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**CIRCUIT SPLIT: *DE MINIMIS* SAMPLING FROM COPYRIGHTED RECORDINGS AFTER**

***VMG SALSOU, LLC v. CICCONE***

**Stefan Caris Love**

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# Circuit Split: *De minimis* Sampling From Copyrighted Recordings After *VMG Salsoul, LLC v. Ciccone*

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Stefan Caris Love

## I. Introduction

Stealing music is legal again. On June 2, 2016, in *VMG Salsoul, LLC v. Ciccone*, the Ninth Circuit held that a sampled horn hit in Madonna’s “Vogue” was *de minimis*, infringing on neither the composition nor the recording of its source.<sup>1</sup> The Ninth thus split from the Sixth Circuit’s notorious decision in *Bridgeport Music, Inc. v. Dimension Films* to exclude the *de minimis* defense from recording infringement cases—the only other circuit level case on this issue.<sup>2</sup>

This article approaches the decision in *VMG* both positively and normatively. As a matter of positive law, the *VMG* court’s extension of the *de minimis* rule to sampled recordings walked a trail cleared by four prior district court cases.<sup>3</sup> Together, these cases adumbrate an emerging *de minimis* rule for sampling.

Normatively, arguments against extending the *de minimis* rule are logically incoherent. In opposing this extension, the *Bridgeport* court argued, in part, that the technological differences between compositions and recordings justify separate legal frameworks: The *de minimis* defense should be permitted for compositions, but not recordings.<sup>4</sup> The argument that recordings merit this extra protection depends on two assumptions, each a species of technological essentialism: First, a digital copy always retains the essence of its source; second, recordings’ rich detail

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<sup>1</sup>*VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

<sup>2</sup>*Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005). The court in *VMG* openly acknowledged the split. *VMG*, 824 F.3d at 886–87. Cf. *Newton v. Diamond*, 388 F.3d 1189, 1192–96 (9th Cir. 2004) (holding that a sample was *de minimis* with respect to its source composition); *Jarvis v. A & M Records*, 827 F. Supp. 282 (D.N.J. 1993) (finding a genuine issue of material fact with respect to whether a sample was *de minimis* with respect to its source composition).

<sup>3</sup>*Pryor v. Warner/Chappell Music, Inc.*, No. CV 13-04344 RSWL, 2014 WL 2812309 (C.D. Cal. June 20, 2014); *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588 (S.D.N.Y. 2013); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009), *aff’d in part*, 635 F.3d 1284 (11th Cir. 2011); *Williams v. Broadus*, No. 99 Civ. 10957, 2001 U.S. Dist. LEXIS 12894 (S.D.N.Y. Aug. 27, 2001).

<sup>4</sup>*Bridgeport*, 410 F.3d at 798, 801–05; see also, e.g., Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 528–30 (2006).

specifies an invaluable “signature sound.” Under examination, both assumptions prove unsustainable. Therefore, the emerging *de minimis* rule should be widely followed.

## II. The Emerging *De minimis* Rule for Sampling

Though sometimes portrayed as a legal wilderness,<sup>5</sup> the case history governing sampling has coalesced into two separate but coherent doctrines. These doctrines have culminated in the circuit split between the Sixth, in *Bridgeport*, and the Ninth, in *VMG*.

To win a copyright infringement claim, the plaintiff must show both “ownership of a valid copyright” in a work—for music, either a composition, a recording, or both—and that the defendant “cop[ied] . . . constituent elements . . . that are original.”<sup>6</sup> “Sampling” is “[a] process in which a sound,” typically a part or segment of a song, “is taken directly from a recorded medium and transposed onto a new recording,” typically as a part or segment of a new song.<sup>7</sup> It would then appear, provided that the sampled material is “original” (a very low hurdle),<sup>8</sup> that an unlicensed sample infringes on its source recording by definition.

Indeed, this is the first doctrine that emerges from the case history. In *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, rapper Biz Markie sampled about ten seconds of instrumentals from plaintiff Gilbert O’Sullivan’s song “Alone Again (Naturally).”<sup>9</sup> He incidentally also copied the song’s title and imitated elements of its vocal “hook.”<sup>10</sup> The copying was brazen, even subversive; the court was equally forthright in finding for the plaintiff: “Thou shalt not steal.”<sup>11</sup>

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<sup>5</sup>See, e.g., Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 847 (2011); Ponte, *supra* note 4, at 518–20, 534; Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 361, 375 (2008).

<sup>6</sup>*Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

<sup>7</sup>Will Fulford-Jones, *Sampling, Grove Music Online*, OXFORD MUSIC ONLINE (2001), <https://doi.org/10.1093/gmo/9781561592630.article.47228>. For a history of sampling, see Evans, *supra* note 5, at 851–63.

<sup>8</sup>See *Feist*, 499 U.S. at 345–46.

<sup>9</sup>*Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991). See generally Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 266–68 (2009) (criticizing the *Grand Upright* decision).

<sup>10</sup>*Grand Upright*, 780 F. Supp. at 183.

<sup>11</sup>*Id.* at 183, 185. The very brazenness of Markie’s copying, as well as the thematic similarities between his lyrics and the original, might have sustained a defense of fair use, but none was raised, *id.* Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583, 594 (1994) (holding that a commercial song that sampled “Oh, Pretty Woman” may be fair use because it “could be perceived as commenting on the original or criticizing it”). See generally Julian Azran, *Bring Back the Noise: How Cariou v. Prince Will Revitalize Sampling*, 38 COLUM. J.L. & ARTS 69 (2014) (summarizing the development of fair-use doctrine).

But given the flagrancy of Markie's copying, *Grand Upright* offered little guidance for less clear-cut cases.

The Sixth Circuit clarified and extended *Grand Upright* in *Bridgeport*, finding infringement even though the sample at issue was so brief and inconspicuous “that no reasonable juror . . . would recognize [its] source”: sampling was per se infringement of the source recording.<sup>12</sup> The court based this holding on the language of the copyright statute, though it also offered a range of other justifications.<sup>13</sup> In so holding, the circuit court rejected the district court's earlier holding that the plaintiff's copying was *de minimis*—too insignificant to be actionable.<sup>14</sup> Instead, in cases where the defendant admitted sampling a copyrighted recording, the *de minimis* defense was now unavailable: “Get a license or do not sample.”<sup>15</sup> Copyright holders mustered their attorneys.<sup>16</sup>

By rejecting the *de minimis* rule, the *Bridgeport* court disregarded a longstanding third element of copyright infringement: whether the defendant's work is “substantially similar” to the plaintiff's.<sup>17</sup> (When copying is not “substantial,” it is *de minimis*: the terms are antonyms.<sup>18</sup>) Though *Bridgeport*'s abandonment of the *de minimis* rule has attracted more attention,<sup>19</sup> in a separate line of cases, courts have readily applied the *de minimis* rule to sampled recordings.<sup>20</sup> The doctrine emerging from these cases takes the form of two tests: the “ordinary listener” test and the “fragmented literal similarity” test.<sup>21</sup> Both tests originated in *Williams v. Broadus*, the first case in the line.<sup>22</sup>

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<sup>12</sup>*Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798, 801 (6th Cir. 2005).

<sup>13</sup>*Id.* at 799–805.

<sup>14</sup>*Id.* at 797–98. See generally Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De minimis Defense From Copyright Law?*, 36 N.M.L. REV. 261 (2006) (explicating the rule of *de minimis*).

<sup>15</sup>*Bridgeport*, 410 F.3d at 801.

<sup>16</sup>*Cf.* Azran, *supra* note 11, at 76–81 (discussing the economic and aesthetic consequences of *Bridgeport*).

<sup>17</sup>*Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004); *cf.* DAVID NIMMER, NIMMER ON COPYRIGHT §13.03 (2016). In rejecting tests of substantial similarity, the *Bridgeport* court was actually affirming Sixth Circuit precedent. See *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003) (stating that the test of substantial similarity applies only “where there is no direct evidence of copying”).

<sup>18</sup>*Cf.* Cromer, *supra* note 14, at 271–72 (“The doctrine of substantial similarity is a natural extension of the doctrine of *de minimis*”).

<sup>19</sup>See, e.g., Reilly, *supra* note 5; John Schietinger, Note and Comment, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209 (2005).

<sup>20</sup>*Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1284 (11th Cir. 2011); *Pryor v. Warner/Chappell Music, Inc.*, No. CV 13-04344 RSWL, 2014 WL 2812309 (C.D. Cal. June 20, 2014); *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588 (S.D.N.Y. 2013); *Williams v. Broadus*, No. 99 Civ. 10957, 2001 U.S. Dist. LEXIS 12894 (S.D.N.Y. Aug. 24, 2001). I do not discuss *Newton v. Diamond*, 388 F.3d 1189, 1192–96 (9th Cir. 2003), here because it addresses sampling only with respect to the source composition, not recording.

<sup>21</sup>The phrase “fragmented literal similarity” originates in NIMMER, *supra* note 17, at §13.03(A)(2).

<sup>22</sup>*Williams*, 2001 U.S. Dist. LEXIS 12894, at \*8–9.

The “ordinary listener” test, in its original form, asks whether an ordinary listener would “regard the aesthetic appeal” of the source work and copying work “as the same.”<sup>23</sup> The *Williams* court mentioned this test, but did not develop it. The court in *Saregama India Ltd. v. Mosley* framed this same test in terms of recognition, a clearer formulation than “aesthetic appeal,” holding that the defendant's sampling was *de minimis*, the court found that “it is highly unlikely that the average lay observer could discern the source of the one-second snippet without prior warning.”<sup>24</sup> The court's finding depended on the brevity of the sample (one second, repeated sporadically) and the lack of other similarities between the songs at issue, with respect to lyrics, “tempo, rhythms, and arrangements.”<sup>25</sup> This was the test applied by the Ninth Circuit in *VMG*. The court reached the same conclusion on slightly different facts: “A reasonable jury could *not* conclude that an average audience would recognize the appropriation,” because it lasts “less than a second,” and because the sample itself had been altered from its source, including a change in key, sonic alterations, and the overlay of additional sounds.<sup>26</sup> The sample was thus *de minimis*.

In moving away from the “ordinary listener” test, the *Williams* court instead noted the copying work's “fragmented literal similarity” to its source, because the copying work included segments of the source work verbatim, but lacked other similarities.<sup>27</sup> Under the resulting “fragmented literal similarity” test, to determine whether the copying was substantial, the court evaluated the sample's quantity and “qualitative importance”—within its source, not the new recording.<sup>28</sup> This last point bears emphasis: A new recording can sample an insignificant portion of a source recording and repeat it many times over, without infringement.<sup>29</sup> Denying summary judgment that a sample infringed on its source, the court noted the sample's quantitative brevity (“two out of 54 measures”) and relatively unimportant position at the very beginning of the source recording.<sup>30</sup>

The court in *TufAmerica, Inc. v. Diamond* gave a veritable clinic on the “fragmented literal similarity” test, applying it to six different samples from the Beastie Boys' canon.<sup>31</sup> With respect to quantity, the court considered each sample's aggregate total duration in the source; for

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<sup>23</sup>*Id.* at \*8. An earlier, vaguer version of this test compares the works’ “total concept and feel,” language borrowed from *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). *See also* Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 107–108 (2007).

<sup>24</sup>*Saregama*, 687 F. Supp. 2d at 1338; *see also Pryor*, 2014 WL 2812309, at \*7.

<sup>25</sup>*Saregama*, 687 F. Supp. 2d at 1338.

<sup>26</sup>*VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 879–80 (9th Cir. 2016) (emphasis in original).

<sup>27</sup>*Williams*, 2001 U.S. Dist. LEXIS 12894, at \*9.

<sup>28</sup>*Id.* at \*9–10, \*13–14; *see also Pryor*, 2014 WL 2812309, at \*7; *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 599 (S.D.N.Y. 2013); *Jarvis v. A & M Records*, 827 F. Supp. 282, 290–91 (D.N.J. 1993).

<sup>29</sup>Some commentators have criticized this principle. *See, e.g., Ashtar, supra* note 9, at 290–92; Alexander Stewart, “*Been Caught Stealing*”: *A Musicologist’s Perspective on Unlicensed Sampling Disputes*, 83 UMKC L. REV. 339, 351 (2014).

<sup>30</sup>*Williams*, 2001 U.S. Dist. LEXIS 12894 at \*9, \*12–13.

<sup>31</sup>*TufAmerica*, 968 F. Supp. 2d at 603–07.

instance, the first sample at issue was a one-second segment that recurred nine times in the source, thus occupying nine seconds total.<sup>32</sup> Aggregate durations of around three seconds were barely long enough to consider, and the court also considered six seconds to be relatively short; conversely, several other samples occupied nine or more total seconds in the source, which argued against a finding of *de minimis*.<sup>33</sup> With respect to quality, the court considered a variety of factors: a source recording's "title phrase" was qualitatively significant, as was a distinctive chord progression; a stereotyped effect, an indistinctive drum fill, and a generic lyric were not.<sup>34</sup> The court assessed quantity and quality in tandem. For example, when finding a three-second sample *de minimis*, the court determined, "[T]here is nothing in . . . the song itself to suggest that [this sample's] value to the piece is so significant as to give qualitative value to an otherwise quantitatively minute portion."<sup>35</sup>

Though the "fragmented literal similarity" test and "ordinary listener" test are sometimes presented as opposing alternatives,<sup>36</sup> *TufAmerica* reveals their shared spirit: a sample of quantitative and qualitative importance to its source is also more likely to be recognized by an ordinary listener.<sup>37</sup> This shared spirit also explains why a sample is best considered in the context of its source, rather than the new work. A sample that plays a trivial role in its source is not likely to be recognized, no matter how much it is repeated in the new work, so it is *de minimis* on either test, whereas a sample that plays a prominent role in its source is more likely to be recognized, even if occurring only briefly in the new work, so it is substantial on either test.

The tests have two important differences. First, if a sample has been much altered from its source, then the "fragmented literal similarity" test is inappropriate, since any similarity is no longer "literal."<sup>38</sup> Second, the "fragmented literal similarity" test considers only the sample, not the non-copied portions of the new work, whereas the "ordinary listener" test sometimes (though not always) considers these non-copied portions as well<sup>39</sup>—perhaps because a work's other similarities or differences make a sample easier or harder to recognize.

This line of cases offers guidelines for the unlicensed sampler hoping to establish a *de minimis* defense (outside of the Sixth Circuit, at least). A sample is likely to be found *de minimis* if: (a)

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<sup>32</sup>*Id.* at 603.

<sup>33</sup>*Id.* at 603–07.

<sup>34</sup>*Id.* at 604–07.

<sup>35</sup>*Id.* at 607.

<sup>36</sup>*See, e.g., id.* at 596–97; Ponte, *supra* note 4, at 538–40.

<sup>37</sup>*TufAmerica*, 968 F. Supp. 2d 588 at 596–97. Indeed, the lower, district court in *Bridgeport* freely applied both tests at once. *See Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 797–98 (6th Cir. 2005).

<sup>38</sup>*See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 880 n.8 (9th Cir. 2016).

<sup>39</sup>*See Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338 (S.D. Fla. 2009) (considering non-copied portions), *aff'd*, 635 F.3d 1284 (11th Cir. 2011); *VMG*, 824 F.3d at 879–80 (disregarding non-copied portions).

the sample is altered from its source, which will lead courts to employ the broader “ordinary listener” test; (b) the other aspects of the two works are different; (c) the sample's total duration is relatively brief in the source, perhaps a few seconds at most; and (d) the sample is not an especially memorable or distinctive portion of its source. Though this rule has emerged only slowly, such circumspection does not signal copyright law's inadequacy;<sup>40</sup> rather, this process is exactly how the law ordinarily adapts to cultural and technological change. Contrast the sophistication of the court's reasoning in *VMG* or *TufAmerica* with the bluntness of *Grand Upright*, and consider the interval of only two decades between them. In another decade or two, *Bridgeport* will likely show itself to have been an aberration,<sup>41</sup> as the proper *de minimis* rule grows yet more sharply defined.

### **III. Extending the *De minimis* Rule Is Appropriate Because Recordings Do Not Merit Extra Copyright Protection**

Under *Bridgeport*, “no substantial similarity or *de minimis* inquiry should be undertaken” for digital sampling from a recording.<sup>42</sup> The *Bridgeport* court's primary argument, from statutory interpretation, has been thoroughly criticized.<sup>43</sup> Equally suspect, however, is the court's understanding of recording technology: “[E]ven when a small part of a sound recording is sampled, the part taken is something of value. . . . It is a physical taking rather than an intellectual one.”<sup>44</sup>

The court's first point, that the “part taken is something of value,” improperly resurrects the dead “sweat of the brow” doctrine. Under this doctrine, a recording's copyrightability depends on the labor and other expenses that went into its creation. The Supreme Court has rejected this doctrine; properly, a sample's economic value, as reflected in the cost of its source's creation or in samplers' bottom line, makes no showing toward infringement.<sup>45</sup>

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<sup>40</sup>But see, e.g., Ponte, *supra* note 4, at 556–59 (proposing statutory reform); Anna Shapell, “Give Me a Beat:” *Mixing and Mashing Copyright Law to Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519, 550, 560–65 (2012) (arguing that “the existing statute's ability to adapt to new forms of technology-driven music is deficient” and proposing a compulsory licensing scheme).

<sup>41</sup>As noted in *VMG*, “Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the *de minimis* doctrine does not apply in a copyright infringement case.” *VMG*, 824 F.3d at 881.

<sup>42</sup>*Bridgeport*, 410 F.3d at 798.

<sup>43</sup>See, e.g., *VMG*, 824 F.3d at 881–85; Cromer, *supra* note 14, at 276–81; Ponte, *supra* note 4, at 542–45.

<sup>44</sup>*Bridgeport*, 410 F.3d at 801–02.

<sup>45</sup>*Cf.* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 353–54 (1991) (rejecting the “sweat of the brow” doctrine that labor entails copyrightability). But see Reilly, *supra* note 5, at 401 (“[S]imply because it saves time and production costs . . . samplers are taking something of recognizable value[.]”).

Initially, the court's second point, about “physical taking,” may appear more promising; though the phrasing “physical taking” is inapt,<sup>46</sup> the idea that a recording is somehow “physical” where a composition is “intellectual” captures a widely held intuition, which merits interrogation. This intuition rests on two separate forms of technological essentialism: (a) whenever mediated by technology, an act of copying preserves the essence of the copied work; and (b) recordings' infinite variety (as versus compositions' finitude) makes each recording unique in a way that deserves legal protection.

#### A. Sampling a Recording Does Not Preserve the “Essence” of the Copied Work

Musicologist Alexander Stewart has argued that copying a composition is “intellectual” because it “requires the producer or musician to become cognizant of the notes, rhythms, and harmonies,” whereas sampling a recording is “physical” because the sampler merely “digitally cop[ies] the actual sounds” with a computer.<sup>47</sup> By implication, recordings deserve extra copyright protection because their copying is mediated by technology. Of course, a sample's “actual sounds” can be altered by a variety of powerful digital tools, sometimes rendering its source unrecognizable, and forensic musicologists go to great lengths to reconstruct these alterations; but these powerful tools “do nothing to change the underlying musical expression or performance” captured in a recording,<sup>48</sup> perhaps because they are also computerized.

After a sample has been altered beyond recognition, such that it passes the “ordinary listener” test, what can remain of its source? The digital sound file is no longer the same sound file, in terms of its constituent data. The sounds specified by the file have also changed—even musicologists have trouble tracing them. If the data has changed and the sounds have changed, then there is literally nothing left of the source, other than the fact of copying itself (as admitted by the defendant or established by experts' evidence) and the fact that the copying was carried out by computer. Under the logic of *Bridgeport*, these facts must justify abandoning *de minimis*.

This argument flounders on two hypotheticals. First, imagine a lazy composer who uses a computer program to automatically transcribe and notate the pitches and rhythms of one measure of a popular song. Then the composer uses the computer to make pre-programmed changes to the notation, plays it back, makes some more changes, and inserts the measure into a new composition.<sup>49</sup> Perhaps it is even repeated several times. The source composition is no longer recognizable, but a musicologist can reconstruct it. Sued for infringement, the composer admits the copying. Neither the notation nor the musical expression (the sounds) resembles the source.

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<sup>46</sup>*E.g.*, Ponte, *supra* note 4, at 544 (“However, both musical scores and sound recordings are physical takings.”).

<sup>47</sup>Stewart, *supra* note 29, at 358.

<sup>48</sup>*Id.* at 342–50.

<sup>49</sup>Samplers perform much the same process: The important thing is that a computer does the work. See Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 ST. JOHN'S J. LEGAL COMMENT. 373, 377–82 (2007) (discussing the sampling process and aesthetic).

The fact of computerized copying is admitted, but of a composition, not a recording—is the *de minimis* defense available?

Next, imagine an eccentric music producer who (for obscure reasons) decides to make and alter a sample “by hand.” Using a specialized computer program, the producer opens up a sound file for a popular recording, exposing the digital data as a string of characters, and copies a portion of these characters into another sound file—such a process is at least hypothetically possible. The producer even eschews the “copy” and “paste” functions, instead typing in the characters one by one. Then, after extensive research, the producer learns how to change the sound file's pitch, tempo, and other features by manually editing these characters. These changes ultimately make the source recording unrecognizable in the new recording. Sued for infringement, the producer admits the copying and method. Neither the sound file nor the musical expression resembles the source recording. The fact of copying is admitted, but the copying was manual, not computerized—is the *de minimis* defense available?

These (admittedly fanciful) hypotheticals suggest that courts should disregard the means of copying and focus on the ends. A recording has no digital essence. If the source is no longer recognizable in the new musical expression or its “tangible medium” (the sound file), then nothing of legal significance can possibly remain. It does not matter whether the copying was by computer or by hand or by some combination—such copying is not infringement.

## **B. Recordings' Unique Informational Richness Is Legally Insignificant**

The other form of essentialism approaches this problem from the opposite side. Because pitches and rhythms, the stuff of compositions, are finite, some accidental compositional copying cannot be avoided;<sup>50</sup> the *de minimis* doctrine protects these accidents. Conversely, because “there are a limitless number of ways to create sound recordings from a composition,”<sup>51</sup> it is impossible to copy a recording accidentally;<sup>52</sup> therefore, the protections of *de minimis* are unnecessary and inappropriate. Now, on its own, the impossibility of accident should not be enough to justify excluding the *de minimis* defense. Accident (versus intention) only goes to the fact of copying, not its substantiality.<sup>53</sup> Instead, recordings' infinitude begets another form of essentialism.

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<sup>50</sup>See Reilly, *supra* note 5, at 387–89.

<sup>51</sup>*Id.* at 389.

<sup>52</sup>*Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

<sup>53</sup>*Cf. Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) (“[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.”). *But see Kohus v. Mariol*, 328 F.3d 848, 853-54 (6th Cir. 2003) (stating that the test of substantial similarity applies only “where there is no direct evidence of copying”). The split between the Sixth and Ninth Circuits thus originated before *Bridgeport* and *VMG*.

“All performances,” and therefore all recordings, “are unique.”<sup>54</sup> What is more, many performers and recording engineers cultivate a “signature sound,” irreducible to a composition, and often, this very sound is what attracts a sampler to a particular recording in the first place.<sup>55</sup> To put this another way: a composition, as fixed in musical notation, specifies some important features of a musical expression, but leaves a great deal to the performers, the instruments, and chance. But a recording, as fixed on a sound file, all but determines a musical expression—the only variables are the audio equipment and volume of playback. Compositions are information-poor where recordings are information-rich. This richness may appear to warrant extra copyright protection.

Though recordings' informational richness is important, it is of dubious legal consequence. If a recording's “signature sound” is so expressively important, in every detail, then when a sampler alters that sound even slightly, the new sample does not infringe on the source: those all-important details have changed. Alternatively, if the altered sample seems nevertheless to remain substantially similar to the source, such that a finding of infringement seems correct, then each expressive detail must not have mattered so much, after all, since the law, and intuition, could so easily accommodate their alteration. Legally speaking, either every minuscule detail of the recording matters, or not. Copyright holders cannot have it both ways. This logical knot only tightens in the face of *de minimis* infringement: how can a sample possibly steal its source's “signature sound” if that sound is literally unrecognizable? Thus the second form of essentialism is hoisted with its own petard.

In fact, though the medium is different, the sensible approach to recordings is no different from the sensible approach to compositions. Each composition is unique, in a trivial sense, and many composers carefully consider each expressive detail; despite this, sometimes the law finds a composition substantially similar to a past work, and sometimes not. For recordings, notwithstanding their greater detail, the essential problem is no different: sometimes a new recording sounds substantially similar to its source, and sometimes not. To argue otherwise is to imbue recordings and recording technology with imaginary powers.

#### **IV. Conclusion**

Though it splits from the Sixth Circuit, the Ninth Circuit's extension of the *de minimis* defense to sound recordings, in *VMG*, follows the trail of four earlier cases. Together, these cases articulate a set of guidelines for unlicensed sampling from copyrighted recordings, binding in the Ninth Circuit and persuasive elsewhere. Samplers that follow these guidelines can avoid claims of infringement. Furthermore, although sound recordings are information-rich and often depend on advanced digital technology, neither feature justifies granting them extra copyright protection.

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<sup>54</sup>Stewart, *supra* note 29, at 356.

<sup>55</sup>See Reilly, *supra* note 5, at 357, 388–91; see also Stewart, *supra* note 29, at 352.