap group Public Enemy, explained that pre-recorded sounds have a different sonic effect than organic sounds. "A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off the record is going to have all the compression that they put on the recording, the equalization. It's going to hit the tape harder. It's going to slap you. Something that's organic is almost going to have a powder effect."[232] Sampled sounds allow rap artists to invoke in their works the urban feel of their environments more than live instruments do.[233] In addition, hiring studio musicians to recreate a short segment from a prior recording is highly inefficient.[234] Therefore, although rap artists are free under copyright law to rerecord prior works, rerecording may be highly impractical and will not allow artists to achieve the unique sonic effect they are able to produce by combining sampled sounds.

2. The Current Licensing Regime Hinders Creation by New Artists

In reaching its holding, the *Bridgeport* court also relied on the fact that rap artists have sought samples as a matter of course.[235] However, the court failed to recognize that licenses are often prohibitively expensive and that the sample clearing process is burdensome. Because sound recordings and musical compositions are two distinct copyrights, artists must locate and purchase clearances from both the sound recording and musical composition copyright holders.[236] Sampling clearing houses represent the record companies, artists, and production companies and control the sampling rights to sound recordings and musical compositions.[237] Artists have the burden of keeping track of all their samples and then must go through the clearing houses to negotiate licensing fees.[238] Although *Bridgeport* asserted that the market would keep license fees in check, because copyright holders cannot

---

[231] *Id.* at 79.

[232] McLeod, *supra* note 208.

[233] Josh Norek, Note, *"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 84 (2004).

[234] Brodin, *supra* note 100, at 863. Further, if the sample is not deemed *de minimis*, the rap artist must still license the musical composition in order to rerecord the previous work. This would minimize any potential cost-savings the artists would have enjoyed by not paying for the sound recording license. *Id.*

[235] Bridgeport II, 410 F.3d 792, 804 (6th Cir. 2005).

[236] MUSIC AND COPYRIGHT, *supra* note 12, at 147.

[237] *See Bridgeport II*, 410 F.3d at 804 n.19.

[238] Szymanski, *supra* note 3, 291.

charge more than it would cost to recreate the copyrighted sounds, this does not ensure that prices will be set so as to achieve the proper balance between incentivizing creativity and protecting authors' economic interests.[239] Under the current ad hoc licensing system, parties negotiate prices based on the quantity and quality of the sample and the popularity of the original work.[240] Sample licenses typically cost between $1,000 and $5,000, but samples for popular recordings can cost several times those amounts.[241] Copyright holders may also impose additional "rollover rates" once the artist sells a certain number of albums.[242] Also, sample licenses often involve signing away a percentage of future profits on the new work[243] and a percentage of copyright ownership in the new work.[244] The current license fees make it very difficult for independent labels to acquire clearance. Likewise, for up-and-coming artists, the costs of licensing samples may exceed the entire album's recording budget.[245] Because the prohibitive cost of samples hinders the creation of new works, courts should allow *de minimis* use of samples to further the purpose of copyright law.

Bridgeport also failed to account for the disparity in bargaining power between copyright holders and artists.[246] Copyright holders have exclusive control over their sound recordings, giving them a significant bargaining advantage over potential samplers, both in establishing licensing fees and in granting licenses.[247] Because there is no compulsory licensing system, copyright holders can simply refuse to license.[248] Some artists, like The Beatles, Jefferson Airplane, and Pink Floyd, have

---

[239] *See* Garnett, *supra* note 183, at 519.

[240] *See* Szymanski, *supra* note 3, at 294-95. Efforts by Industry players to establish industry-wide rates and procedures have been unsuccessful to date. *Id.* at 290.

[241] MUSIC AND COPYRIGHT, *supra* note 12, at 147.

[242] McLeod, *supra* note 208.

[243] MUSIC AND COPYRIGHT, *supra* note 12, at 147.

[244] Norek, *supra* note 233, at 90.

[245] *Id.* at 91; Richard Stim, Getting Permission for Samplings Others' Work, Nolo, http://www.nolo.com/article.cfm/objectID/D788BAEE-8E99-4825B0B97B2D132AF98F (last visited Nov. 5, 2005).

[246] Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 199 (2004).

[247] *See* Brodin, *supra* note 100, at 864.

[248] The Copyright Act grants compulsory licenses to those seeking to create cover recordings of copyrighted musical compositions. *See* 17 U.S.C. §115. Section 115 does not apply to sound recording copyrights, and there are no compulsory licenses for samples of musical compositions, because Section 115 does not apply to works that "change the basic melody or fundamental character of the [original] work." *Id.*

strict no-sampling policies.[249] Others refuse requests for samples because of the perceived controversial subject matter of the new song.[250] Another difficulty in obtaining clearances arises from the fact that copyright owners require copies of the new works before they grant licenses, so they can determine the substance and nature of the sample.[251] Because copyright holders have complete veto power over the use of their material, they are free to deny licenses once they have heard the new work.[252] This can result in much wasted time and effort on the part of artists. As a result, rap artists are limited in their choice of samples, and in order to save time and hassle often prefer to sample from artists on their own labels.[253] Because copyright holders can limit access to their works under the current licensing scheme, courts should allow *de minimis* sampling to promote the progress of rap music.

Moreover, the current licensing scheme further harms new artists by expanding the scope of copyright protection. Because of the lack of clear guidelines as to what must be licensed and what is *de minimis* or fair use, the current practice is to license any recognizable sample, regardless of how *de minimis* it is.[254] Artists prefer to pay the licensing fees than to risk litigation, because it is less expensive to license than to litigate.[255] Further, the risk of litigation may be high, because copyright holders increasingly monitor new works for unauthorized sampling and demand large settlements when they find that their works have been used.[256] Consequently, the expansion of copyright holders' rights and the threat of litigation impede artistic progress and thwart the goals of copyright law.

---

[249] *See* Morse, *supra* note 82. Although many of these artists' sound recordings are not protected by copyright, because they were created before 1972, the copyright holders can still prevent sampling of their works by denying licenses for their musical compositions.

[250] Vaidhyanathan, *supra* note 10, at 143. For example, artists may deny license to "gangsta" rappers or others whose lyrics glamorize violence and womanizing. Szymanski, *supra* note 3, at 296 n. 85.

[251] Stim, *supra* note 245.

[252] *Id.*

[253] *See* Szymanski, *supra* note 3, at 297.

[254] *See* Norek, *supra* note 233, at 89.

[255] Bridgeport II, 410 F.3d 792, 802 (6th Cir. 2005).

[256] Szymanski, *supra* note 3, at 291. However, there is some incentive for the parties to cooperate. Record labels and publishers may be reluctant to sue other artists out of fear that they may one day be sued or because their own artists may want to sample from those artists in the future. *Id.* at 294. Likewise, the *Bridgeport* court suggested that the incidence of "live and let live" has been relatively high and that many instances of sampling go unnoticed, because "today's sampler is tomorrow's samplee." *Bridgeport II*, 410 F.3d at 804.

3. The *Bridgeport* Rule Does Not Benefit Recording Artists

The *Bridgeport* court also failed to note that allowing *de minimis* unauthorized sampling does not necessarily inhibit creativity or harm authors' copyright interests. Sampling often increases the value of the original work by sparking interest in long forgotten song or artist.[257] The purpose of copyright law is to encourage creativity for the overall public benefit, but disallowing *de minimis* sampling does not further this purpose. The potential to collect sampling license fees will not likely induce musicians to create, because license fees constitute a relatively small percentage of the compensation received by a relatively small number of artists.[258] In addition, the bulk of sample license fees go to publishers and record companies, not to the artists, because music industry practice dictates that virtually all musical composition and sound recording copyrights are assigned to publishing companies and record labels.[259] Thus, it is the record companies and publishers who lose control of their property when rap artists sample without authorization. Those same entities stand to benefit when samples are licensed.[260] Similarly, allowing *de minimis* sampling does not impede the creation of new works. Musicians are unlikely to refrain from creating new works because of the possibility that another artist will sample a few seconds from their work, copy it, alter it and then incorporate it into a new work that is very different from their original work.[261] As one commentator noted, "It is doubtful that anyone has ever picked up a guitar in the hope that one day he will be able to license a two second sample."[262] Therefore, allowing *de minimis* unauthorized sampling in no way inhibits the production of new works, in contrast to the *Bridgeport* rule, which hinders creativity.

As detailed above, the *Bridgeport* court overlooked several policy reasons that support the *de minimis* defense in digital sampling cases. The prohibitive cost of sample licenses, the burdensome process of obtaining clearances, and problems of copyright owner holdout restrict

---

[257] Vaidhyanathan, *supra* note 10, at 143. As one attorney noted of past musicians, "[sampling] represents a second career for a lot of these guys." Morse, *supra* note 249. In fact, some popular musicians of the past actively seek to market their works to samplers. The estate of Curtis Mayfield, an R&B pioneer who died in 2000, recently took out an ad in Billboard magazine encouraging potential sampler to contact his manager to obtain sample clearances. *Id.*

[258] Szymanski, *supra* note 3, at 327.

[259] Abramson, *supra* note 16, at 1669.

[260] Rose, *supra* note 4, at 92. As one commentator noted, "[c]opyright is not speaking for those who create, but those who hold massive amounts of copyright." MUSIC AND COPYRIGHT, *supra* note 12, at 5.

[261] Brodin, *supra* note 100, at 866.

[262] Szymanski, *supra* note 3, at 326 n.241.

the availability of samples, thereby impeding the creation of new rap works. Also, the current licensing scheme expands the scope of copyright protection, so that it goes beyond encouraging creativity and protecting authors' rights to actually frustrating the purpose of copyright law. Allowing *de minimis* use of samples ensures the proper balance between allowing authors to benefit from their artistic creations and fostering the creation of new works.

VIII. CONCLUSION

The *Bridgeport* court's bright-line rule impedes rather than furthers the purpose of copyright law. In *Bridgeport*, the George Clinton sample was transformed and embedded within new musical material, so that it was barely recognizable as having been sampled from the plaintiff's work.[263] In fact, the copyright holders themselves probably never would have recognized their work in its new musical context had it not been for the fact that the defendants licensed the musical composition. Where listeners, even those familiar with the original work, cannot ascertain that a particular work has been sampled, it makes little sense to grant absolute copyright protection to the copyright holders. Instead, courts should allow *de minimis* sampling, which balances the interests of copyright holders against the public benefit to be gained from the creation of new works. The *de minimis* defense is recognized throughout copyright law as an important means of furthering the goals of copyright law. It should apply to sound recordings as to other types of copyrights. Allowing *de minimis* use of samples in rap music enables artists to create new works and increases awareness of prior works without harming the economic interests of copyright holders. It allows up-and-coming artists to bypass the procedural and monetary hurdles of obtaining sample licenses when their new creations are transformative and borrow minimally from prior works. It also allows rap artists to contribute to the broad artistic movement of building upon past works. Therefore, allowing *de minimis* use of sound recording samples directly furthers the purpose of copyright law – to promote the creation of artistic works for the benefit of the public. As the Supreme Court once noted, "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."[264]

---

[263] *See supra* p. 5-6.

[264] Twentieth Century Fox Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).