

COPYRIGHT IN A GLOBAL INFORMATION ECONOMY

2016 Case Supplement

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Chapter 7. Copyright in Musical Works and Sound Recordings

C. Sampling

Page 419. Replace Chapter 7.C with the following:

In certain musical genres, such as rap, hip hop, and dubstep, “sampling” is a common practice. Sampling involves digitally copying and remixing sounds from previously recorded albums. As you now know, this practice may implicate two copyrights. When should sampling require the permission of the musical work copyright owner? When should it require the permission of the sound recording copyright owner?

VMG Salsoul, LLC v. Ciccone
2016 WL 3090780 (9th Cir. June 2, 2016)

GRABER, J.:

In the early 1990s, pop star Madonna Louise Ciccone, commonly known by her first name only, released the song *Vogue* to great commercial success. In this copyright infringement action, Plaintiff VMG Salsoul, LLC, alleges that the producer of *Vogue*, Shep Pettibone, copied a 0.23-second segment of horns from an earlier song, known as *Love Break*, and used a modified version of that snippet when recording *Vogue*. Plaintiff asserts that Defendants Madonna, Pettibone, and others thereby violated Plaintiff’s copyrights to *Love Break*. . . .

FACTUAL AND PROCEDURAL HISTORY

Because this case comes to us on appeal from a grant of summary judgment to Defendants, we recount the facts in the light most favorable to Plaintiff.

In the early 1980s, Pettibone recorded the song *Ooh I Love It (Love Break)*, which we refer to as *Love Break*. In 1990, Madonna and Pettibone recorded the song *Vogue*, which would become a mega-hit dance song after its release on Madonna’s albums. Plaintiff alleges that, when recording *Vogue*, Pettibone “sampled” certain sounds from the recording of *Love Break* and added those sounds to *Vogue*. “Sampling” in this context means the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo. *See Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).

Plaintiff asserts that it holds copyrights to the composition and to the sound recording of *Love Break*. Plaintiff argues that . . . [w]hen creating two commercial versions of *Vogue*, Pettibone sampled a “horn hit” from *Love Break*, violating Plaintiff’s copyrights to both the composition and the sound recording of *Love Break*.

The horn hit appears in *Love Break* in two forms. A “single” horn hit in *Love Break* consists of a quarter-note chord comprised of four notes—E-flat, A, D, and F—in the key of B-flat. The single horn hit lasts for 0.23 seconds. A “double” horn hit in *Love Break* consists of an eighth-note chord of those same notes, followed immediately by a quarter-note chord of the same notes. Plaintiff’s expert identified the instruments as “predominantly” trombones and trumpets.

The alleged source of the sampling is the “instrumental” version of *Love Break*, which lasts 7 minutes and 46 seconds. The single horn hit occurs 27 times, and the double horn hit occurs 23 times. The horn hits occur at intervals of approximately 2 to 4 seconds in two different segments: between 3:11 and 4:38, and from 7:01 to the end, at 7:46. The general pattern is single-double repeated, double-single repeated, single-single-double repeated, and double-single repeated. Many other instruments are playing at the same time as the horns.

The horn hit in *Vogue* appears in the same two forms as in *Love Break*: single and double. A “single” horn hit in *Vogue* consists of a quarter-note chord comprised of four notes—E, A-sharp, D-sharp, and F-sharp—in the key of B-natural.³ A double horn hit in *Vogue* consists of an eighth-note chord of those same notes, followed immediately by a quarter-note chord of the same notes.

The two commercial versions of *Vogue* that Plaintiff challenges are known as the “radio edit” version and the “compilation” version. The radio edit version of *Vogue* lasts 4 minutes and 53 seconds. The single horn hit occurs once, the double horn hit occurs three times, and a “breakdown” version of the horn hit occurs once.⁴ They occur at 0:56, 1:02, 3:41, 4:05, and 4:18. The pattern is single-double-double-double-breakdown. As with *Love Break*, many other instruments are playing at the same time as the horns.

The compilation version of *Vogue* lasts 5 minutes and 17 seconds. The single horn hit occurs once, and the double horn hit occurs five times. They occur at 1:14, 1:20, 3:59, 4:24, 4:40, and 4:57. The pattern is single-double-double-double-double-double. Again, many other instruments are playing as well.

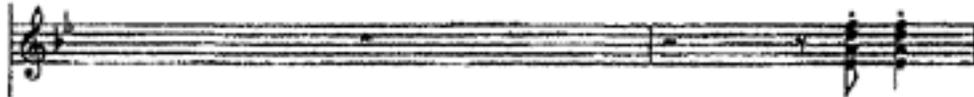
One of Plaintiff’s experts transcribed the composition of the horn hits in the two songs as follows. *Love Break*’s single horn hit:



Vogue’s single horn hit:



Love Break’s double horn hit:



Vogue’s double horn hit:



³ In musical terms, assuming that the composition was copied, Pettibone “transposed” the horn hit in *Love Break* by one-half step, resulting in notes that are half a step higher in *Vogue*.

⁴ The record does not appear to disclose the meaning of a “breakdown” version of the horn hit, and neither party attributes any significance to this form of the horn hit.

In a written order, the district court granted summary judgment to Defendants on two alternative grounds. First, neither the composition nor the sound recording of the horn hit was “original” for purposes of copyright law. Second, the court ruled that, even if the horn hit was original, any sampling of the horn hit was “de minimis or trivial.” . . .

DISCUSSION

Plaintiff has submitted evidence of actual copying. In particular, Tony Shimkin has sworn that he, as Pettibone’s personal assistant, helped with the creation of *Vogue* and that, in Shimkin’s presence, Pettibone directed an engineer to introduce sounds from *Love Break* into the recording of *Vogue*. Additionally, Plaintiff submitted reports from music experts who concluded that the horn hits in *Vogue* were sampled from *Love Break*. Defendants do not concede that sampling occurred, and they have introduced much evidence to the contrary.⁵ But for purposes of summary judgment, Plaintiff has introduced sufficient evidence (including direct evidence) to create a genuine issue of material fact as to whether copying in fact occurred. . . .

Our leading authority on actual copying is *Newton*, 388 F.3d 1189. We explained in *Newton* that proof of actual copying is insufficient to establish copyright infringement:

For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. *See Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997). This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.

...

Newton, 388 F.3d at 1192–93. In other words, to establish its infringement claim, Plaintiff must show that the copying was greater than de minimis.

Plaintiff’s claim encompasses two distinct alleged infringements: infringement of the copyright to the *composition* of *Love Break* and infringement of the copyright to the *sound recording* of *Love Break*. . . . We squarely held in *Newton*, 388 F.3d at 1193, that the de minimis exception applies to claims of infringement of a copyrighted composition. But it is an open question in this circuit whether the exception applies to claims of infringement of a copyrighted sound recording.

Below, we address (A) whether the alleged copying of the composition or the sound recording was de minimis, [and] (B) whether the de minimis exception applies to alleged infringement of copyrighted sound recordings⁶

A. Application of the De Minimis Exception

A “use is de minimis only if the average audience would not recognize the appropriation.” *Newton*, 388 F.3d at 1193; *see id.* at 1196 (affirming the grant of summary judgment because “an average audience would not discern Newton’s hand as a composer ... from Beastie Boys’ use of the sample”). Accordingly, we must determine whether a reasonable juror could conclude that the average audience would recognize the

⁵ For example, Plaintiff hired Shimkin and then brought this action, raising doubts about Shimkin’s credibility; Pettibone and others testified that Shimkin was not present during the creation of *Vogue* and was not even employed by Pettibone at that time; and Defendants’ experts dispute the analysis and conclusions of Plaintiff’s experts.

⁶ Because we affirm the judgment on the ground that any copying was de minimis, we do not reach Defendants’ alternative arguments. Accordingly, we assume without deciding that the horn hits are “original.” *See Newton*, 388 F.3d at 1192 (assuming originality). . . .

appropriation. We will consider the composition and the sound recording copyrights in turn.

1. Alleged Infringement of the Composition Copyright

When considering an infringement claim of a copyrighted musical composition, what matters is not how the musicians actually played the notes but, rather, a “generic rendition of the composition.” *Newton*, 388 F.3d at 1194; *see id.* at 1193 (holding that, when considering infringement of the composition copyright, one “must remove from consideration all the elements unique to [the musician’s] performance”). That is, we must compare the written compositions of the two pieces.

Viewing the evidence in the light most favorable to Plaintiff, Defendants copied two distinct passages in the horn part of the score for *Love Break*. First, Defendants copied the quarter-note single horn hit. But no additional part of the score concerning the single horn hit is the same, because the single horn hit appears at a different place in the measure. In *Love Break*, the notes for the measure are: half-note rest, quarter-note rest, single horn hit. In *Vogue*, however, the notes for the measure are: half-note rest, eighth-note rest, single horn hit, eighth-note rest. Second, Defendants copied a full measure that contains the double horn hit. In both songs, the notes for the measure are: half-note rest, eighth-note rest, eighth-note horn hit, quarter-note horn hit. In sum, Defendants copied, at most, a quarter-note single horn hit and a full measure containing rests and a double horn hit.

After listening to the recordings, we conclude that a reasonable jury could *not* conclude that an average audience would recognize the appropriation of the composition. Our decision in *Newton* is instructive. That case involved a copyrighted composition of “a piece for flute and voice.” *Newton*, 388 F.3d at 1191. The defendants used a six-second sample that “consist[ed] of three notes, C—D flat—C, sung over a background C note played on the flute.” *Id.* The composition also “require[d] overblowing the background C note that is played on the flute.” *Id.* The defendants repeated a six-second sample “throughout [the song], so that it appears over forty times in various renditions of the song.” *Id.* at 1192. After listening to the recordings, we affirmed the grant of summary judgment because “an average audience would not discern [the composer’s] hand as a composer.” *Id.* at 1196.

The snippets of the composition that were (as we must assume) taken here are much smaller than the sample at issue in *Newton*. The copied elements from the *Love Break* composition are very short, much shorter than the six-second sample in *Newton*. The single horn hit lasts less than a quarter-second, and the double horn hit lasts—even counting the rests at the beginning of the measure—less than a second. Similarly, the horn hits appear only five or six times in *Vogue*, rather than the dozens of times that the sampled material in *Newton* occurred in the challenged song in that case. Moreover, unlike in *Newton*, in which the challenged song copied *the entire composition* of the original work for the given temporal segment, the sampling at issue here involves only *one instrument group* out of many. As noted above, listening to the audio recordings confirms what the foregoing analysis of the composition strongly suggests: A reasonable jury could not conclude that an average audience would recognize an appropriation of the *Love Break* composition.

2. Alleged Infringement of the Sound Recording Copyright

When considering a claimed infringement of a copyrighted sound recording, what matters is how the musicians *played* the notes, that is, how their rendition distinguishes

the recording from a generic rendition of the same composition. *See Newton*, 388 F.3d at 1193 (describing the protected elements of a copyrighted sound recording as “the elements unique to [the musician’s] performance”). Viewing the evidence in the light most favorable to Plaintiff, by accepting its experts’ reports, Pettibone sampled one single horn hit, which occurred at 3:35 in *Love Break*. Pettibone then used that sampled single horn hit to create the double horn hit used in *Vogue*.

The horn hit itself was not copied precisely. According to Plaintiff’s expert, the chord “was modified by transposing it upward, cleaning up the attack slightly in order to make it punchier [by truncating the horn hit] and overlaying it with other sounds and effects. One such effect mimicked the reverse cymbal crash.... The reverb/delay ‘tail’ ... was prolonged and heightened.” Moreover, as with the composition, the horn hits are not isolated sounds. Many other instruments are playing at the same time in both *Love Break* and *Vogue*.

In sum, viewing the evidence in the light most favorable to Plaintiff, Pettibone copied one quarter-note of a four-note chord, lasting 0.23 seconds; he isolated the horns by filtering out the other instruments playing at the same time; he transposed it to a different key; he truncated it; and he added effects and other sounds to the chord itself. For the double horn hit, he used the same process, except that he duplicated the single horn hit and shortened one of the duplicates to create the eighth-note chord from the quarter-note chord. Finally, he overlaid the resulting horn hits with sounds from many other instruments to create the song *Vogue*.

After listening to the audio recordings submitted by the parties, we conclude that a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit. That common-sense conclusion is borne out by dry analysis. The horn hit is very short—less than a second. The horn hit occurs only a few times in *Vogue*. Without careful attention, the horn hits are easy to miss. Moreover, the horn hits in *Vogue* do not sound identical to the horn hits from *Love Break*. . . .

B. The De Minimis Exception and Sound Recordings

Plaintiff argues, in the alternative, that even if the copying here is trivial, that fact is irrelevant because the de minimis exception does not apply to infringements of copyrighted sound recordings. Plaintiff urges us to follow the Sixth Circuit’s decision in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), which adopted a bright-line rule: For copyrighted sound recordings, any unauthorized copying—no matter how trivial—constitutes infringement.

The rule that infringement occurs only when a substantial portion is copied is firmly established in the law. The leading copyright treatise traces the rule to the mid-1800s. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A][2][a], at 13-56 to 13-57, 13-57 n.102 (2013) (citing *Folsom v. Marsh*, 9 F.Cas. 342, No. 4901 (C.C. Mass. 1841)); *id.* § 13.03[E][2], at 13-100 & n.208 (citing *Daly v. Palmer*, 6 F.Cas. 1132, No. 3,552 (C.C.S.D.N.Y. 1868)) The reason for the rule is that the “plaintiff’s legally protected interest [is] the potential financial return from his compositions which derive from the lay public’s approbation of his efforts.” [*Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977)]. If the public does not recognize the appropriation, then the copier has not benefitted from the original artist’s expressive content. Accordingly, there is no infringement.

Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the de minimis doctrine does not apply in a copyright

infringement case. Instead, courts consistently have applied the rule in *all* cases alleging copyright infringement. . . .

Plaintiff nevertheless argues that Congress intended to create a special rule for copyrighted sound recordings, eliminating the *de minimis* exception. We begin our analysis with the statutory text.

Title 17 U.S.C. § 102, titled “Subject matter of copyright: In general,” . . . treats sound recordings identically to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works. Similarly, nothing in the neutrally worded statutory definition of “sound recordings” suggests that Congress intended to eliminate the *de minimis* exception. . . .

Title 17 U.S.C. § 106, titled “Exclusive rights in copyrighted works,” . . . [does not] suggest[] differential treatment of *de minimis* copying of sound recordings compared to, say, sculptures. Although subsection (6) deals exclusively with sound recordings, that subsection concerns public performances; nothing in its text bears on *de minimis* copying.

Instead, Plaintiff’s statutory argument hinges on the third sentence of 17 U.S.C. § 114(b), which states:

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

Like all the other sentences in § 114(b), the third sentence imposes an express *limitation* on the rights of a copyright holder: “The exclusive rights of the owner of a copyright in a sound recording . . . *do not extend* to the making or duplication of another sound recording [with certain qualities].” *Id.* (emphasis added); *see id.* (first sentence: “exclusive rights . . . do not extend” to certain circumstances; second sentence: “exclusive rights . . . do not extend” to certain circumstances; fourth sentence: “exclusive rights . . . do not apply” in certain circumstances). We ordinarily would hesitate to read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights. Given the considerable background of consistent application of the *de minimis* exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule. . . .

Even if there were some ambiguity as to congressional intent with respect to § 114(b), the legislative history clearly confirms our analysis on each of the above points. Congress intended § 114 to limit, not to expand, the rights of copyright holders: “The approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made ‘subject to sections 107 through 118,’ and must be read in conjunction with those provisions.” H.R. Rep. No. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674.

With respect to § 114(b) specifically, a House Report stated:

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound

recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

Id. at 106, reprinted in 1976 U.S.C.C.A.N. at 5721 (emphasis added). That passage strongly supports the natural reading of § 114(b), discussed above. . . .

Perhaps more importantly, the quoted passage articulates the principle that “infringement takes place whenever all *or any substantial portion* of the actual sounds ... are reproduced.” *Id.* (emphasis added). That is, when enacting this specific statutory provision, Congress clearly understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works. . . .

In coming to a different conclusion, the Sixth Circuit reasoned as follows:

[T]he rights of sound recording copyright holders under clauses (1) and (2) of section 106 “do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” 17 U.S.C. § 114(b) (emphasis added). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word “entirely” to this language. *Compare* Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971) (adding subsection (f) to former 17 U.S.C. § 1) (“does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds”). In other words, a sound recording owner has the exclusive right to “sample” his own recording.

Bridgeport, 410 F.3d at 800–01.

We reject that interpretation of § 114(b). *Bridgeport* ignored the statutory structure and § 114(b)'s express *limitation* on the rights of a copyright holder. *Bridgeport* also declined to consider legislative history on the ground that “digital sampling wasn't being done in 1971.” 410 F.3d at 805. But the state of technology is irrelevant to interpreting Congress' intent as to statutory structure. Moreover, as Nimmer points out, *Bridgeport's* reasoning fails on its own terms because contemporary technology plainly allowed the copying of small portions of a protected sound recording. Nimmer § 13.03[A][2][b], at 13-62 n.114.16.

Close examination of *Bridgeport's* interpretive method further exposes its illogic. In effect, *Bridgeport* inferred from the fact that “exclusive rights ... *do not extend* to the making or duplication of another sound recording that *consists* entirely of an independent fixation of other sounds,” 17 U.S.C. § 114(b) (emphases added), the conclusion that exclusive rights *do extend* to the making of another sound recording that *does not consist* entirely of an independent fixation of other sounds. As pointed out by Nimmer, *Bridgeport's* interpretive method “rests on a logical fallacy.” Nimmer § 13.03[A][2][b], at 13-61. A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional. *E.g.*, Joseph G. Brennan, *A Handbook of Logic* 79–80 (2d ed. 1961).

For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessarily follow that “if it has not rained, then the grass is dry.”

Someone may have watered the lawn, for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us *anything* about the condition of the grass if it has not rained. Accordingly, even though it is true that, “if the recording consists entirely of independent sounds, then the copyright does not extend to it,” that statement does not necessarily mean that “if the recording does not consist entirely of independent sounds, then the copyright does extend to it.”

The Sixth Circuit also looked beyond the statutory text, to the nature of a sound recording, and reasoned:

[E]ven when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the “song” but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.

Bridgeport, 410 F.3d at 801–02 (footnote omitted).

We disagree for three reasons. *First*, the possibility of a “physical taking” exists with respect to other kinds of artistic works as well, such as photographs, as to which the usual de minimis rule applies. *See, e.g., Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998) (affirming summary judgment to the defendant because the defendant’s use of the plaintiff’s photographs in a movie was de minimis). A computer program can, for instance, “sample” a piece of one photograph and insert it into another photograph or work of art. We are aware of no copyright case carving out an exception to the de minimis requirement in that context, and we can think of no principled reason to differentiate one kind of “physical taking” from another. *Second*, even accepting the premise that sound recordings differ qualitatively from other copyrighted works and therefore *could warrant* a different infringement rule, that theoretical difference does not mean that Congress *actually adopted* a different rule. *Third*, the distinction between a “physical taking” and an “intellectual one,” premised in part on “sav[ing] costs” by not having to hire musicians, does not advance the Sixth Circuit’s view. The Supreme Court has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and *not* the “fruit of the [author’s] labor.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). . . .

Because we conclude that Congress intended to maintain the “de minimis” exception for copyrights to sound recordings, we take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit’s contrary holding in *Bridgeport*. . . . We acknowledge that our decision has consequences. But the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent. Otherwise, we would have no choice but to blindly follow the rule announced by whichever circuit court decided an issue first, even if we were convinced, as we are here, that our sister circuit erred. . . .

Additionally, as a practical matter, a deep split among the federal courts *already exists*. Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to apply *Bridgeport*’s rule. Although we are the first circuit court to follow a different path than *Bridgeport*’s, we are in well-charted territory. . . .

Finally, Plaintiff advances several reasons why *Bridgeport*’s rule is superior *as a*

matter of policy. For example, the Sixth Circuit opined that its bright-line rule was easy to enforce; that “the market will control the license price and keep it within bounds”; and that “sampling is never accidental” and is therefore easy to avoid. *Bridgeport*, 410 F.3d at 801. Those arguments are for a legislature, not a court. They speak to what Congress *could* decide; they do not inform what Congress *actually* decided.¹¹

We hold that the “de minimis” exception applies to actions alleging infringement of a copyright to sound recordings. . . .

SILVERMAN, J., dissenting:

The plaintiff is the owner of a copyright in a fixed sound recording. This is a valuable property right, the stock-in-trade of artists who make their living recording music and selling records. The plaintiff alleges that the defendants, without a license or any sort of permission, physically copied a small part of the plaintiff’s sound recording—which, to repeat, is property belonging to the plaintiff—and, having appropriated it, inserted into their *own* recording. If the plaintiff’s allegations are to be believed, the defendants deemed this maneuver preferable to paying for a license to use the material, or to hiring their own musicians to record it. In any other context, this would be called theft. It is no defense to theft that the thief made off with only a “de minimis” part of the victim’s property. . . .

. . . [B]y statute, sound recording copyright holders have an *exclusive* right to sample their *own* recordings. It’s an exclusive right; the statute does not give that right to others. [*Bridgeport*,] 410 F.3d at 800–01. Under 17 U.S.C. §§ 106 and 114, the holder of a copyright in a sound recording (but not others) has the exclusive right to reproduce the work in copies or records “that directly or indirectly recapture the actual sounds fixed in the recording,” as well as the exclusive right to prepare derivative works “in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” 17 U.S.C. §§ 106(1) and (2); 114(b). Congress clearly qualified these exclusive rights, writing that “another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording” are not within the scope of the copyright holder’s exclusive rights. 17 U.S.C. § 114(b). In other words, the world at large is free to imitate or simulate the creative work fixed in the recording (like a tribute band, for example) so long as an actual copy of the sound recording itself is not made.

The majority rejects this straightforward reading, explaining by way of a rhetorical exercise that *Bridgeport*’s reading of § 114(b) is a logical fallacy, expanding the rights of copyright holders beyond that allowed under the judicial de minimis rule. As I see it, it is the majority that tortures the natural reading of these provisions. Bear in mind that §

¹¹ It also is not clear that the cited policy reasons are necessarily persuasive. For example, this particular case presents an example in which there is uncertainty as to enforcement—musical experts disagree as to whether sampling occurred. As another example, it is not necessarily true that the market will keep license prices “within bounds”—it is possible that a bright-line rule against sampling would unduly stifle creativity in certain segments of the music industry because the licensing costs would be too expensive for the amateur musician. In any event, even raising these counter-points demonstrates that the arguments, as Plaintiff concedes, rest on policy considerations, not on statutory interpretation. One cannot answer questions such as how much licensing cost is too much without exercising value judgments—matters generally assigned to the legislature.

114(b) simply explains the scope of exclusive rights already granted to copyright holders under § 106. These two provisions must be read together, as the Sixth Circuit did. . . .

The second reason the Sixth Circuit gave for not adopting the de minimis rule is that sound recordings are different than their compositional counterparts: when a defendant copies a recording, he or she takes not the song but the sounds as they are fixed in the medium of the copyright holders' choice. [*Bridgeport*, 410 F.3d] at 801–02. In other words, the very nature of digital sampling makes a de minimis analysis inapplicable, since sampling or pirating necessarily involves copying a fixed performance. *See id.* at 801 n.13. The defendants wanted horns to punctuate their song, so they took the plaintiff's copyrighted recording of horns. The horn hit is brief, but clearly perceptible and does its job. This is unlike indiscernible photographs used, not for their content (which cannot be made out), but to dress a movie set. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998).

This is a physical taking, not an intellectual one. [*Bridgeport*, 410 F.3d] at 802. Sampling is never accidental. *Id.* at 801. As the Sixth Circuit observed, it is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another that he has heard before. *Id.* When you sample a sound recording you know you are taking another's work product. *Id.* Accordingly, the pertinent inquiry in a sampling case is not whether a defendant sampled a little or a lot, but whether a defendant sampled at all. *Id.* at 798 n.6, 801–02 and n.13. .

. . . *Bridgeport* provides in the case of a fixed sound recording a bright-line rule, and I quote: "Get a license or do not sample." 410 F.3d at 801. True, *Get a license or do not sample* doesn't carry the same divine force as *Thou Shalt Not Steal*, but it's the same basic idea. I would hold that the de minimis exception does not apply to the sampling, copying, stealing, pirating, misappropriation—call it what you will—of copyrighted fixed sound recordings. Once the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission. I therefore respectfully dissent.

NOTES AND QUESTIONS

1. The *VMG Salsoul* court's articulation of the "de minimis use" standard incorporates its prior description of that standard in *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). How well did the *Newton* court define the line between permissible copying and improper appropriation? (If you would like to review *Newton* in greater detail, it is excerpted at pp. 419-25 of the casebook.)

2. Do you agree with the *VMG Salsoul* court's conclusion that the sampled portions of the *Love Break* musical composition were de minimis as a matter of law?

3. The owners of the two copyrights implicated by sampling usually will be different entities. Sometimes, the defendant will have licensed one copyright but not the other. *Newton* is an example: defendants had licensed the sound recording from Newton's record label but had neglected to license the composition from Newton himself. In *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), the defendant had licensed the musical composition but had not obtained authorization for the sound recording. Should that fact one copyright was licensed but the other was not affect resolution of the dispute as to the unlicensed copyright? How? Should it matter

which of the two layers of music copyright was the licensed one, and which was the unlicensed one?

4. Was the court right to conclude that the sampled portions of the *Love Break* sound recording also were de minimis as a matter of law? As the court notes, in *Bridgeport*, the Sixth Circuit interpreted §114 to preclude application of the de minimis use standard to sound recording sampling. Which reading of the statute do you find more persuasive? Is §114 meant to limit or expand the rights granted in §106? (If you would like to review the Sixth Circuit's opinion in *Bridgeport*, it is excerpted at pp. 425-29 of the casebook.)

5. As you learned in Chapters 5 (pp. 253-57) and 6 (pp. 396-98), the de minimis use standard is well established in copyright law—but, there is also a well established practice in certain industries of clearing rights in recognizable content. (See Question 4, p. 257.) Is explicit recognition of a “de minimis use” shelter for sampling a good idea? Why, or why not?

The *Bridgeport* court concluded that the bright-line rule it derived from the statute, “[g]et a license or do not sample,” was also sound policy. What are the costs and benefits of that bright-line rule?

6. In deciding the policy questions that surround sampling, would it be important to understand why recording artists sample when, as the court notes, they are free to make sound-alike recordings? Consider the following excerpt:

Cultural judgments about borrowing, repetition and originality are central to understanding legal evaluations of both sampling and hip hop. Repetition expressed through sampling and looping has been, for much of the history of hip hop, an inherent part of what makes hip hop music identifiably hip hop. Consequently, the question of whether and how sampling should be permitted is in some measure an inquiry about how and to what extent hip hop can and should continue to exist as a musical form. Copyright standards, particularly in the music area, must have greater flexibility to accommodate varying styles and types of musical production, whether based on an African American aesthetic of repetition and revision, a postmodern style, transformative imitation and borrowing in the manner of Handel, allusion as practiced by Brahms or another aesthetic that fails to conform to the Romantic author ideal that has to this point been integral to copyright.

Musical borrowing is not necessarily antithetical to originality or creativity. The conceptions of creativity and originality that pervade copyright discussions are incomplete or inaccurate models of actual musical production, particularly the collaborative aspects of musical practice evident in borrowing. Similarly, views of past musical composition should be tempered with a recognition of the operation of invented traditions and cultural ideals that play a powerful role in shaping both representations and contemporary beliefs and attitudes.

Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context*, 84 N.C. L. Rev. 547, 630-31 (2006); see also K. J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 Hastings Comm. & Ent. L.J. 339 (1999) (arguing that copyright rules have routinely functioned to deny protection to African American music artists). Should Professor Arewa's analysis inform the legal treatment of sampling? If so, in what way?