All Mixed Up: *Bridgeport Music v. Dimension Films* and De Minimis Digital Sampling

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INTRODUCTION

"Get a license or do not sample."[1] These simple words hold a profound meaning, not just for artists who sample to create their works, but for everyone. Sampling has become not merely the vice of a fringe music genre, but the virtue of many artists—not only rappers and hip-hop stars, but also electronic, pop, and even country artists. Simply put, *sampling* is the process by which the artist uses a segment of another's musical recording as part of a new work.[2] Many samples contain only a few notes from the original work. These samples are often altered in pitch, tone, and speed until they are virtually unrecognizable, and then woven into the fabric of the new song.[3]

For relatively small samples, artists have long relied on the de minimis doctrine to sustain this creative process. The maxim *de minimis non curat lex*, translated roughly as "the law does not concern itself with trifles,"[4] applies to all civil cases.[5] Under the de minimis doctrine, some things, while technically violations of the law, are considered too petty to waste the time and resources of the court.[6] However, in

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1. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

2. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1100 (11th ed. 2003).

3. For example, the sample at issue in *Bridgeport* was a two-second long, three-note arpeggiated chord. For use in the allegedly infringing song, the pitch was lowered, and the piece was looped and extended to sixteen beats, so that the sound then lasted approximately seven seconds. *Bridgeport*, 383 F.3d at 394. For more examples of the various ways samples can be manipulated and altered, see 3 Notes and Runnin', http://www.downhillbattle.org/3notes/ (last visited Apr. 8, 2005). 3 Notes and Runnin' is a protest project started by the organization Downhill Battle, in which amateur DJs and musicians took the same three-note sample at issue in *Bridgeport* and incorporated it into original thirty-second works. *Id.*

4. BLACK'S LAW DICTIONARY 464 (8th ed. 2004).

5. *See, e.g.*, Nebraska. v. Wyoming & Colorado, 534 U.S. 40 (2004) (water law); McConnell v. FEC, 540 U.S. 93 (2003) (election reform); McKune v. Lile, 536 U.S. 24 (2002) (§ 1983 claim); Mitchell v. Helms, 530 U.S. 793 (2000) (state aid to parochial schools); Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (FTC advertising restrictions); Comm'r v. Estate of Hubert, 520 U.S. 93 (1997) (estate tax).

6. *See, e.g.*, West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 869 (C.C.E.D.N.Y. 1909).

Bridgeport Music, Inc. v. Dimension Films,[7] the Sixth Circuit held that the de minimis doctrine was inapplicable where there was digital sampling of a sound recording protected by a valid copyright.[8]

Around the same time as the *Bridgeport* decision, the Ninth Circuit, in *Newton v. Diamond*,[9] had an opportunity to address a similar sampling issue involving a musical composition, and concluded that a three-note sequence with one background note was de minimis.[10] These two cases indicate a circuit split over how sampling should be treated under copyright law. This circuit split is important because, while both cases involved copyrightable subject matter and the standards for infringement should apply equally to both, the *Bridgeport* court's ruling would mean that one type of subject matter, sound recordings in particular, would be treated differently and in fact given more protection than other types of subject matter, including literary works, films, and musical compositions. This circuit split is all the more important because of the dearth of legal precedent relating to digital sampling of sound recordings in particular.[11] In reality, however, sampling has been with us throughout history—the only difference is the advanced computer software and equipment that make the process easier and more direct.[12] Indeed, sampling can be likened to "quoting" the idea contained within the few notes borrowed from the original whole.[13] Thus, as this Note will show, cases involving sampling can be analogized to those involving other copyrightable subject matter, and should not be treated differently.

The factual similarities of the *Newton* and *Bridgeport* cases allow a closer examination of the problem that digital sampling presents to copyright law. In *Newton*, the plaintiff, a flutist[14] and composer, sued the rap group the Beastie Boys for

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7. 383 F.3d 390 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

8. *Id.* at 396. In that case, the sample in question was three notes long. In contrast, the Supreme Court has traditionally refused to rule there is no de minimis defense or exception available, except in cases of constitutional violations. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2323 (2004) ("There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.").

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

10. *Id.* The *Newton* court's holding regarding the originality of the portion sampled will be discussed in Part I.C and Part III.A, *infra*.

11. *See Bridgeport*, 383 F.3d at 400 (noting lack of judicial precedent); Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 180 (2002) (noting the circular problem that occurs where many sampling cases are settled out of court because lack of precedent makes court unpredictable).

12. *See generally* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 272–89 (1996) (discussing the technique and history of digital sound sampling).

13. *See* Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 n.6 (S.D.N.Y. 2001).

14. There is some debate over whether the term "flutist" or "flautist" is correct. The district court used the term "flautist." Newton v. Diamond, 204 F. Supp. 2d 1244, 1252 (C.D. Cal. 2002), *aff'd*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2905 (2005). The court of appeals, however, used the term "flutist." *Newton*, 388 F.3d at 1191. This Note will use the term "flutist," as this is the term Newton uses in his briefs and court documents. *See, e.g.*, Petition for

copyright infringement. The work at issue was a three-note sequence with one background note from the composition "Choir," sampled by the Beastie Boys in its song "Pass the Mic."[15] The Beastie Boys had a license for the *sound recording*; Newton's claim was that the Beastie Boys' sample violated his copyright in the *musical composition*.[16] The district court found that the sampled portion of Newton's musical composition was not original, and thus not entitled to copyright protection as a matter of law.[17] The court further found that even if the sequence was entitled to protection, the allegedly infringing use was de minimis.[18] The Ninth Circuit affirmed the district court's grant of summary judgment for the defendants on the ground that the use was de minimis.[19]

In *Bridgeport*, the plaintiffs owned the sound recording copyright for "Get Off Your Ass and Jam" ("Get Off") by George Clinton, Jr. and the Funkadelics.[20] A three-note, two-second sample from "Get Off" was lowered in pitch, looped, and extended to sixteen beats.[21] The sample, as altered, was used in five places in the song "100 Miles and Runnin'" ("100 Miles"), which was in turn included on the soundtrack for the film *I Got the Hook Up*.[22] The defendants were the producers of that film and the corresponding soundtrack.[23] The plaintiffs argued that the defendants had infringed their *sound recording* copyright in "Get Off" by using the song "100 Miles" in the film and on the soundtrack.[24] The district court granted the defendants' motion for summary judgment on the basis that the use of the sampled material was de minimis.[25] The Sixth Circuit Court of Appeals, however, reversed, finding that the de minimis defense was categorically unavailable to defendants in cases involving digital sampling.[26] This ruling was affirmed after a panel rehearing.[27]

Courts have traditionally refused to establish any "bright-line rules" in copyright infringement circumstances because, as the *Bridgeport* district court recognized, the court's role is to "balance the interests protected by the copyright laws against the

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Writ of Certiorari, Newton v. Diamond, 125 S. Ct. 2905 (2005) (No. 04-1219), 2005 WL 585205. "Flutist" also seems to comport with modern American usage. *See* BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 355 (2003).

15. *Newton*, 204 F. Supp. 2d at 1244–47.

16. *Id.* at 1247. A sound recording copyright protects the actual sounds fixed—the work of the performing artist and the producers of the record. A musical composition copyright, on the other hand, protects the notes and lyrics that make up each song. For more on the distinction between the sound recording and musical composition copyrights, see *infra* Part III.

17. *Newton*, 204 F. Supp. 2d at 1256.

18. *Id.*

19. *Newton*, 388 F.3d 1189. Newton petitioned the Supreme Court for certiorari on issues somewhat beyond the scope of this Note. *See* Petition for Writ of Certiorari, *supra* note 14. The Supreme Court denied certiorari. *See* Newton v. Diamond, 125 S. Ct. 2905 (2005).

20. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

21. *Id.* at 394.

22. *Id.*

23. *Id.* at 393.

24. *Id.*

25. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830 (M.D. Tenn. 2002), *rev'd*, 383 F.3d 390 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

26. *Bridgeport*, 383 F.3d at 395.

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

stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works."[28] As this Note will explain, the *Bridgeport* case breaks with more than just philosophical tradition. In many ways, the decision is reminiscent of historical cases where changes in technology necessitated changes in both the interpretation of copyright and the attitudes of society regarding what is (and is not) considered art.[29] Thus, this circuit split may indicate not only a rift in judicial opinion, but also a rift in society's attitudes toward music and technology. Nevertheless, the *Bridgeport* court's fundamental misinterpretation of the law is contrary to all relevant case law, statutory language, and legislative history, and sets a dangerous precedent with the potential to stultify creativity and stagnate music technology.

This Note will examine the challenge digital sampling presents to current copyright law, as evidenced by the *Bridgeport* and *Newton* cases. Part I will discuss the prerequisites to copyrightability, with emphasis on the originality requirement. Part II will discuss what constitutes copyright infringement, including in particular the substantial similarity requirement. Part III will discuss copyright protection in musical compositions and sound recordings, and the distinction between the two types of subject matter. Part IV will cover two major defenses to copyright infringement—fair use and de minimis—and explain the problems with the *Bridgeport* "bright-line" approach to the digital sampling problem.[30] Finally, Part V will propose an appropriate test to determine actionable infringement in digital sampling cases, and discuss some responses to the digital sampling challenge that attempt to enable copyright law to accommodate digital sampling without destroying the artist's incentive to create. Along the way, it will become clear that the *Bridgeport* court's opinion in regard to this issue is short-sighted and misguided, and indeed out of line with current copyright jurisprudence, the legislative history of the Copyright Act, and the underlying Constitutional mandate. Nevertheless, the legal costs and uncertainty involved with a *Newton* case-by-case analysis necessitate a systematic response to the digital sampling challenge.

I. PREREQUISITES TO COPYRIGHT PROTECTION

Copyright represents a delicate balance between the desire to advance creativity by allowing artists a limited monopoly on their work, and the public interest in the free and open exchange of ideas.[31] A work must be copyrightable in order for the owner of

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28. *Bridgeport*, 230 F. Supp. 2d at 840.

29. *See, e.g.*, White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (holding that piano rolls for player pianos were copies of the work, even though the music could not be "seen"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (examining copyrightability of photograph and whether photograph was a product of the photographer or of the camera).

30. This Note is treating the de minimis doctrine as a defense because it would normally be an issue raised by the defendant. However, it is important to note that it is not an affirmative defense per se, and would normally be addressed by the court prior to addressing any affirmative defenses. For example, the affirmative defense of fair use excuses copying that is already found to be infringement, while a finding that copying is de minimis precludes a finding that such copying constitutes infringement. *See infra* Part IV.

31. *See* Stewart v. Abend, 495 U.S. 207, 209 (1990); Sony Corp. of Amer. v. Universal City

that work to sue for copyright infringement. Generally, in order for a work to be copyrightable, it must be an "original work of authorship fixed in any tangible medium of expression."[32]

This Part will outline the constitutional prerequisites for copyright protection, and the policies that inform those prerequisites. Subpart A will discuss the constitutional element of copyright and the purpose of copyright in American society. Subpart B will discuss the first prerequisite of copyright, that of "fixation." Subpart C will discuss the originality requirement, with due attention to the analysis of originality in the *Bridgeport* and *Newton* cases.

A. The Constitution and the Purpose of Copyright

Congressional authority to promulgate copyright statutes is located in the United States Constitution, Article I, Section 8, Clause 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[33] The goal of copyright protection then is to "promote the dissemination of knowledge to enhance the public welfare."[34] The means to accomplish this goal are utilitarian and economic in nature—authors and artists are given a monopoly over their works for a limited period of time.[35] This monopoly serves as an incentive for creators to spend the time and effort the creative process requires, secure in the fact that they will not subsequently be undercut by free-riders.[36]

The utilitarian focus of U.S. copyright law should be distinguished from the continental European form of copyright protection, which views an artist's work as "an extension of his or her own personality," and accordingly grants more control to the artist over the eventual use to which his or her art is put.[37] In contrast, the U.S. system focuses on economic incentives, a perhaps quintessentially American "conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare."[38] This underlying philosophy of U.S. copyright law should be kept in mind when analyzing the challenges posed by digital sampling—under the European system, questions such as whether the artist "liked" the song in which a sample of his work was used, or the way in which it was used, would be extremely relevant. In the United States, however, attention is placed instead on economic concerns, such as whether the "borrowing" work will affect the market for the original.[39]

Studios, Inc., 464 U.S. 417, 429 (1984).

32. 17 U.S.C. § 102(a) (2000).

33. U.S. CONST. art. 1, § 8, cl. 8.

34. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 6 (3d ed. 1999).

35. *See id.*

36. This philosophy has particular significance in regard to digital sampling. Many opponents of sampling have argued that it allows relatively less talented "artists" to effectively hijack the work product of others, thus free-riding on the talent and efforts of the original artist for their own material gain. *See, e.g.*, Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1668 (1999) (concluding that sampling, which "allows a producer of music to save money . . . without sacrificing the sound and phrasing of a live musician . . . poses the greatest danger to the musical profession because the musician is being replaced with himself").

37. LEAFFER, *supra* note 34, at 3.

38. Mazer v. Stein, 347 U.S. 201, 219 (1954).

39. This is particularly evident in fair use analysis. *See infra* Part IV.A.

B. Fixed in a Tangible Medium

In order for a work to be copyrightable, it must first be *fixed*, that is, when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[40] Fixation is a constitutional requirement, flowing from use of the word "Writings" in Clause 8.[41] This prerequisite is, for the purposes of this Note, relatively uncontroversial, especially in relation to sound recordings, which are fixed by definition.[42]

C. Original Works of Authorship

It is not enough, of course, for a work to simply be fixed—it must also be *original*. Originality, like fixation, is a constitutional requirement.[43] In drafting the 1976 Copyright Act, Congress intentionally left "original" undefined in the statute, in order to incorporate the extended body of case law interpreting the subject.[44] The Supreme Court has stated that "[t]he *sine qua non* of copyright is originality."[45] In order to be considered *original*, the work must (1) be "independently created by the author," and (2) possess "at least some minimal degree of creativity."[46] The creativity threshold is extremely low, and "[a]lthough slavish copying involving no artistic skill whatsoever does not qualify a showing of virtually any independent creativity will do."[47] Additionally, creativity is not synonymous with *novelty*. While novelty is required, for example, in order to register a patent, novelty is not required for copyright purposes, and a work may be considered original even if it borrows common themes or ideas from other works.[48]

Originality is assessed by looking at the work as a whole, thus, "[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected [in and of itself] . . . . [C]opyright protection may extend only to those components of a work that are original to the author."[49] This phenomenon is perhaps most striking in music, and courts recognize that there are a "limited number of notes and chords available to composers," and therefore "common themes frequently reappear in various

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40. 17 U.S.C. § 101 (2000). The term "phonorecord" indicates an object on which a sound is fixed; "copy" refers to everything else. *Id.*

41. *See* U.S. CONST. art. I, § 8, cl. 8; Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346–47 (1991) (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); The Trade-Mark Cases, 100 U.S. 82 (1879)).

42. *See* 17 U.S.C. § 101 (2000) (defining "sound recording").

43. *See* U.S. CONST. art. I, § 8, cl. 8; *Feist*, 499 U.S. at 346.

44. H.R. REP. NO. 94-1476 at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

45. *Feist*, 499 U.S. at 345.

46. *Id.*

47. Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988) (citations omitted).

48. *See Feist*, 499 U.S. at 346–47. And this is a good thing, if it is true that "there is nothing new under the sun." *Ecclesiastes* 1:9.

49. *Feist*, 499 U.S. at 348.

compositions, especially in popular music."[50] Such common themes do not meet the minimum threshold for originality, in the same way that a very simple sentence in English would not. Notes, like words, must be put together in an original way that requires a modicum of creativity.

The originality requirement is particularly important in sampling cases. In *Newton v. Diamond*,[51] the district court found that the three-note sequence sampled by the Beastie Boys from Newton's flute composition was not original in and of itself as a matter of law.[52] Because the particular sequence was not original, the musical composition thereof was not entitled to copyright protection, and the Beastie Boys could sample it with impunity.[53] Similarly, the defendants in *Bridgeport Music, Inc. v. Dimension Films*[54] argued that the three-note sample at issue was a common sequence and therefore not entitled to copyright protection.[55] However, unlike in *Newton*, the alleged infringement in *Bridgeport* was of the sound recording (not the musical composition), leading the district court to conclude that while the notes themselves may have been unoriginal, the artist's performance, as captured in the sound recording, was original.[56] The opposing decisions of the two cases in regard to the originality issue highlight the fact that, depending on the subject matter of the copyright, there may be different characteristics to evaluate in order to determine if a work, or piece thereof, is sufficiently original to merit copyright protection.[57] However, although originality may

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50. *Gaste*, 863 F.2d at 1068.

51. 204 F. Supp. 2d 1244 (C.D. Cal. 2002), *aff'd*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2905 (2005).

52. *Id.* at 1253. The court held that the *musical composition* was not original; although Newton's performance may have been original, the issue in this case was infringement of the composition and not infringement of the sound recording, and therefore Newton's unique performance style was irrelevant. *See infra* Part III.B.

53. The court of appeals affirmed only on the ground that the use was de minimis. *Newton*, 388 F.3d at 1190. The originality inquiry does inform the de minimis inquiry, however, in that typically a sample that qualified as de minimis would likewise be unoriginal, and therefore not entitled to copyright protection in the first instance. Nevertheless, it does not follow that a given sequence found to be unoriginal will necessarily be de minimis. *See infra* Part IV.B.

54. 383 F.3d 390 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

55. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002) (noting the way the arpeggiated chord is used and memorialized in the "Get Off" sound recording), *rev'd*, 383 F.3d 390 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

56. *Id.* The court of appeals originally did not address the originality issue, except to say that it "would agree with the district court's analysis . . . *if* the composition copyright had been at issue." *Bridgeport*, 383 F.3d at 396 (emphasis added). The court of appeals concluded that a different analysis was required for sound recording copyrights, and "that the requirement of originality is met by the fixation of sounds in the master recording." *Id.* Of course, both fixation and originality are constitutionally required, and while a sound recording is by definition fixed, it is not by definition original. *See supra* Part I.B–C. Additionally, it seems clear that the district court adequately distinguished the fact that the copyright in question was of a sound recording. The court remedied the error in its subsequent order granting a panel rehearing, by amending the opinion to read simply "[w]e agree with the district court's analysis on the question of originality." Bridgeport Music, Inc. v. Dimension Films, No. 02-6521, 2004 U.S. App. LEXIS 26877, at *2 (6th Cir. Dec. 20, 2004).

57. For the specific differences between a musical composition copyright and a sound recording copyright, see *infra* Part III.A–B.

reside in different characteristics depending on the nature of the work, originality in some form is always required.

II. COPYRIGHT INFRINGEMENT

In order to maintain an action for infringement, a copyright owner must prove (1) that he or she has a valid copyright in the work, (2) actual copying, and (3) that the two works are substantially similar when taken as a whole.[58] A valid copyright is established through proof of fixation, originality, copyrightable subject matter under section 102 of the Copyright Act, and compliance with other statutory formalities.[59] Evidence of copyright registration raises a rebuttable presumption of originality, and is typically considered *prima facie* evidence of the requisite ownership.[60] Thus, in order to prove copying, the copyright owner must show that the two works are substantially similar, *and* that the defendant actually copied the work.[61] Subpart A will discuss the substantial similarity requirement. Subpart B will cover how to prove actual copying.

A. Substantial Similarity

As the term "substantial similarity" implies, the two works at issue need not be identical. The most commonly articulated test looks at each work as a whole, and considers "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[62]

To determine whether the two works are substantially similar, courts assess both qualitative and quantitative factors. The quantitative analysis looks at whether "the

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58. *See* 17 U.S.C. § 501 (2000); *see also* Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1196 (10th Cir. 2005); Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231, 239–40 (2d Cir. 1983); Stratchborneo v. ARC Music Corp., 357 F. Supp. 1393, 1404–05 (S.D.N.Y. 1973).

59. *See* 17 U.S.C. § 401(c) (2000).

60. *See id.* § 401(d).

61. *See* LEAFFER, *supra* note 34, at 382.

62. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)). This standard is somewhat controversial. The D.C., First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits all apply the "average audience" test in all cases. *See, e.g.*, Atkins v. Fischer, 331 F.3d 988, 993 (D.C. Cir. 2003); Taylor Corp. v. Four Seasons Greetings, LLC, 315 F.3d 1039, 1043 (8th Cir. 2003); Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1232 (11th Cir. 2002); Susan Wateen Doll Co. v. Ashton-Drake Galleries, 272 F.3d 441, 451 (7th Cir. 2001); Segrets, Inc. v. Gillman Knitwear Co., 207 F.3d 56, 66 n.11 (1st Cir. 2000); Country Kids 'N CitySlicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996); Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986). The Third, Fourth, and Sixth Circuits use a "specialized audience" test in cases regarding complex and technical works. *See, e.g.*, Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003); Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 736 (4th Cir. 1990); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1233 (3d Cir. 1986). The plaintiffs in *Newton* petitioned the Supreme Court for a writ of certiorari in part to resolve the split on this issue. *See* Petition for Writ of Certiorari, Newton v. Diamond, 125 S.Ct. 2905 (2005) (No. 04-1219), 2005 WL 585205. Newton's petition was denied. *See* Newton v. Diamond, 125 S.Ct. 2905 (2005). For the purposes of this Note, the "average audience" test will be used where necessary, reflecting the majority position on this issue.

segment in question constituted a substantial portion of the plaintiff's work, not whether it constituted a substantial portion of the defendant's work."[63] The qualitative analysis considers whether the copied portion is qualitatively important to the plaintiff's work as a whole.[64] "[Q]uantitatively insignificant infringement may be substantial if the material is qualitatively important to [the] plaintiff's work."[65] Thus, for example, a work that takes a large amount of ambient, background elements from the copyrighted work may be considered substantially similar; but a work may also be substantially similar where only a minute bit of the copyrighted work is taken, if that bit is a hook or signature element thereof.[66]

In *Newton*, the Ninth Circuit determined that the two works were not substantially similar as a matter of law.[67] The court determined that, quantitatively, the portion sampled lasted approximately two seconds, and comprised roughly two percent of Newton's composition, "Choir."[68] The court also found that the portion was not qualitatively more important to Newton's composition than any other portion.[69]

The *Bridgeport* court, in contrast, decided that where digital sampling is involved, no substantial similarity analysis is necessary.[70] The court based this conclusion in part on the belief that *every* sample necessarily takes something of value.[71] However, the Copyright Act itself, and the House Report thereof, clearly indicate that the substantial similarity analysis is to be applied in all cases of copyright infringement, and that sound recordings are not to be treated any differently.[72] Under the *Bridgeport* rule, it would only be necessary to prove actual copying in order to prove infringement; the two works would not have to be even remotely similar to each other.

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63. Jarvis v. A&M Records, 827 F. Supp. 282, 290 (D.N.J. 1993). This portion of the analysis is where the de minimis doctrine comes into play. If a sample does not constitute a substantial portion of the plaintiff's work, even where copying is admitted, that copying does not rise to the level of actionable infringement. *See infra* Part IV.B.

64. *See* Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir. 1987); Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714 at *4 (S.D.N.Y. 2001).

65. Apple Computer, Inc. v. Microsoft Corp., 821 F. Supp. 616, 624 (N.D. Cal. 1993), *aff'd*, 35 F.3d 1435 (9th Cir. 1994); *see also Baxter*, 812 F.2d at 425.

66. *See, e.g.*, McDonald v. Multimedia Entm't, Inc., No. 90 Civ. 6356 (KC), 1991 WL 311921, at *3–*4 (S.D.N.Y. 1991).

67. *Newton*, 388 F.3d at 1195–96.

68. *Id.*

69. *Id.*

70. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 399 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

71. *Id.*

72. *See* 17 U.S.C. § 114(a) (2000); H.R. REP. NO. 92-487, at 10 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1572 (stating that the sound recording copyright is not intended to "grant any broader rights than are accorded to other copyright proprietors"); H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 ("[I]nfringement 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 . . . .") (emphasis added).

B. Actual Copying

In addition to proving that the two works taken as a whole are substantially similar, the copyright owner must also prove that the defendant actually copied his or her work.[73] Since a copyright owner will seldom catch someone red-handed in the process of copying his or her work,[74] actual copying is typically proved by showing (1) that the defendant had access to the work, and (2) that the works are substantially similar to such a degree that independent creation is improbable.[75]

In order to prove access, the plaintiff must show that there was a reasonable probability that the defendant had access to the original copyrighted work.[76] There are some cases in which the copyrighted work is so popular and publicly available that access will be inferred.[77] Such cases usually involve a hit pop song, blockbuster movie, or the like. Access is also inferred in cases of "striking similarity"—where the similarities between the two works are so remarkable that they can only be explained by copying.[78]

Regardless of how strong the proof of access is, the works must still be substantially similar.[79] The similarity required at this stage is *probative similarity*—the two works

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73. *See* 17 U.S.C. § 501 (2000); *see also* Warner Bros., Inc. v. Am. Broad. Cos., Inc., 720 F.2d 231 (2d Cir. 1983); Stratchborneo v. ARC Music Corp., 357 F. Supp. 1393, 1404–05 (S.D.N.Y. 1973).

74. In some sampling cases, however, the defendant (as in *Bridgeport*) will stipulate to actual copying and rely in full on an affirmative defense. *See, e.g.*, Jean v. Bug Music, Inc., No. 00 CIV 4022(DC), 2002 WL 287786 at *4 (S.D.N.Y. 2002); Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714 at *2 (S.D.N.Y. 2001); Jarvis v. A&M Records, 827 F. Supp. 282, 289 (D.N.J. 1993).

75. Some courts use the term "suhstantial similarity" in both the overall infringement analysis and in this context, leading to confusion. *See, e.g.*, Evans Newton, Inc. v. Chicago Sys. Software, 793 F.2d 889, 894–95 (7th Cir. 1986). This Note will follow several courts and commentators in using the term "probative similarity" to refer to that which is used as proof of copying. *See, e.g.*, Dam Things from Denmark v. Russ Berrie & Co., Inc., 290 F.3d 548, 562 n.19 (3d Cir. 2002) (quoting Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992)); *see also* Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990); LEAFFER, *supra* note 34, at 383 (citing HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 14.01 (1993)).

76. *See, e.g.*, Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939 (8th Cir. 1992); Gaste v. Kaiserman, 863 F.2d 1061, 1067 (2d Cir. 1988).

77. *See, e.g.*, BrightTunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (holding infringement where song in question was a big hit at home and abroad; although defendant denied having heard it, the court determined that was not plausible because the song was so pervasive).

78. *See, e.g.*, *Gaste*, 863 F.2d at 1068 (2d Cir. 1988) (concluding evidence sufficient to infer access based on striking similarity where nearly every measure in the infringing work could be traced back to the original copyrighted work). However, even striking similarity is not enough where it is evident that the defendant had no access whatsoever to the copyrighted work. *See, e.g.*, Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984) (holding that while the two songs at issue had an extraordinary degree of similarity, there was no infringement because the plaintiff's song was so obscure that it was not reasonable to believe that the defendant had access to it).

79. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); Arica Inst., Inc. v. Palmer, 761 F. Supp. 1056 (S.D.N.Y. 1991).

must be so similar as to indicate that the defendant copied, rather than independently created, the work.[80] While in many cases the same evidence will be used in both the substantial similarity and the probative similarity analysis, there are situations in which a plaintiff could show one but not the other.[81] In any event, where the plaintiff is able to demonstrate a sufficient degree of both access and probative similarity, a presumption of copying is raised.[82] At this point, the burden shifts to the defendant, who can rebut the presumption by showing either independent creation, or that both works referenced the same work in the public domain.[83] The defendant also has affirmative defenses.[84]

III. COPYRIGHT IN MUSICAL COMPOSITIONS AND SOUND RECORDINGS

The Copyright Act of 1976 grants specific, limited rights to copyright holders. Generally, the copyright owner has six exclusive rights: reproduction, adaptation, distribution, performance, display, and sound recording digital audio transmission.[85] These rights are not unlimited, and "the law has never recognized an author's right to absolute control of his work."[86] The Copyright Act limits copyright protection to works of authorship in eight categories of subject matter—literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[87] The category within which a work falls will determine whether all six exclusive rights apply, and whether further limitations apply to the rights granted by section 106.

This Part will examine two of those categories—musical compositions and sound recording—and emphasize the distinction between these two categories, which are easily confused, and analyzing this distinction in light of the *Bridgeport* and *Newton* cases. Subpart A will discuss the cbaracteristics, limitations, and interpretation of the musical composition copyright, while Subpart B will discuss the characteristics, limitations, and interpretation of the sound recording copyright. Subparts C, D, and E will discuss important distinctions in music copyright law. Subpart C will discuss the distinction between the sound recording copyright, on the one hand, and the phonorecord on which the sound recording is fixed, on the other. Subpart D will provide an example of the confusion that develops over which elements of a song make up the sound recording, and which elements make up the musical composition itself.

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80. *See, e.g.*, *Dam Things from Denmark*, 290 F.3d at 562; *Laureyssens*, 964 F.2d at 140.

81. One example would be where the plaintiff's work (either intentionally or accidentally) contains factual errors. The presence of the same errors in the defendant's work would tend to indicate copying, but would not necessarily render the two works substantially similar as a whole. *See, e.g.*, Feist Publ'ns v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 344–45 (1991); Eckes v. Card Prices Update, 736 F.2d 859, 863–64 (2d Cir. 1984).

82. *See* LEAFFER, *supra* note 34, at 384.

83. *Id.*

84. *See infra* Part IV.

85. 17 U.S.C. § 106 (2000). *See also* LEAFFER, *supra* note 34, at 283.

86. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 n.13 (1984).

87. *See* 17 U.S.C. § 102(a) (2000). The categories are intended to be inclusive, not exhaustive.

Subpart E will discuss the distinction between sampling and creating a derivative work, and what this means in terms of copyright protection for both the original and derivative artists.

A. Musical Compositions

The musical composition copyright covers the actual melody, harmony, rhythm, and lyrics that make up a musical work.[88] Essentially, the elements covered are those that could be transcribed into a piece of sheet music, although a composition does not necessarily have to be fixed in this way.[89] Any element that cannot be notated, such as a performer's distinct voice or a specialized breathing pattern, is not included in the musical composition copyright, even if it contributes substantially to the originality of the work.[90] Ultimately, the musical composition copyright "protects only the sound that would invariably result from playing" the indicated notes.[91]

When evaluating whether a musical composition copyright has been infringed, courts look to the combination of notes, harmony, melody, and rhythm to determine whether the two works are substantially similar.[92] Therefore, musical composition copyrights can be infringed by independent duplication of the song (i.e., by playing the music yourself and attempting to pass it off as your own).[93] Proof of copying often turns on whether the alleged infringer had access to the copyrighted composition; where songs are strikingly similar but there is no reasonable way the alleged infringer could have known about the copyrighted composition, there is no infringement.[94] Similarly, the defendant may *think* that he did not base his own work on the copyrighted composition in any way, but if contact with the song was nearly inescapable, a court may nevertheless find infringement.[95] Additionally, a musical composition copyright covers the work as a whole, although there may be elements of the work that are not protectible in and of themselves.[96] Music is a limited language, so

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88. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[D] (rev. ed. 2004).

89. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 194 (5th ed. 2003).

90. *Cf.* Newton v. Diamond, 204 F. Supp. 2d 1244, 1252 (C.D. Cal. 2002), *aff'd*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2905 (2005).

91. *Id.* at 1251.

92. *Id.* at 1249 (citing 3 NIMMER & NIMMER, *supra* note 88, at § 2.05[D]); *see also supra* Part II.

93. Selle v. Gibb, 741 F.2d 896, 901–02 (7th Cir. 1984).

94. *Id.*

95. BrightTunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976). *See also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 346 (1989) (noting that one of the significant differences between music and literary copyrights is that in cases involving the former, courts will hold that accidental duplication is infringement if the song has broad commercial airplay). Notice, too, that there is no intent element to copyright infringement; thus, infringement is infringement, regardless of whether you "meant to do it."

96. *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992); *cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348–51 (1991) (noting that only portions of a work that are original and non-trivial are subject to copyright protection).

often short combinations of notes or rhythms that are similar to those in other songs are naturally unavoidable.[97]

Most case law deals with infringement of musical compositions, as opposed to sound recordings, so some courts, including the *Bridgeport* court, think that these cases do not apply as precedent for sound recording infringement actions.[98] Nevertheless, all copyright infringement claims must prove the same elements—substantial similarity and actual copying—the only difference is that the facts considered will be different. So, for example, a case involving infringement of a visual work can easily be analogized and applied to a musical composition or sound recording copyright infringement—the analysis does not change depending on the subject matter.[99] The next subpart will discuss the characteristics evaluated in a sound recording infringement claim, the limits of copyright protection for sound recordings, and the misinterpretation thereof by the *Bridgeport* court of appeals.

B. Sound Recordings

A *sound recording* is defined as a work that results from the "fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects . . . in which they are embodied."[100] A sound recording is "essentially . . . a captured performance."[101] Thus, while a sound recording, in the musical context, always is a recording of a specific musical composition, each is *separately* copyrightable. In

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97. *See* Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988).

98. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 400 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005) ("[A]lthough there were no existing judicial precedents we did not pull this interpretation out of thin air."); *see also id.* at 400 n.13 ("We have not addressed in detail any of the cases frequently cited in these music copyright cases because in the main they involved infringement of the composition copyright and not the sound recording copyright."). The fact that there are fewer precedents involving the sound recording copyright is due in part to the fact that musical compositions have been protected throughout U.S. copyright history. *See, e.g.*, Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, *repealed by* Act of Oct. 19, 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2541 (effective Jan. 1, 1978). Sound recordings, however, were not subject to copyright protection until 1971. Sound Recording Amendment, Pub. L. No. 92-140, 85 Stat. 391 (1971). *See infra* Part III.B.

99. *See generally Feist*, 499 U.S. 340 (citing a variety of copyright precedents in case involving two literary works, including cases involving motion pictures and musical composition subject matter); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998) (same); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70 (2d Cir. 1997) (same); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993) (same); Rogers, 960 F.2d 301 (same); Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231 (2d Cir. 1983) (same). *Contra* Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 650–51 n.15 (6th Cir. 2004) (explaining that cases frequently cited in music copyright cases were not cited here "because in the main they involve infringement of the composition copyright and not the sound recording copyright"). *See also* Brett I. Kaplicer, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227 (2000) (applying analysis used in cases involving visual art subject matter to sampling cases).

100. 17 U.S.C. § 101 (2000).

101. LEAFFER, *supra* note 34, at 135.

sampling cases, it is possible that either the musical composition copyright, or the sound recording copyright, or both, have been infringed.

Section 106 of the Copyright Act limits the exclusive rights in sound recordings to reproduction, adaptation, distribution, and transmission.[102] There is no right of performance in a sound recording.[103] Section 114(b) further limits the rights in sound recordings by indicating that infringement can only occur by unauthorized: (1) reproduction by mechanical means; or (2) preparation of a derivative work, "in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[104] Thus, there is no infringement of a sound recording copyright where someone independently creates a work that mimics the copyrighted work.[105] The clear intent of Congress in this section is to *limit* the exclusive rights in sound recordings; during the passage of the Sound Recording Amendment of 1971, Congress explicitly stated that "this *limited* copyright does not grant any broader rights than are accorded to other copyright proprietors . . . ."[106] Contrary to both the explicit language of the statute and the clear intent of Congress, the court of appeals in *Bridgeport* interpreted § 114(b) as an *expansion* of the rights of the sound recording copyright holder.[107] The court dismissed congressional intent as indicated in the House Reports accompanying the passage of the Sound Recording Amendment, concluding that "[t]he legislative history is of little help because digital sampling wasn't being done in 1971."[108] The court then used what it called a "literal reading" of the statute to determine that substantial similarity was not required in cases of sound recording infringement by digital sampling.[109] This interpretation is the equivalent of allowing the author of a novel copyright protection for every letter of the alphabet he uses.[110]

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102. 17 U.S.C. § 106 (2000); *see also* 17 U.S.C. § 114(a) (2000).

103. § 114(a).

104. § 114(b).

105. *Id. See also* H.R. Rep. No. 92-487, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1573. There may, however, still be infringement of the musical composition in such cases.

106. H.R. Rep. No. 92-487, at 10 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1572 (emphasis added).

107. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 400 n.14 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005) ("Certain provisions of the copyright law . . . suggest that broader protection against unauthorized sampling may be available for owners of sound recordings than for the owners of musical compositions that may be embodied in those sound recordings.").

108. *Id.* at 401. This reasoning is dubious at best, since courts often reference legislative history to determine how a statute should apply to technology that did not exist when the statute was originally passed. Perhaps more disturbing, the statement is actually incorrect. The first electronic music synthesizers were introduced in the late 1950s, and, although analog rather than digital, were capable of sampling any recorded sound in the same way that digital sampling programs do today. *See* Electronic Music Foundation Timeline, http://emfinstitute.emf.org/bigtimeline/1900s.html (last visited Apr. 9, 2005). The first digital samplers were introduced in 1975, before the passage of the Copyright Act of 1976. *See id.*; *see also* Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 70–72 (1993). Thus, if Congress believed that digital sampling should be treated differently, it is reasonable to assume that this issue would have been addressed in the 1976 Act, or in the amendments that have followed.

109. *Bridgeport*, 383 F.3d at 401. Apparently a "literal reading" includes selective quoting of

Sound recordings must meet the same constitutional prerequisite of originality as all other copyrightable subject matter. For sound recordings, the source of that originality is either the interpretive performance of the specific artist, or perhaps the producer.[111] As with other categories, the requisite degree of creativity is minimal, so that "[a]lmost any conscious performance by a human being would add the degree of originality necessary for copyrightability in a sound recording."[112] The infringement analysis is likewise similar to that of a musical composition, except that instead of looking at the music itself, the focus is on the performance thereof. Although the *Bridgeport* court concluded that the substantial similarity analysis was not required in order to prove infringement of a sound recording,[113] the statutory language and house reports accompanying both the Sound Recording Amendment of 1971 and the Copyright Act of 1976 make clear that Congress intended that plaintiffs would still have to demonstrate substantial similarity in sound recording infringement cases.[114]

C. The Distinction Between Sound Recordings and Phonorecords

An important distinction to make with regard to a sound recording copyright is that it protects the sounds on the phonorecord, not the phonorecord itself.[115] The *Bridgeport* court of appeals evidently overlooked this point, as the opinion analogizes a sound recording to a book, and concludes "[t]here are probably any number of reasons why the decision was made by Congress to treat a sound recording differently from a book *even though both are the medium in which an original work is fixed* rather than the creation itself."[116] Digital sampling entails making a copy, the same as if

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the statute that removes the word "limited." *See id.* at 400 n.14 (quoting 17 U.S.C. §114(b), which uses the word "limited" twice). The sentence quoted by the court here is itself a clarification of one of these limitations.

110. This analogy makes it sound incredibly absurd to say, as the *Bridgeport* court does, that "[w]e do not see this [rule] as stifling creativity in any significant way." *Id.* at 398; *cf.* MARK DUNN, ELLA MINNOW PEA: A NOVEL IN LETTERS (Anchor Books 2002) (telling the story of the inhabitants of a fictitious island who must stop using the letters of the alphabet as the letters fall off of a statue memorializing a former island inhabitant who created the sentence, "The quick brown fox jumps over the lazy dog," the only sentence to utilize all twenty-six letters of the alphabet).

111. LEAFFER, *supra* note 34, at 136.

112. *Id.*

113. *Bridgeport*, 383 F.3d at 399.

114. *See, e.g.*, H.R. Rep. 94-1476, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 ("[I]nfringement 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 . . . .") (emphasis added); *see also* 4 NIMMER & NIMMER, *supra* note 88, § 13.03 [A][2], at 13–50 (stating that "[t]he practice of digitally sampling prior music . . . should not be subject to any special analysis").

115. *See* 17 U.S.C. § 101 (2000) (defining "sound recording"); H.R. Rep. No. 94-1476 at 53–57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666–69 ("The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, 'sound recordings' as copyrightable subject matter are distingnished from 'phonorecords,' the latter being physical objects on which sounds are fixed."). Obviously, if this was not the case, sound recording infringement would logically consist of, for example, breaking or scratching compact discs.

116. *Bridgeport*, 383 F.3d at 398 (emphasis added).

someone photocopied a page from a book.[117] The artist sampling a given work does not literally "take" the sound out of the original recording, as sampling uses the same basic process familiar to many computer users who transfer music from compact discs onto the hard drives of their computers. If this transfer was a physical taking, after ripping tracks from a compact disc, the disc would come out of the computer's CD-ROM drive blank. Thus, it is not accurate to say, as the *Bridgeport* court does, that when "sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one."[118]

D. The Distinction Between Sound Recording and Musical Composition Copyrights

Newton is a good example of the confusion that sometimes develops over which characteristics of the work are relevant for finding infringement. Rather than argue the merits of the combination of notes in and of itself, Newton argued that the three notes sampled were unique and identifiable because of his *particular performance technique*.[119] The characteristics Newton relied upon to establish the "uniqueness" of his piece could have been notated (and thus made part of the musical composition), but since they were not notated, they were only part of the sound recording, and not part of the musical composition at issue.[120] Given that "the rights of a copyright in a sound recording do not extend to the [musical composition] itself, and vice versa," the district court concluded that, while the sound recording might be original, the particular sequence of notes reflected in the musical composition was not original.[121]

Newton could not recover for infringement of the sound recording, since the Beastie Boys already had a license for it.[122] This case places in sharp relief the importance of carefully distinguishing between musical composition rights, on the one hand, and sound recording rights, on the other. While the elements of a copyright infringement claim are the same for both types of subject matter, the characteristics a plaintiff will rely upon to make up that claim will be different. The next subpart will discuss the distinction between mere sampling and the creation of a derivative work, and what this means in terms of protection for both the original artist and the derivative artist.

E. The Distinction Between Sampling and Derivative Works

The *Bridgeport* court also concluded that "a sound recording owner has the exclusive right to 'sample' his own recording."[123] While a sound recording owner certainly has the right to sample his own recording all he wishes, this is not one of the

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117. *See* Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 881 (1992) (describing the process of digital sampling).

118. *Bridgeport*, 383 F.3d at 399.

119. *See* Newton v. Diamond, 204 F. Supp. 2d 1244, 1252 (C.D. Cal. 2002), *aff'd*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2905 (2005).

120. *Id.* at 1252.

121. *Id.* at 1249, 1251.

122. *Id.* at 1249. Newton had sold his rights in the sound recording to ECM records, who in turn granted the Beastie Boys a license to sample it. *Id.*

123. *Bridgeport*, 383 F.3d at 398.

exclusive rights granted by the Copyright Act. Section 114(b) limits a sound recording owner's rights under § 106(2) to the preparation of derivative works, which can be made by rearranging or remixing the actual sounds fixed in the sound recording.[124] First, a "remix" is not equivalent to a "sample." A "remix" is a "variant of an original recording . . . made by rearranging or adding to the original."[125] A "sample," in contrast, is "an excerpt from a musical recording that is used in another artist's recording."[126] Thus, a "sample," by definition, comes from an outside work. The key difference is that in a remix, the original song is the core of the work, and other elements are added around that core, creating a derivative work of the original song. In sampling cases, only a small piece of the original song is added to a new song; the new song is not a derivative of the sampled work.[127]

Thus, "sampling" could almost never create a derivative work. Section 101 defines a "derivative work" as one "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."[128] As should be evident from this definition and from the distinction between "remix" and "sample" above, one could not create a derivative work in this context unless the original work was used as the main theme of the new work. That a license would be required for a use such as this is not at all controversial.[129]

Williams v. Broadus[130] is particularly instructive on this point. There, rapper Snoop Dogg sampled a song without permission, subsequently arguing that the owner of that song did not have a valid copyright because it contained a portion of *another* song copied without permission.[131] The court first noted that "a work is not derivative simply because it borrows from a pre-existing work."[132] The court then reasoned that "if a secondary work transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, *does not infringe the copyright of the original work.*"[133]

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124. 17 U.S.C. § 114(b) (2000).

125. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 2, at 1053.

126. *Id.* at 1100.

127. For example, suppose Recording Artist *A* creates an original sound recording of a pop love song called "Girl." Recording Artist *B* then samples two notes from a guitar solo in "Girl" for his original sound recording of a hip-hop song called "Bling." The two-note sample comprises approximately one percent of the song "Bling," which is otherwise nothing like the song "Girl" in terms of lyrics, genre, rhythm, melody, or subject matter. It is clear that "Bling" could never be considered a derivative work of the song "Girl." In contrast, suppose Recording Artist *B* takes the song "Girl," adds a new bass beat, and raps over the top of the guitar solos. Recording Artist B has created a *remix* of the song "Girl," which is a derivative work.

128. 17 U.S.C. § 101 (2000).

129. *See, e.g.*, Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *5 (S.D.N.Y. 2001) ("[R]ecent cases have held that the unlawful use of a pre-existing work in a derivative work *always* invalidates copyright protection for the entire derivative work.") (emphasis added).

130. *Id.*

131. *Id.* at *1–2.

132. *Id.* at *2.

133. *Id.* at *3 (citations omitted) (emphasis added).

Significantly, the court also stated that the fact that "this case involves the practice of sampling prior music into a new composition does not alter this analysis."[134]

Despite all case law, statutory language, and legislative history to the contrary, the *Bridgeport* court of appeals seems determined to treat sound recordings differently than other categories of copyrightable subject matter, and to do so in a way that expands the rights available to sound recording owners beyond those of others. However, perhaps the most significant consequence of the new *Bridgeport* rule is that it intentionally eliminated the age-old copyright infringement doctrine of de minimis, and nearly accidentally eliminated the statutory defense of fair use. The next Part will consider these two defenses to copyright infringement, and the implications of the *Bridgeport* decision on each.

IV. DEFENSES TO COPYRIGHT INFRINGEMENT

In some cases, the defendant will admit to actual copying but argue, in regard to substantial similarity, that the use in question was de minimis. In other cases, the fair use doctrine provides a defense even where there is actual copying *and* substantial similarity, either admitted or proved. This Part will discuss these two defenses, their value, and the effect of the *Bridgeport* decision thereon. Subpart A will briefly discuss fair use.[135] Subpart B will discuss the de minimis doctrine and its intended demise with respect to sound recordings.

A. Fair Use

The fair use doctrine has a long history in U.S. copyright law, and is codified in section 107 of the Copyright Act of 1976.[136] The fair use doctrine provides that even if a person uses a copyrighted work in a way that would ordinarily constitute infringement, it will not be considered infringement under certain circumstances.[137] To determine whether the use made of a given work constitutes fair use, section 107 provides factors to consider, including: (1) the "purpose and character" of the use, including the commercial or noncommercial nature thereof; (2) the nature of the copyrighted work itself; (3) the qualitative and quantitative amount of the work used, in relation to the copyrighted work as a whole; and (4) the effect of such use on the copyrighted work's potential market.[138]

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134. *Id.*; *accord* 4 NIMMER & NIMMER, *supra* note 88, § 13.03 [A][2], at 13–50 (stating that "[t]he practice of digitally sampling prior music . . . should not be subject to any special analysis").

135. Fair use will not be discussed at length because the defense was not addressed in either the *Newton* or *Bridgeport* decisions. The affirmative defense of fair use was raised by *Bridgeport* defendant No Limit in its answer, and the district judge is free to consider it on remand. Brief for Appellee No Limit Films LLC for Panel Rehearing at 13, Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004) (No. 02-6521). As the analysis of fair use is relatively complex, a full discussion is outside the scope of this Note.

136. 17 U.S.C. § 107 (2000).

137. *Id.*

138. *Id.*

While these factors are not exclusive, each of them represents a certain value judgment that is made relative to the value in the copyright itself. In general, copyright law attempts to balance the interests of authors in protecting their original works and the interests of the public in the free and open exchange of ideas.[139] The constitutional purpose of congressional copyright authority is "To promote the Progress of Science and the useful Arts . . . ."[140] The utilitarian underpinnings of American copyright law dictate that where the public good would not be served by the copyright monopoly, that monopoly should give way.[141] The fair use doctrine seeks to advance these policies, and thus each of the factors analyzed to determine fair use is necessarily a policy-based, case-by-case analysis.

The original decision of the court of appeals in *Bridgeport* did not mention fair use, but the tone thereof and the implications of the new "bright-line test" led many commentators to believe that the court was purporting to eliminate fair use with respect to sonnd recordings.[142] However, the court subsequently issued an order granting a panel rehearing and amending the first opinion.[143] Specifically, the court added a sentence to the final paragraph of the opinion indicating that there was no necessity to consider the affirmative defense of fair use, and the opinion was not intended to express any opinion as to its applicability.[144] It seems clear, however, that the court could not have actually eliminated fair use in regard to sound recordings because the defense is codified in section 107 of the Copyright Act of 1976, and section 106 says that the exclusive rights granted by that section are subject to the limitations in sections 107–122.[145] The court eliminated the defense that the copying in question was de minimis. As the next Subpart makes clear, fair use is not an adequate substitute for the de minimis doctrine—not only because fair use is far more complex, unpredictable, and expensive; but also because fair use does not serve the same policies as the de minimis doctrine.

B. De Minimis

The de minimis doctrine is not limited to copyright law; it applies in all civil cases.[146] *De minimis* comes from the phrase *de minimis non curat lex*, which is roughly

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139. *See* Stewart v. Abend, 495 U.S. 207, 209 (1990); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

140. U.S. CONST. art. 1, § 8, cl. 8.

141. *See supra* text accompanying notes 34–39; *see also* Landes & Posner, *supra* note 95, at 358 ("Only if the benefits of the use exceed the costs of copyrighted protection . . . is the no right/no liability solution of fair use defensible on pure transaction-cost grounds.").

142. *See, e.g.*, Brief of *Amicus Curiae* Recording Industry Association of America in Support of Petition for Rehearing, Bridgeport Music v. No Limit Films, No. 02-6521 (6th Cir. 2005); Brief of *Amici Curiae* Brennan Center for Justice at NYU School of Law and the Electronic Frontier Foundation in Support of Appellee, Bridgeport Music, Inc. v. Dimension Films, No. 02-6521 (6th Cir. 2005).

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

144. *Id.* at 796.

145. *See* 17 U.S.C. §§ 106–107 (2000).

146. *See supra* note 5.

translated as "the law does not concern itself with trifles."[147] The idea is that some things, while they may technically be violations of the law, are too petty to waste the time and resources of the court. Thus, Judge Chatfield observed, over ninety years ago, that "[e]ven 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."[148] Recording artists who use small samples are not the only people who rely on the de minimis doctrine. On the contrary, as the Second Circuit recognized in *On Davis v. Gap, Inc.*,[149] "[t]rivial copying is a significant part of modern life."[150] Thc court continued:

> Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, hut for the *de minimis* doctrine, would technically constitute a violation of law. We do not hesitate to make a photocopy of a lctter from a friend to show to another friend, or of a favorite cartoon to post on the refrigerator. Parents in Central Park photograph their children perched on José de Creeft's Alice in Wonderland sculpture. We record television programs aired while we are out, so as to watch them at a more convenient hour. Waiters at a restaurant sing "Happy Birthday" at a patron's table. When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law.[151]

Another policy underlying the dc minimis doctrine, as it applies to copyright law, relates back to originality: if copying is in the amount of a word or two, or a note or two, the chance that so small a piece of any given work actually would be copyrightable in and of itself is practically nil.[152] Additionally, if so small a piece of a work is borrowed, there is almost no chance that the two works will be substantially similar.[153] Thus, the de minimis doctrine promotes judicial economy by ensuring that most cases involving trivial instances of copying will never result in a lawsuit at all. Where they do, they will almost certainly result in summary judgment for the defendants.[154]

Whether a use is de minimis is necessarily a fact-specific inquiry—no bright-line rule can accommodate thc many variations among both uses and works.[155] The

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147. BLACK'S LAW DICTIONARY 443 (7th ed. 1999).

148. West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909).

149. 246 F.3d 152, 173 (2d Cir. 2001).

150. *Id.*

151. *Id.* (citations omitted).

152. *See supra* Part I.C.

153. *See supra* Part II.A.

154. *See On Davis*, 246 F.3d at 173 (noting that "[t]he *de minimis* doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying," and that where suits are brought, "judgment would be for the defendants").

155. *See, e.g.*, Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998); Jarvis v. A&M Records, 827 F. Supp. 282, 290 (D.N.J. 1993); *accord* Newton v. Diamond, 204 F. Supp. 2d 1244, 1254 (C.D. Cal. 2002) (noting that there has not even been a de facto line drawn for when the number of notes sampled would *definitely* be de minimis, but speculating that certainly a single note would be de minimis). *Contra* Bridgeport Music, Inc. v. Dimension

Bridgeport court nevertheless believes it is justified in its ruling. First, it claims the result is dictated by the statute.[156] However, as was discussed previously, there is nothing in the statutory law, applicable case law, or legislative history to indicate any support for a rule such as the one handed down here.[157] Second, the court relies on the previously discredited conclusion that sampling "is a physical taking rather than an intellectual one."[158] In contrast, the *Newton* court noted that any use must be significant in order to be actionable and concluded that the Beastie Boys' sample from Newton's flute composition was de minimis.[159]

The case law on the de minimis doctrine is well established, and at least three district courts, in considering digital sampling cases, have held that the taking at issue was de minimis under circumstances highly analogous to those in the *Bridgeport* case in terms of the length of the sample and prominence thereof.[160] Whether the allegedly infringing use is de minimis is considered part of the substantial similarity analysis. This analysis is firmly entrenched in U.S. copyright law.[161] Every circuit has held that copyright infringement requires proof of *both* substantial similarity *and* actual copying (including the Sixth Circuit in cases other than those involving sound recordings)[162] and has rejected infringement claims where the copying was de minimis or the works were not substantially similar (also including the Sixth Circuit regarding alleged infringement of subject matter other than sound recordings).[163] As was discussed previously, there is nothing in the applicable sections of the Copyright Act or in the

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Films, 383 F.3d 390, 397 (6th Cir. 2004) ("The music industry, as well as the courts, are best served if something approximating a bright-line test can be established.").

156. *Bridgeport*, 383 F.3d at 399.

157. *See supra* Part III.B.

158. *Bridgeport*, 383 F.3d at 399. *See supra* Part III.B.

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

160. *See Newton*, 204 F. Supp. 2d 1244, *aff'd* 388 F.3d 399; Jean v. Bug Music, Inc., No. 00 Civ. 4022, 2002 WL 287786 (S.D.N.Y. Feb. 27, 2002); McDonald v. Multimedia Entm't, Inc., No. 90 Civ. 6356, 1991 WL 311921 (S.D.N.Y. July 19, 1991).

161. *See supra* Part II.A.

162. *See, e.g.*, Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 512 (6th Cir. 2004); Bridgmon v. Array Sys. Corp., 325 F.3d 572 (5th Cir. 2003); Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127 (2d Cir. 2003); Cavalier v. Random House, Inc. 297 F.3d 815 (9th Cir. 2002); Dam Things from Denmark v. Russ Berrie & Co. 290 F.3d 548 (3d Cir. 2002); Yankee Candle Co. v. Bridgewater Candle Co. 259 F.3d 25 (1st Cir. 2001); Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000); TransWestern Publ'g Co. v. Multimedia Mktg. Assocs., Inc., 133 F.3d 773 (10th Cir. 1998); Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939 (8th Cir. 1992); Keeler Brass Co. v. Cont'l Brass Co., 862 F.2d 1063 (4th Cir. 1988); Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984); Whitehead v. Paramount Pictures Corp., 53 F. Supp. 2d 38 (D.D.C. 1999).

163. *See, e.g.*, Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007 (7th Cir. 2005); Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004); Gordon v. Nextel Commc'ns & Mullen Adver., Inc., 345 F.3d 922 (6th Cir. 2003); Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp., 354 F.3d 112 (2d Cir. 2003); Schoolhouse, Inc. v. Anderson, 275 F.3d 726 (8th Cir. 2002); King v. Ames, 179 F.3d 370 (5th Cir. 1999); Herzog v. Castle Rock Entm't, 193 F.3d 1241 (11th Cir. 1999); Matthews v. Freedman, 157 F.3d 25 (1st Cir. 1998); Towler v. Sayles, 76 F.3d 579 (4th Cir. 1996); Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62 (3d Cir. 1978); Whitehead v. CBS/Viacom, Inc., 315 F. Supp. 2d 1 (D.D.C. 2004); Madrid v. Chronicle Books, 209 F. Supp. 2d 1227 (D. Wyo. 2002).

legislative history to justify treating sound recordings differently from other subject matter with regard to the proof required for infringement.[164]

The *Bridgeport* court claimed that its decision was motivated in part by judicial economy,[165] but the rule it announced would not advance this goal. First, it seems that the *Bridgeport* court's decision will have precisely the opposite effect that it intends—by holding that everyone who samples as little as a single note is infringing, the court opens the floodgates to more lawsuits. Second, despite its intentions, the court did not actually eliminate the de minimis doctrine with respect to sound recordings. An analysis similar to de minimis is used in considering the affirmative defense of fair use.[166] However, fair use cases involve a complex, fact-specific analysis that is almost never amenable to summary judgment; de minimis cases, in contrast, can be (and often are) decided on a motion for summary judgment.[167] Thus, the *Bridgeport* court's rule will increase not only the *number* of copyright infringement suits, but also the *complexity* of those suits.

The court states that its primary economic concerns are those of the music industry and claims that its rule will protect artists' works by ensuring that others cannot steal pieces from that work and capitalize on it.[168] However, the court's rule would impose unacceptable costs on the music industry as well. First, the transaction costs would be extremely high. Producers and record studios would have to spend more time and money obtaining sample clearances, and thus they would be less likely to produce albums with multiple sample-based tracks. Additionally, sample clearance fees would increase because artists would have no option hut to obtain a license or not use the sample.[169] The court seems to think that the price of licenses will not be an issue hecause the markets will control the prices. However, a copyright is, *by definition*, a monopoly. There is a market for sample licenses now that is able to operate relatively freely. If, under the *Bridgeport* rule, everyone is *required* to buy a license for *every* note they sample, it takes away freedom of choice. Sound recording owners (consisting mostly of studios) can charge whatever they want because, with a captive market, the buyer only has one choice—take it or leave it.[170] This is not the kind of "limited monopoly" the Framers had in mind.

Another justification the court presents for its rule is that the rule is easily enforceable. However, if infringement starts with just one note, it seems that the rule would be more difficult to enforce. First, as previously discussed, removing substantial similarity and *de minimis* from the infringement analysis means that defendants will rely on the affirmative defense of fair use. Thus, cases involving trivial sampling will

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164. *See supra* Part III.B.

165. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 399 (6th Cir. 2004) ("When one considers that he has 800 other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent.").

166. *See supra* Part IV.A.

167. *See* On Davis v. Gap, Inc., 246 F.3d 152, 173 (2d Cir. 2001).

168. *Bridgeport*, 383 F.3d at 400.

169. *Cf.* Landes & Posner, *supra* note 95, at 332.

170. Incidentally, this was one of the RIAA's major concerns. *See generally* Brief of *Amicus Curiae* Recording Industry Association of America in Support of Petition for Rehearing Bridgeport Music v. No Limit Films, No. 02-6521 (6th Cir. 2005).

be more complex and more likely to go to trial.[171] Second, it seems highly probable that recording artists and producers determined to use trivial samples without paying inflated licensing fees will simply work harder to disguise these samples, thus making them more difficult to detect.[172] Both of these situations indicate that the rule announced by the *Bridgeport* court that *all* digital sampling is per se copyright infringement will be more, not less, difficult to enforce.

Finally, the court's rule will have the direct result of significantly stifling creativity.[173] First, as discussed above, increased license fees will mean that producers and studios will be less inclined to produce albums with sample-based music.[174] Similarly, recording artists, particularly those who do not yet have established careers, will be less likely to create sample-based music.[175] Copyright law has always recognized that literary and artistic works necessarily borrow from other works (and from the public domain); indeed, this is why works are not required to be *novel* in order to be copyrightable.[176] The courts have long recognized that "[e]very book in literature, science, and art, borrows, and must necessarily borrow, and use much which was well known and used before."[177]

Sample-based recording artists, like writers, visual artists, and filmmakers, necessarily borrow from others in order to create their works; allowing copyright protection for every note in a sound recording would stifle creativity in music just as much as allowing a writer copyright protection for every letter of the alphabet he uses in writing a novel would stifle creativity in literature.[178] It may be true that less-establisbed artists are free-riders, and that more established artists should not have to bear the costs of new artists' creation. However, the limited monopoly of copyright protection is designed to create an incentive for artists to create new works. Free-riding was already occurring before *Bridgeport*, and this did not stop any artists from creating new works, so there is no need to extend the copyright monopoly further. Furthermore, the *Bridgeport* decision does nothing to encourage artists to create completely new works without using any samples. Thus, the *Bridgeport* decision represents a net loss for the music industry, resulting only in greater costs with little to no gain.

The *Bridgeport* court has a response to the above arguments: if the artist doesn't want to pay for a sample license (or cannot afford to do so), he can always duplicate the sound in the studio with live musicians.[179] This response, however, fails to take into account the realities of sample-based music production. Today, much sample-based

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171. *See supra* text accompanying notes 164–68.

172. *See* Landes & Posner, *supra* note 95, at 332.

173. The court, to the contrary, asserted: "We do not see this as stifling creativity in any significant way." *Bridgeport*, 383 F.3d at 398.

174. *See supra* text accompanying notes 168-69.

175. For a discussion of the economic impact of sample-based music, see 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, 203–06 (2004).

176. *See* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345–48 (1991); *supra* Part I.C.

177. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C. Mass. 1845) (No. 4436).

178. *See supra* note 110 and accompanying text.

179. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).

music can be (and is) produced in home studios.[180] However, duplicating a given sound with live musicians takes the sample-based recording artist out of his house and into a professional studio, which can triple or even quadruple his recording costs, not including the amount the artist would have to pay the musicians themselves.[181] As a simple example, suppose a disgruntled law student, tired of long hours in the library, decides he wants to try his hand at becoming a rapper. Before his first year he bought a laptop, so all he has to do is add around $500 worth of software and he can produce a near-professional-quality demo in his living room.[182] While his colleagues are studying for exams, he can shop his demo to record companies. However, with the *Bridgeport* rule in effect, that same law student would very nearly be priced out of the market—a studio demo would cost him between $4800 and $6400, plus travel expenses.[183] This simple example places in sharp relief the real cost of the *Bridgeport* rule to developing artists. The next Part will discuss alternatives to the *Bridgeport* rule that attempt to respond to the challenge digital sampling presents without stifling creativity, while at the same time avoiding the legal costs and general uncertainty epitomized by *Newton*.[184]

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180. These studios do vary in expense. An entry-level artist could build a budget home recording studio (built around a PC) for under $5000. *See* Midnight Musician Digital Recording Solution Matrix, http://www.midnight musician.com/build-a-studio.asp?cl=recording&source=adwords&kw=home%20recording%20studio (last visited Apr. 10, 2005). However, home-based recording artists can spend well over $50,000 on state-of-the-art equipment and software. *Id.* Sample-based recording artists who own a PC can record a near-professional-quality album for under $500. *See* Achenbach, *supra* note 175, at 202–03.

181. Studio rates range from between $50 and $80 per hour, with block rates available at around $450–$500 for an 8–10 hour block. *See, e.g.*, Eckert Labs, Nashville, Tennessee, Rates, http://www.eckertlabs.com/rates.html (last visited Apr. 10, 2005); Trod Nossel Productions & Recording Studios, Rates, http://www.trodnossel.com/stdiorts.html (last visited Apr. 10, 2005). A new artist with an independent label record deal would be given a recording fund ranging from $5000–$125,000. *See* PASSMAN, *supra* note 89, at 93. Since the recording fund is designed to pay the recording costs and the artist's advance, the recording costs technically come out of the artist's pocket, because advances are recoupable by the record company. *Id.* As for the musicians, each would be paid at least scale, which amounts to a minimum of $574.38 *per session*. *See* AFM Nashville, Standard AFM Recording Scales, http://www.afm257.org/scalerates.html (last visited Apr. 10, 2005). Given this information, a *single track* recorded with live musicians in an outside studio could cost a recording artist anywhere from $2225 (eight-hour studio block with one musician paid at scale) to $7899 (two eight-hour studio blocks with two musicians paid at scale).

182. *See* Achenbach, *supra* note 175, at 203 n.82.

183. Some studios offer demo packages, such as Skyelab in New York, which charges $1600 per track for demos. Skyelab Music Demo Rates, http://www.skyelab.com/Music_Demo_Rates.htm (last visited Apr. 10, 2005). Most demos have three to four tracks. PASSMAN, *supra* note 89, at 14. Thus, if our hypothetical law student is able to find a studio with a demo package, he can make a full demo for $4800–$6400—far cheaper than the per hour rates discussed at note 181, *supra*.

184. The Beastie Boys accrued around $500,000 in legal fees for their victory. *See* Molly Sheridan, *When Stealing Is Not a Crime: James Newton vs. the Beastie Boys*, NEWMUSICBOX NEWS, http://www.newmusicbox.org/news.nmbx?id=00124 (last visited Apr. 10, 2005).

V. RESPONSES TO THE DIGITAL SAMPLING CHALLENGE

There are costs involved with allowing sampling to run free, just as there are costs involved with *Bridgeport*'s hard-line stance. However, there are also ways that these costs can be alleviated, while at the same time encouraging creativity and growth in the industry. In Subpart A, this Note proposes a more precise test that will reduce uncertainty in copyright infringement cases. However, reducing the number of copyright infringement cases in the first instance should also be a goal. To this end, this Part will also examine three responses to the digital sampling challenge. Subpart B will discuss the Creative Commons licensing regime. Subpart C will discuss the possibility of a compulsory license for sampling. Subpart D will examine the growth of sample clearinghouses, and discuss how this system could be adapted more effectively in the U.S. market.

A. Digital Sampling and Copyright Infringement—A Proposed Test

An effective test to determine whether a digital sample infringes a sound recording copyright should reflect the technological advances that make sampling different from other forms of copying, while at the same time recognizing that sampling is still copying, not a physical appropriation, of the copyrighted material.[185] Such a test must also strike a balance between recording artists' property interests in their works and the public's interest in furthering creative expression. To this end, courts deciding claims of sound recording copyright infringement based on digital sampling should look at *both* the plaintiff's and the defendant's works. Currently, in most cases, to determine whether a use is de minimis, courts look only at the amount of the *plaintiff's* work that was taken.[186] In sampling cases, however, courts should also look at the defendant's work, and consider how prominent the sample is, whether it is an organizing feature of the defendant's song, and how many times it is used. Courts should also take into account the degree to which the sample was manipulated or altered.[187] This test would take into account the ability of sample-based artists to loop a sample, thus making it longer or more prominent in their song than it was in the original. At the same time, this test would ensure that small samples that are used merely as accent or atmospheric sounds would not be considered infringement.

For example, suppose Artist *A* samples a three-note, six-second long sequence from Artist *B*'s four-minute long sound recording. The sample's pitch is lowered slightly, and occurs at three points in Artist *A*'s song, comprising approximately eighteen seconds of Artist *A*'s four-minute song. Under the proposed test, Artist *A*'s use would be non-infringing. The sample is altered (albeit slightly); it comprises only two-and-one-half percent of Artist *B*'s sound recording, and only 7.5% of Artist A's recording; and it is used only three times.

In contrast, suppose Artist *A* samples the same sequence from Artist *B*'s sound recording, but this time uses it thirty times, as a key part of the song's intro and as a

185. *See supra* Part III.B.

186. *See supra* note 63 and accompanying text.

187. The degree to which the sample was manipulated or altered is important because it reflects the degree to which the sampling use is productive, as opposed to reproductive. *See* Landes & Posner, *supra* note 95, at 360.

recurring theme throughout the work. Under the proposed test, this use would he infringing. Although the sampled piece still comprises only 2.5% of Artist *B*'s sound recording (and thus would be non-infringing under the *Newton* substantial similarity analysis), it now comprises *twenty-five percent* of Artist *A*'s sound recording, and is a pivotal element in the work. Although the sample is altered, the alteration is only slight, and cannot overcome the prominence of the sample and the number of times it is used.

These hypotheticals demonstrate that the proposed test would take into account the reality of digital sampling technology and practice in order to accommodate the interests of both sample-based recording artists and the artists whose work is sampled. Additionally, while this test does not create a bright-line rule, the factors considered are factors with which sample-based recording artists and producers are intimately familiar. Thus, this test would be relatively simple for artists and producers to evaluate preemptively in practice, in order to decide whether it is necessary to acquire a license for a given sample. The remainder of this Part will consider various regimes that could centralize and simplify the licensing process.

B. Creative Commons

One of the most interesting and innovative options is Creative Commons. Supported by Adam Yauch, Michael Diamond, and Adam Horovitz (The Beastie Boys), the defendants in *Newton v. Diamond*,[188] and chaired by Lawrence Lessig, Creative Commons is designed to help artists and authors release their works for sampling, according to their own terms.[189] Creative Commons (CC) is a nonprofit organization, and its licenses "allow musicians to dictate how their music will be used—even if they sign with a record label."[190] An unlimited CC license allows artists to distribute their music as widely as possible, with no payment or control requirements. There are multiple licenses, ranging from those that allow users to sample but not to use the entire work, to those that charge nominal rates for downloads or sampling rights.[191] Lessig wants Creative Commons to be exactly what the Sixth Circuit, assuming the best of intentions, hoped the *Bridgeport* ruling would achieve: "[P]eople don't necessarily want to change existing law," says Lessig, "they do want a way to make its burdens easier to overcome. They seek, as the Sixth Circuit proposes, a license to sample . . . . [C]reators who use the CC licenses are saying: We have built upon the work of others. Consistent with the law, we can enable the next great revolution."[192] Horovitz pinpoints another reason for a system like Creative Commons: "The worst part is that most of the time when you sample something, the people who made the original music don't really get paid anyway. Because there are so many layers in the situation now, some lawyer ends up seeing most of the money."[193]

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

189. Lawrence Lessig, *Creative Freedom for All: Done Right, Copyrights Can Inspire the Next Digital Revolution*, WIRED, Nov. 2004, at 188–89.

190. Hilary Rosen, *How I Learned to Love Larry*, WIRED, Nov. 2004, at 188–89.

191. *Id.*

192. Lessig, *supra* note 189, at 188–89.

193. Eric Steur, *The Remix Masters*, WIRED, Nov. 2004, at 185.

C. Compulsory Licensing

Another option often advanced by legal commentators is to amend section 115 of the Copyright Act to create compulsory licensing for sampling.[194] Currently, section 115 provides a limited compulsory license that essentially allows any artist to perform a "cover song"—a new version of a song that was previously recorded by a different artist.[195] Proponents of this option argue that the current ad hoc system of negotiating sampling license fees is biased and inefficient, and a statutory licensing scheme should be created that would enable sound recording copyright owners a set fee for a set sample length.[196] Such a system would work much like the compulsory licensing system for mechanical rights.[197] The mechanical compulsory license, most commonly used by artists who wish to record "cover songs," enables any individual to perform a copyrighted composition, and sets forth a system of compensation for the copyright owner.[198]

A compulsory license for sampling would similarly allow any artist to sample any other artist's work, subject to the payment of statutorily-determined fees.[199] The fee would depend in part on the length of the sample, with the possibility that there would be a maximum length for samples subject to compulsory licensing.[200] The sample compulsory license would also need to allow for alterations of the sample, which are prohibited under the existing mechanical compulsory licensing scheme.[201]

Although a statutory compulsory license scheme for samples has many proponents, it also has its critics.[202] Some of the primary concerns are that a compulsory license would not take into account the qualitative value of the sample, that it would not adequately address the rights of the sampled artist, and that it would oversimplify the issues sampling raises.[203] Perhaps the real difficulty with the compulsory licensing option, however, is that it would necessitate new congressional legislation to amend the Copyright Act.

D. Sample Clearinghouses

Sample clearinghouses are a private market-based response to the sampling challenge. Such ventures are far more centralized in Europe, in part because sample-based electronic music is more popular there than in the United States.[204] While there

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194. *See* 17 U.S.C. § 115 (2000); *see also* Achenbach, *supra* note 175, at 206–21; Baroni, *supra* note 108, at 93–101.

195. *See* § 115(a).

196. *See* Baroni, *supra* note 108, at 91–93.

197. *Id.* at 94.

198. *See* § 115; *see also* Achenbach, *supra* note 175, at 207–09.

199. *See* Achenbach, *supra* note 175, at 210–15.

200. *Id.* at 214–15.

201. *See id.* at 215; 17 U.S.C. § 115(a)(2) (2000).

202. *See, e.g.*, Szymanski, *supra* note 12, at 294–98 (summarizing the limitations of compulsory licensing scheme).

203. *Id.*

204. *See, e.g.*, Sample Clearinghouse, http://www.sampleclearance.com (last visited Apr. 10, 2005).

are some such clearinghouses in the United States, they are not as well organized. Clearinghouses can reduce the transaction costs by handling clearances in large volumes, and by using specially-trained employees. Most established artists in the United States now rely on their lawyers or record label to do sample clearances.[205] This process is extremely time consuming, and the license fees for an entire album of sample-based music can easily reach $100,000.[206] If sample clearinghouses were built up to operate at an industry-wide level, much like ASCAP and BMI operate for performance rights, rates might become more standardized and uniform throughout the industry; certainly the process would become more efficient.

CONCLUSION

One thing seems clear: sampling, like the player pianos and cameras of over one hundred years ago, will not go away.[207] Furthermore, technology is developing at an exponential rate. If the copyright law gets bogged down in minutiae, it is ultimately the public that loses. Attempting to eliminate the de minimis doctrine from copyright seems absurd; although the *Bridgeport* court purported to limit its decision solely to the situation of digital sampling of a sound recording,[208] there is nothing to stop another court from extending the ruling further. The potential effects of such a decision are staggering. When faced with change, a reactionary judicial response only becomes the amusing anomaly for future generations. More importantly, the *Bridgeport* court's attempt to clarify an already-confusing area of law is no clarification at all, and only seems to mix it up more. The court's bright-line test misinterprets statutory law and congressional intent, and flies in the face of over one hundred years of copyright jurisprudence.

The *Newton* decision, while following precedent and traditional statutory interpretation, cannot be relied upon by sample-based recording artists. The ad hoc nature of the substantial similarity analysis makes the outcome of such cases difficult to predict. Furthermore, even if the artist's use is found to be non-infringing, the legal costs involved make a "wait-and-see" approach less than desirable. Thus, the practical effect of the *Newton* approach may be no less harsh than *Bridgeport*'s bright-line rule—under *Newton*, lawyers will still advocate licenses for all samples, particularly for newer artists who cannot afford to mount an effective defense to an infringement suit.

Somewhere between *Newton* and *Bridgeport* there is a healthy compromise that everyone in the industry, including lawyers, can live with. This Note has proposed one such compromise—a test that would require courts to examine both the plaintiff's and the defendant's works in order to determine whether digital sampling constitutes infringement. This test would take into account the unique challenge presented to traditional copyright law by digital sampling, while at the same time avoiding the mistakes of *Bridgeport*'s bright-line rule. While industry-wide steps should be taken to make the sample licensing process more efficient, recording artists and producers also

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205. *See* Baroni, *supra* note 108, at 91–93.

206. *See id.* at 92–93.

207. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

208. *Bridgeport*, 383 F.3d at 396.

need a clear idea of when a license is required. This Note has attempted to provide such guidance by offering a test that would examine not only what is sampled, but also how that sample is used. Under this test, recording artists could feel free to use a few notes or a drumbeat without having to choose between a costly negotiation and licensing process, on the one hand or a potentially costly infringement suit on the other. While this is not a bright-line rule, the outcome would be fairly predictable in the vast majority of cases. Ultimately, any response to the digital sampling challenge should recognize that sampling merely allows recording artists to stand on the shoulders of other artists, furthering creative expression—something that copyright law has always encouraged.