Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry

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I. INTRODUCTION

U2, Peter Gabriel, and Iggy Pop have something in common with L.L. Cool J, Public Enemy and Tone-Loc.1 All have sampled sounds from old songs to make innovative, new music.2 In the rap industry, sampling is the foundation, “providing the punch of Chuck Berry guitar licks to L.L. Cool J’s songs, just as Tone-Loc’s hit ‘Wild Thing’ is buoyed by bits from Van Halen’s ‘Jamie’s Crying.’”3

This case note will focus on the Sixth Circuit’s decision in Bridgeport Music v. Dimension Films that a two-second sample of a sound recording without a license is a copyright infringement. Part I will explore the history of music sampling and the reasoning behind the Sixth Circuit’s decision. Part II will examine the theory of substantial similarity and the de minimis doctrine as they relate to copyright infringement in a sound recording, and the distinction between sound recordings and music compositions. Part II will also look at the concepts of licensing and fair use and their role in copyright infringement. Part III will analyze the Sixth Circuit’s decision in Bridgeport Music, evaluate the application of fair use to copyright infringement, as well as address the possibility that the Bridgeport Music decision could have a serious chilling effect.

1. David Zimmerman, Rap’s Crazy Quilt of ‘Sampled’ Hits, USA TODAY, July 31, 1989, at 4D. See David Zimmerman, A ‘Boutique’ of Borrowing, USA TODAY, July 31, 1989, at 4D.
2. Id.
3. Id. See Henry Self, Digital Sampling: A Cultural Perspective, 9 UCLA ENT. L. REV. 347, 351 (2002) (discussing the idea that while music has developed and changed over the years, sampling has always been an integral part of hip hop music).
on the future of hip hop and rap music.

II. BACKGROUND

A. The History of Sampling and the Decision in Bridgeport Music v. Dimension Films

In the world of hip hop music, sampling is a key ingredient. Sampling inspires musicians and producers to continuously create new kinds of music. Nevertheless, in Bridgeport Music v. Dimension Films, the United States Court of Appeals for the Sixth Circuit created a new rule in music sampling by holding that a mere two-second unauthorized sample is enough to constitute copyright infringement of a sound recording. Here, Bridgeport Music, No Limit Films and Westbound Records used a digital sample from the composition and sound recording of the rap song "100 Miles" in the movie soundtrack "I Got the Hook Up." The district court had granted summary judgment in favor of the defendants regarding the recording company’s claim of sound recording infringement. The court held that the goal of copyright law is to deter blanket plagiarism of prior works.

The district court reasoned that "a balance must be struck between protecting an artist’s interests, and depriving other artists of the building blocks of future works." Musicians have liberally taken musical concepts and ideas from other musicians since the beginning of modern music. When a fan of one musician’s work

5. Id.
7. Id. at 393.
9. Id. at 842.
10. Id.
11. Id.
cannot easily figure out that the sampled music has been borrowed by another musician upon hearing the second work, it would hinder the goals of copyright law to penalize the artistic work of the borrower.\textsuperscript{12}

Sampling involves the incorporation of short segments of prior sound recordings into new recordings.\textsuperscript{13} The tradition of sampling originated in Jamaica in the 1960's when disc jockeys operated portable sound systems to "mix" segments of prior recordings into new mixes.\textsuperscript{14} Sampling of pre-existing sound recordings allowed the disc jockeys to improve and develop a new sound recording without having to pay other artists to come to the studio and reproduce the requested sound.\textsuperscript{15} The practice of sampling journeyed to the United States and developed throughout the 1970's using the analog technologies available at that time.\textsuperscript{16} In the 1980's, analog sampling turned into digital sampling with the introduction of the digital synthesizer, utilizing technology called MIDI – Musical Instrument Digital Interface – keyboard controls.\textsuperscript{17}

These synthesizers allowed musicians and producers to digitally alter and mix sampled sounds, which greatly extended the scope of possibilities for prerecorded music.\textsuperscript{18} The digital recording equipment "takes snapshots of the analog voltages along a continuous and fluctuating line, and then assigns a binary code representing the voltage level at that particular time."\textsuperscript{19} The

\begin{thebibliography}{19}
\bibitem{12} Id.
\bibitem{13} Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003).
\bibitem{14} Id.; See History of Rap and Hip Hop, at http://www.jahsonic.com/Rap.html (last visited Apr. 17, 2005); See generally WIKIPEDIA, Hip Hop Music, at http://en.wikipedia.org/wiki/Hip_hop_music (last visited Apr. 17, 2005) (providing an in-depth discussion of the the history of the hip hop genre and the musicians that were fundamental to its creation.)
\bibitem{16} Newton, 349 F.3d at 593.
\bibitem{17} Id.
\bibitem{18} Id.
\end{thebibliography}
'sampling rate' represents the speed the sampling device captures the samples, or assigns binary numbers." 20 When the sampling rate is elevated, it creates a larger bandwidth, which, in turn, produces a superior sound. 21

Analog equipment limited musicians to "scratching" vinyl records and "cutting" back and forth between different sound recordings. 22 Conversely, digital sampling allows artists to manipulate the sample in numerous ways by slowing down, speeding up, combining, and otherwise changing the samples. 23 "'Sampling' is a technique in contemporary music wherein one original composition is digitized and inserted into the body of another." 24 A digital sample has been defined as "the conversion of analog sound waves into a digital code. The digital code that [portrays] the sampled music ... can then be reused, manipulated or combined with other digitalized or recorded sounds using a machine with digital data processing capabilities, such as a computerized synthesizer." 25

Sampling is an important part of hip hop and rap music. 26 Some of the earliest rap artists, such as Grandmaster Flash and Sugarhill Gang, made their own sound over existing music, a process considered an art form. 27 In fact, the Roots' co-manager Shawn Gee stated that, "[a]s hip[]hop evolved, 'samples became an instrument' to create new sounds." 28 As one producer remarked, "Samples inspire producers to create a new piece of music." 29

20. Id.
21. Id. at 182.
22. Newton, 349 F.3d at 593.
23. Id.
27. Id; See History of Rap and Hip Hop, at [http://www.jahsonic.com/Rap.html (last visited Apr. 17, 2005)].
28. Id.
29. Id.
The United States Constitution characterizes the purpose of the Copyright Clause as that which "Promote[s] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Currently, an artist may copyright his or her work for life plus seventy years. It was not until 1971 that sound recordings became subject to a separate copyright, most likely because technological advances were making illegal copying, commonly known as "pirating," of sound recordings a very simple task. Copyright laws aim to find a balance between protecting the creative works of authors and inventors and stifling further creativity. This balancing test gives an artist who holds a copyright in a sound recording the exclusive right to reproduce that recording in a way that would directly or indirectly recapture the actual sounds fixed in that recording. This exclusive right in the sound recording is restricted to the privilege to create a copied work in which the "actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." Therefore, the public can imitate or simulate the creative work that is fixed in the recording, as long as an actual copy of the sound recording itself is not made.

31. 17 U.S.C. § 302(a) (2000). In 1998, the Sonny Bono Copyright Term Extension Act was passed to extend the duration of an author's copyright from the author's life plus fifty years to the author's life plus seventy years. ROCHELLE COOPER DREYFUS & ROBERTA ROSENTHAL KWALL, INTELLECTUAL PROPERTY: CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW 214 (2d ed. 2004).
34. Id. at 397; See generally J. Michael Keyes, Musical Musings: The Case for Rethinking Music Copyright Protection, 10 MICH. TELECOMM. TECH. L. REV. 407, 419-430 (2004), available at http://www.mttlr.org/volten/Keyes.pdf (discussing music copyright law and the need to protect more than just the copyright owner.)
36. Id.
Section 101 of the Copyright Act of 1976 defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." Phonorecords are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

Professor David Nimmer identifies a distinction between sound recordings, which are works of authorship, and phonorecords, which represent these sounds. Nimmer questions why the drafters of the Copyright Act decided to define phonorecords as the "material object in which sounds are first fixed," and then define copies by putting it in an extra category, as "material objects other than phonorecords." He notes that the Copyright Act was an unavoidably complex statute and that adding the distinction between phonorecords and copies was a superfluous addition to the statute. In order to avoid this unneeded confusion, Nimmer suggests that copies should be defined as including "all material objects in which works of authorship are fixed, regardless of whether or not the work itself consists of sound."

Bridgeport Music v. Dimension Films focused on the issue of whether it was acceptable to "lift" or "sample" something less than

39. Id.
40. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[C], at 2-36.1 (2004).
42. Id. at 2-36.1-2-36.2.
43. Id. at 2-36.1.
44. Id. at 2-36.2.
the whole sound recording. 45 The Sixth Circuit determined that a license is required in order to use any part of the sound recording, be it a small sample, a substantial segment, or the whole recording. 46 The court stated that it could foresee very little restraint on creativity as a result of its ruling. 47

In May 1998, the defendant, Dimension Films, released a movie entitled “I Got the Hook Up,” which included on its soundtrack a recording of the song “100 Miles.” 48 In December 1998, the plaintiff, Bridgeport Music, gained a twenty-five percent interest in the musical composition “100 Miles” as compensation for the use of a sample of the Bridgeport composition “Get Off Your Ass and Jam,” used in “100 Miles.” 49 The court assumed that the sample was digitally copied from the sound recording of “Get Off Your Ass and Jam” and was included on the movie soundtrack of “I Got the Hook Up” as the defendant did not argue to the contrary. 50

Bridgeport and Westbound alleged ownership of both the musical composition and the sound recording copyright in “Get Off Your Ass and Jam,” by George Clinton, Jr. and the Funkadelics, and claimed infringement for the sound recording of “Get Off Your Ass and Jam.” 51 The portion of the song in question was an “arpeggiated chord: three notes that, if struck together, comprise a chord, but instead are played one at a time in very quick succession.” 52 The chord at issue is repeated numerous times at the beginning of “Get Off Your Ass and Jam.” 53 The sample of the arpeggiated chord is played on an unaccompanied

46. Id.
47. Id.
49. Id.
50. Id.
53. Id.
electric guitar. The lower court felt that "the rapidity of the notes and the way they were played produced a high-pitched, whirling sound that captures the listener's attention and creates anticipation of what is to follow." The district court's concern was not in the uniqueness of the chord, but rather in the use of and the acoustic effect created by how the notes were played, particularly because a sound recording infringement was in question. One of the plaintiffs' experts testified that the defendants had reproduced a two-second sample from the guitar solo, reduced the tone, "looped" the new creation, and extended it to sixteen beats. The sample occurred five times in "100 Miles."

Ultimately, the Sixth Circuit cited seven conclusions in their decision that sampling was unacceptable without the copyright owner's permission. First, the court stated that the analysis for determining infringement of a music composition copyright is not the same analysis that should be used to determine a sound recording infringement. Second, the Sixth Circuit declined to follow the lower court's analysis that if the source of the sample was not recognizable to the average person, along with minimal copying of the essence of the piece, there should be no infringement. The Sixth Circuit determined that since it was not a musical composition, the lower court's analysis should not apply. Third, the court found that the "requirement of originality for a sound recording is met by the fixation of sounds in the original master recording." Fourth, the court adopted the

54. Id.
55. Id.
56. Id.
58. Id.
59. Id. at 396-97.
60. Id. at 396. The court stated that they would direct their attention only to the issue as it pertains to copyrights in sound recordings. Id.
61. Id.
62. Id.
63. Bridgeport Music, Inc., 383 F.3d at 396. "Only the actual physical copy of a master recording will be exactly the same as the copyrighted sound
commonly accepted definition of "digital sampling." 64 Fifth, the court confined its opinion to circumstances such as in this case, where there is digital sampling of a copyrighted sound recording. 65

Sixth, due to the development in technology, as well as the increased popularity of hip hop and rap music, digital sampling had become more widespread, giving rise to numerous instances of copyright disputes and potential litigation. 66 Several reasons have been cited for this upsurge in sampling, including the low cost of digital sampling equipment, the amount of time saved because the previous artist has already recorded the sampled music, and the reality that sampling from a recognizable work can be a predictor of future success. 67 The Sixth Circuit's seventh, and final, reason for their decision was the belief that the music industry would benefit from a bright-line rule that could shed some light on the type of digital sampling in copyrighted sound recordings that could be actionable for infringement. 68 The court proceeded to discuss the statutory provisions relating to copyright and sound recordings, specifically Section 114(a) 69 and Section 106 70 of the Copyright

64. Id.
66. Id.
69. 17 U.S.C. § 114(a) (2000). The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).
70. 17 U.S.C. § 106 (2000). Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works,
Act of 1976. In addition, Section 114(b) provides that a sound recording copyright owner has the exclusive right to sample his own recording. 71

Based on the statutory guidelines, the Sixth Circuit made a bold statement: “Get a license or do not sample.” 72 The court reasoned that its rule would not restrain creativity because a musician would be allowed to reproduce the sound in the studio and the market would help regulate the license price. 73 The court decided to take a “literal reading approach” as few guidelines were available to help interpret the copyright statute. 74

The court next addressed the theory of substantial similarity and the de minimis doctrine, stating that these two tests were not appropriate for a sound recording infringement because even when a small part of a sound recording is sampled, that small portion is

71. 17 U.S.C. § 114(b) (2000). The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.


73. Id.

74. Id. at 401. The court said there “is no Rosetta stone for the interpretation of the copyright statute.” The legislative history is not advantageous since digital sampling did not exist in 1971. The court suggests that changes to copyright laws should be made in Congress, not in the courts. Id. at 401-02.
something of value.\textsuperscript{75} For the copyright owner of a sound recording, it is the sounds that are fixed in the medium the artist selects, not the song.\textsuperscript{76} When these sounds are sampled, they are appropriated precisely from that fixed channel so, essentially, there is a physical appropriation and not an intellectual taking.\textsuperscript{77} As a result, the only way to prove a sound recording infringement is to show that the defendant reproduced a segment of sound from the original work – which is the basis of digital sampling.\textsuperscript{78} Therefore, the court determined that sound recordings do not involve the issue of substantial similarity.\textsuperscript{79} Ultimately, the court reversed the entry of summary judgment on Westbound’s allegations against No Limit Films.\textsuperscript{80}

\textbf{B. Key Theories Relating to Copyright Infringement}

\textbf{1. Substantial Similarity}

An action for copyright infringement requires the analysis of several concepts related to copyright law. First, under the concept of substantial similarity, even if the amount that is copied is relatively trivial, it may be held to be substantially similar if the sample taken is of qualitative significance to the pre-existing composition as a whole.\textsuperscript{81} Thus, substantial similarity is not established by the importance of the sampled piece in the purportedly infringing work.\textsuperscript{82} Rather, it is the significance of the

\begin{itemize}
  \item \textsuperscript{75} \textit{Id.} at 399.
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.}
  \item \textsuperscript{78} \textit{Bridgeport Music, Inc.}, 383 F.3d at 399 n.10 (quoting Jeffrey R. Houle, \textit{Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “RAP”?}, 37 LOY. L. REV. 879, 896 (1992).
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} \textit{Id.} at 402.
  \item \textsuperscript{81} 4 \textsc{Melville B. Nimmer \& David Nimmer}, \textsc{Nimmer on Copyright} § 13.03[A][2] at 13-55.
material that has been sampled that is essential to the determination of whether there has been copyright infringement.\footnote{Id.} 

2. The De Minimis Doctrine and Fragmented Literal Similarity

A second concept under copyright infringement is the de minimis doctrine. De minimis has been defined as "of minimum importance" or "trifling."\footnote{Law.com Legal Dictionary, at http://dictionary.law.com/definition2.asp?selected=484&bold=||| (last visited Apr. 17, 2005).} In other words, it refers to an aspect of a particular work that is "so little, small, minuscule or tiny that the law does not refer to it and will not consider it."\footnote{Id.; Ringgold v. Black Entertainment TV, 126 F.3d 70, 74 (2d Cir. 1997) (analyzing the de minimis doctrine within the framework of copyright.)} The Ninth Circuit has determined that a use is de minimis only if "it is so meager and fragmentary that the average audience would not recognize the appropriation."\footnote{Id. at 596.} Within the de minimis doctrine, there is a third concept that Professor Nimmer refers to as "fragmented literal similarity."\footnote{Id.} Fragmented literal similarity occurs when the defendant accurately reproduces a segment of the plaintiff's creation, but does not claim a right to the basic character and structure of the plaintiff's work.\footnote{Id.} When the degree of similarity is great, it is necessary to ask whether the similarity goes to trivial or substantial aspects of the work.\footnote{Id. at 596.}

In \textit{Newton v. Diamond}, the Ninth Circuit court looked at the issue of whether the practice of sampling required a license to use both the performance and the composition of the original...
The Ninth Circuit recognized that sound recordings and their musical compositions are distinct creations with their own copyrights. The defendants in *Newton*, a popular musical group known as the Beastie Boys, were the performers who sampled the plaintiff's work. The Beastie Boys had obtained a license from the plaintiff, James Newton, an accomplished flutist, to sample the sound recording. However, the Beastie Boys did not acquire the right to Newton's copyrighted musical composition. The Beastie Boys had obtained a license from ECM Records by paying $1,000 to use a part of the sound recording of Newton's song "Choir" in different versions of their song "Pass the Mic." Since the license covered the sound recording, Newton based his lawsuit on the violation of his rights in the three-note sequence set down in his copyrighted musical composition.

The district court granted summary judgment for the Beastie Boys, holding that a license to the underlying composition was not necessary because the notes at issue did not have adequate originality to warrant copyright protection. In addition, the court held that even if the copied section of the composition was original, the defendants' use was de minimis and would not be sufficient to constitute a cause of action for infringement. The Ninth Circuit affirmed on the basis that the use was de minimis.

In its opinion, the Ninth Circuit reasoned that an unlawful use of a copyrighted work is actionable if the plaintiff's and the defendant's works are substantially similar. In other words, even if the act of copying is not disputed, there will not be a cause

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90. *Newton*, 349 F.3d at 592.
91. *Id.* at 592-93.
92. *Id.* at 592.
93. *Id.*
94. *Id.*
95. *Id.* at 593.
96. *Newton*, 349 F.3d at 593, 596.
97. *Id.* at 592.
98. *Id.*
99. *Id.*
100. *Id.* at 594.
of action unless the copying is substantial.\textsuperscript{101} The court noted that "the principle that trivial copying does not constitute actionable infringement has long been a part of copyright law."\textsuperscript{102} The court's reference to Judge Learned Hand's observation that "even when there is some copying, that fact is not conclusive of infringement . . . some copying is permitted" reflects the legal principle, \textit{de minimis non curat lex}, "the law does not concern itself with trifles."\textsuperscript{103} Interestingly, the Sixth Circuit, which presided over \textit{Bridgeport Music}, previously acknowledged that if it can be demonstrated that a significant amount of the copyrighted material was not appropriated, the theory of \textit{de minimis non curat lex} can be articulated as a defense to copyright infringement.\textsuperscript{104} Nevertheless, the Sixth Circuit held in \textit{Bridgeport Music} that this line of reasoning did not apply to sound recordings.\textsuperscript{105}

3. Licensing and Fair Use

The final two theories relating to copyright infringement are licensing and fair use. If an artist wants to be completely certain that she can use specific sections of a sound recording from a pre-existing work, she can obtain permission from the copyright owner and pay a fee.\textsuperscript{106} This fee can vary depending on the quantity of the sample that the artist intends to utilize, the specific music the artist intends to sample (a sample from a work of a popular recording artist will be more costly than an unknown beat), and how the sample will figure into the artist's new work (whether it

\textsuperscript{101} Id.
\textsuperscript{102} Newton, 349 F.3d. at 594 (quoting West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909)).
\textsuperscript{103} Id; Ringgold v. Black Entertainment TV, 126 F.3d 70, 74-76 (2d Cir. 1997) (discussing the de minimis concept in detail).
\textsuperscript{105} Bridgeport Music, Inc. v. Dimension Films, 380 F.3d 390, 396 (6th Cir. 2004).
will be a minor sound or whether the whole song will be developed around the sample.)

The District of New Jersey faced the issue of sampling and the de minimis doctrine in Jarvis v. A & M Records. The plaintiff, Boyd Jarvis, wrote a song entitled "The Music's Got Me," and copyrighted its composition and arrangement in 1982. As of the date of the decision, Prelude Records held the sound recording copyright. In 1989, defendants Robert Clivilles and David Cole wrote and recorded a song, "Get Dumb (Free Your Body)," which was released in three versions on A & M Records. In all three versions, the defendants digitally sampled portions of plaintiff's aforementioned song, prompting Jarvis's claim of copyright infringement. The court denied the defendants' motion for summary judgment on plaintiff's musical composition copyright claim, and granted the defendants' motion for summary judgment on the plaintiff's sound recording copyright claim. Because there is a difference between sound recordings and music compositions, the rights of a sound recording copyright do not apply to the song itself. The court reasoned that substantial similarity and the de minimis test of "fragmented literal similarity" applied solely to the musical composition, but not to the sound recording.

Section 107 of the Copyright Act of 1976 states that fair use of a copyrighted work will not result in an infringement on copyright. Fair use is recognized under section 107 as a

107. Id.
109. Id. at 286.
110. Id.
111. Id.
112. Id.
113. Id. at 292, 293.
115. Id. at 288-92.

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complete defense to an infringement claim.\textsuperscript{117} The fair use doctrine permits any member of society to use the facts and ideas in a copyrighted piece, in addition to the expression itself in specific situations.\textsuperscript{118} This affirmative defense provides that “fair use of a copyrighted work, including such use by reproduction in copies... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”\textsuperscript{119} The scope of the fair use defense is quite broad in the context of scholarship, comment, and parody.\textsuperscript{120}

An analysis of sampling and copyright issues gives rise to several questions regarding the concepts of fair use and parody. How does fair use relate to the issue of copyright infringement in sound recordings? Why is it acceptable to copy parts of a song for the purpose of parody, but not for the remixing of hip hop and rap music to create new sounds?

First, it is necessary to define parody and its relationship to the fair use defense. The modern dictionary definition of parody is a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule.”\textsuperscript{121} As it relates specifically to copyright law, parody is regarded as “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”\textsuperscript{122}

Fair use is a copyright term that is defined as “a reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody.”\textsuperscript{123} According to section 107 of the Copyright Act of

\begin{itemize}
  \item \textsuperscript{118} Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).
  \item \textsuperscript{119} \textit{Id.} at 219-20 (quoting 17 U.S.C. § 107 (2000)).
  \item \textsuperscript{120} \textit{Id.} at 220.
  \item \textsuperscript{121} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994) (quoting \textit{AMERICAN HERITAGE DICTIONARY} 1317 (3d ed. 1992)).
  \item \textsuperscript{122} \textit{Campbell}, 510 U.S. at 580.
  \item \textsuperscript{123} \textit{BLACK’S LAW DICTIONARY} 617 (7th ed. 1999).
\end{itemize}
1976, "In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include[:] (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the work used; and (4) the economic impact of the use."124 In OBH, Inc. v. Spotlight Magazine, Inc., the plaintiff sought a preliminary injunction to prevent the defendant from using the plaintiff's trademark in the defendant's domain name on the Internet.125 That court held that a parody "depends on a lack of confusion to make its point," and "must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody."126

A significant case regarding fair use is Campbell v. Acuff-Rose Music, Inc.127 The Supreme Court had to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," constituted fair use within the meaning of section 107 of the Copyright Act of 1976.128 The District Court granted summary judgment for 2 Live Crew, but the Sixth Circuit Court of Appeals reversed, holding that the defense of fair use was not acceptable given the song's commercial character and tremendous amount of sampling.129 The Supreme Court reversed, finding that the Sixth Circuit's conclusion that the commercial nature of the parody had rendered it presumptively unfair was erroneous, and, instead, held that in a fair use analysis, a parody's commercial character is just one element that should be examined.130

The Supreme Court has determined that when fair use is raised in defense of a parody, it is crucial to analyze whether it is apparent that the work is a parody.131 Interestingly, it is not

126. Id. at 191.
128. Id. at 571-72.
129. Id.
130. Id. at 572.
131. Campbell, 510 U.S. at 582.
important whether the parody is in good or bad taste. 132 The Supreme Court has recognized parody as a form of fair use, even though it is not expressly listed among the examples of fair use in Section 107. 133 In making this determination, the Court reasoned that "the very purpose of parody is to comment on or criticize the 'substance or style of the original composition' through humor or slapstick, which makes it a form of criticism." 134

To conclude whether a design or creation constitutes a parody of the original is part of the analysis of the first fair use factor: the nature and purpose of the use. 135 Once the court determines that the work in question is a parody, its analysis of the three remaining factors must be viewed in relation to the nature of parodic works in general. 136 The Supreme Court has noted that the key purpose of this first factor is to ascertain whether the new work displaces the character of the original work, or whether the new work's objective is to add a new dimension or character to the old work. 137 Essentially, the court must determine "whether and to what extent the new work is 'transformative.'" 138

As a result, the second factor, the nature of the original work, is not heavily weighted when analyzing a parody because any creation that warrants a parody is probably going to be famous and

132. Id. Justice Holmes noted, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." Id. at 582-83.

133. Id.


135. Abilene, 320 F. Supp. 2d at 89.

136. Id.

137. Campbell, 510 U.S. at 579.

138. Id. A new work is "transformative" if it can create a "further purpose or different character [by] altering the [original] with [a] new expression, meaning, or message." The court states that although transformative use is not obligatory to find fair use, the "goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." Id.
innovative enough to be near the "core of intended copyright protection." In addition, because it is necessary for a parody to take identifiable material from the original creation in order to express its message, it is probable that the sample will reproduce the core of the original, and the court must keep this in mind when evaluating the third factor: the amount and substantiality of the material used. Finally, given that a parody is not expected to replace the original work in the stream of commerce, it is likely that the new work will not affect "the potential market for or the value of the copyrighted work," which is the fourth factor. Thus, when a court determines that a work is a parody, the second, third, and fourth factors should not interfere with a finding of fair use.

Fair use promotes inspiration and originality by securing an author's right to create upon and transform existing works without having to acquire a license. Fair use developed at the dawn of copyright protection, and, due to the idea that "borrowing from and commenting upon existing works is a fundamental part of the process of inventing new works," fair use has been thought necessary to fulfill copyright law's main goal of promoting creativity.

When a two-second snippet is considered an infringement, it begs the question of whether a half-second snippet could also be an infringement. If a split second sample is an infringement, how difficult would it be to claim copyright ownership to it? Furthermore, will there be a chilling effect in rap music as a result of the Bridgeport Music decision?

140. Id.
141. Id.
142. Id.
143. Id. at 88.
144. Id.
III. Analysis

A. The Sixth Circuit’s Decision in Bridgeport Music, Inc. v. Dimension Films

In Bridgeport Music, Inc. v. Dimension Films, the Sixth Circuit reversed the judgment of the district court, holding that the lower court erred in applying the theory of substantial similarity and the de minimis doctrine to an action of copyright infringement of a sound recording. The court announced a new bright-line rule: neither the substantial similarity test nor the de minimis doctrine should be applied when it is undisputed that an artist has digitally sampled another artist’s copyrighted sound recording.

The Sixth Circuit’s bright-line rule could create conflict and inefficiency in the music industry. By holding that all sampling is illegal without a license, this ruling not only contradicts the basic premise of the Copyright Act, which is to encourage creativity and the development of arts and science, but, in effect, it impedes the progress of an entire institution of music. Sampling’s evolution has fostered extraordinarily unique sounds and styles in music. The Bridgeport Music decision does a great disservice to the hip hop and rap industry by foreclosing the use of minimal sampling. To require an artist to stop the creative process, consult a lawyer, and go through the process of obtaining a license before she has determined whether she is even going to use the sample is disruptive and ineffective. “Nothing today, like nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before.” The use of small samples of pre-existing music shows respect for a musician’s predecessors and fosters the development of new music.

146. Id.
147. Self, supra note 3, at 351 (quoting White v. Samsung Electronics America, Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting)).
While a bright-line rule might appear to be a remedy for this increasingly controversial subject matter, the Sixth Circuit misinterpreted the statutory difference between a copyright for a musical composition and a copyright for a sound recording. The Sixth Circuit "read this and other statutory language as a congressional grant of an unmitigated right to the owner of a copyright in a sound recording to sample or otherwise copy his recording." As a result, sampling any amount less than the entire sound recording will infringe the copyright. The court determined that the theory of substantial similarity and the de minimis doctrine were unsuitable, which led to the reasoning that any unauthorized sampling would be considered sufficient for a copyright infringement in a sound recording.

The Sixth Circuit admitted that there was no existing judicial precedent when it made its decision. The court noted that it relied on law review and text writers to validate its conclusion. Additionally, it court relied on statutory language that was not especially conclusive, and which did not sufficiently justify its reasoning as to the difference between musical compositions and sound recordings. The copyright statute’s language does not state that the doctrine of substantial similar cannot be applicable to copyright in a sound recording. Also, the court conceded that a person’s opinion on the issue of music sampling is usually dependent upon "whose ox is being gored," with hip hop musicians claiming that the Sixth Circuit’s rule stifles creativity, and sound recording copyright owners favoring the court’s holding.

149. Id. at 1356.
150. Id.
151. Id. at 1356-1357.
153. Id.
155. Id. at 1359.
B. The Fair Use Defense and the Idea of Parody

In *Abilene v. Sony Music Entertainment*, the federal court upheld the fair use doctrine by dismissing a suit by three music corporations against Sony, and rappers Killah, Raekwon and the Alchemist, for copyright infringement. The plaintiff accused the rappers and Sony of infringement of the renowned song “What a Wonderful World.” The alleged infringement occurred when the defendants created an album that included a rap song entitled “The Forest,” which made a slang reference to marijuana and varied the first three lines of “What a Wonderful World” in its introduction. The defendants argued they were protected by the fair use doctrine under the Copyright Act of 1976. The court granted summary judgment for Sony, concluding that the song was a parody and that fair use prevented the defendants from being liable for copyright infringement. The court reasoned that “The Forest” modified the pitch, words, and musical characteristics of “What a Wonderful World,” which made it clear that the song was a criticism – specifically, a parody – and that the musicians were making an ironic statement that their view of the world was far from “wonderful.” In fact, the judge held that while the original first three lines of “What a Wonderful World” illustrated the beauty of nature, the rap version “read more like an invitation to get high with the singer.”

160. *Id.*
161. *Id.* at 89.
162. *Id.* at 95.
163. *Id.* at 92.
164. *Id.* at 90; The lyrics to the two songs in question are as follows:
   The lyrics to the first three lines of “What a Wonderful World” are:
   I see trees of green, red roses too
By including the fair use defense in the Copyright Act, the drafters were cognizant that the "Progress of Science and useful Arts"\textsuperscript{165} will sometimes include the need to borrow from pre-existing material in the creation of new works. A court's decision as to whether a defendant has infringed the copyright of a sound recording should be determined on a case-by-case basis, taking into account the numerous factors that are involved in copyright law, including whether the sample is fair use. The use of a bright-line rule does not account for the distinctive aspects of each situation and will hinder the ability of a court to make an individualized judgment.

\textit{C. The Future of Digital Sampling and Its Effect on the Hip Hop Music Industry}

In \textit{Bridgeport Music v. Dimension Films}, the Sixth Circuit's decision that a two-second digital sample was a copyright infringement caused speculation about the future of hip hop and rap music. Will the Sixth Circuit start a trend that other circuits will follow?

Prior to the Sound Recording Act of 1971, sound recordings were not protected.\textsuperscript{166} As a result, these pre-1971 songs are available to artists for use in sampling.\textsuperscript{167} Interestingly, the Sixth Circuit in \textit{Bridgeport Music} specifically mentioned the legality of sampling these vintage recordings, then proceeded to hand down a decision that provided for a new bright-line rule offering even

\begin{verbatim}
I see them bloom for me and you
And I think to myself, what a wonderful world.
The lyrics to the first three lines of "The Forest" are:
I see buds that are green, red roses too
I see the blunts for me and you
And I say to myself, what a wonderful world.
\end{verbatim}

\begin{verbatim}
Abilene, 320 F. Supp. 2d at 87.
165. U.S. CONST. art. 1, § 8, cl. 8.
167. Id. at 401.
\end{verbatim}
more protection for current sound recordings.\textsuperscript{168} Although the court claimed that it was simplifying the law for digital sampling, the law has, on the contrary, become even more complex now that it distinguishes between sound recordings and their underlying musical composition.\textsuperscript{169}

This new protection for sound recordings may require artists to defend their actions in Tennessee for sampling, even though that same work might be protected in other jurisdictions.\textsuperscript{170} While the Sixth Circuit's decision provides increased protection for copyright holders, its effect on the music industry could be damaging because the creativity of musicians and producers might become increasingly discouraged.\textsuperscript{171} Hip hop and rap music has been called "the most exciting inner-city contribution to pop since the Motown hits of the 1960's...[and] the most creative energy in all of pop [music] these days."\textsuperscript{172} Since the 1960's, this type of music has naturally incorporated digital sampling into its style.\textsuperscript{173}

For many artists, digital sampling is more about creating new music than stealing old sounds.\textsuperscript{174} As producer Trevor Horn stated, "It's the song that sells - not the sample."\textsuperscript{175} Hip hop music is constantly evolving. It would be a detriment to the genre to make it illegal to sample small segments of pre-existing music in the creation of a new sound.

In fact, some artists believe it is a mark of respect and

\begin{footnotes}
\item[169] \textit{Id.}
\item[170] \textit{Id.}
\item[171] \textit{Id.}
\item[175] \textit{Id.}
\end{footnotes}
admiration to have other artists sample their work.\textsuperscript{176} Advocates of
digital sampling feel that a prohibition on sampling would have a
significant chilling effect on the creation of rap music."\textsuperscript{177} They
argue that the concept of sampling requires significant creativity
on the part of the digital sampler.\textsuperscript{178} The art of sampling allows
producers and artists to create new music by layering numerous
segments of sampled material to create a collection of sound that
evolves into fresh, new music.\textsuperscript{179}

In 1989, the rap group De La Soul released its classic debut, "3
Feet High and Rising," that included the interlude "Transmitting
Live From Mars."\textsuperscript{180} Lasting sixty-six seconds in length, the song
featured a sample of the 1969 hit "You Showed Me" by the
Turtles.\textsuperscript{181} The twelve-second sample was slowed down and
"looped" electronically so it repeated in the background of the
song.\textsuperscript{182} Despite the fact that the hip hop music audience was not
familiar with the Turtles' song, the Turtles sued De La Soul for
unauthorized use.\textsuperscript{183} The lawsuit eventually settled out of court
with De La Soul paying the Turtles $1,700,000.00 for their use of
the song.\textsuperscript{184} The outcome of that lawsuit weighed heavily on the

\textsuperscript{176} Mary B. Percifull, Note, Digital Sampling: Creative or Just Plain
\textsuperscript{177} Percifull, supra note 167 at 1269 n.53. "Proponents of digital
sampling... feel that sampling encourages creativity." Id. at 1268.
\textsuperscript{178} Renee Graham, Will Ruling on Samples Chill Rap?, BOSTON GLOBE,
will "deter such efforts because few artists or labels will be willing or able to
pay to secure licensing for every sample. In an interview with Stay Free!
magazine, Public Enemy's Chuck D and producer Hank Shocklee reminisced
about making [Public Enemy's] 1988 album, and how copyright clearance for
the many samples they used 'wasn't even an issue.'" Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Jeffrey H. Brown, Comment, "They Don't Make Music the Way They
Used To": The Legal Implications of "Sampling" in Contemporary Music, 1992
\textsuperscript{182} Id.
\textsuperscript{183} Graham, supra note 169.
\textsuperscript{184} Eric Shimanoffs, The Odd Couple: Postmodern Culture and Copyright
hip hop industry, and effectively closed the door on hip hop’s relaxed attitude toward sampling. 185 “In the long run, this [restriction on sampling] will lead to mediocrity in the music,” said DJ and hip hop journalist Davey D. Cook.” 186 The De La Soul decision illustrates the harm that is sure to result if creativity in hip hop music is stifled by rigid copyright laws.

The Sixth Circuit’s ruling in Bridgeport Music has created another opportunity for a chilling effect in rap music. 187 A week after the ruling, the Boston Globe ran an article highlighting the possibility of such an effect, noting that while an artist’s work should be protected, the bright-line rule created in Bridgeport Music will encourage frivolous lawsuits that will benefit neither musicians nor their audiences. 188 “Hip hop has survived the deaths of major stars, censorship, and Vanilla Ice, and it will certainly survive this ruling . . . still, there’s little doubt that the judges who came to this devastating decision may well end up stifling the artistry and creativity their ruling sought to protect.” 189

With any luck, the other circuit courts will realize that the Sixth Circuit’s decision in Bridgeport Music could have a significantly detrimental effect on hip hop and rap music. Hopefully, if those courts are faced with a situation similar to Bridgeport Music, they will determine that creativity and innovation in the music industry are more important than the small licensing fee required for two-second samples of previously-recorded music. If the other circuits refuse to follow the Sixth Circuit, it is possible to avoid the chilling effect that is to be expected should artists be prevented from exercising their ingenuity and imagination through the sampling of small pieces of pre-existing works.

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185. Graham, supra note 169.
186. Id.
187. Id.
188. Id.
189. Id.

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IV. CONCLUSION

The Sixth Circuit’s decision in Bridgeport Music v. Dimension Films that a two-second sample of a sound recording is copyright infringement has the potential to significantly hinder the hip hop and rap music industry. If a two-second digital sample is considered actionable for copyright infringement, then not only will musicians and producers become discouraged in the development and creation of new music, but it could also lead to an onslaught of copyright litigation.

Applying the theory of substantial similarity and the de minimis doctrine to sound recordings would be a more efficient means of determining copyright infringement. Two purposes would be served by using these tests: 1) providing protection for the copyright holder’s work; and 2) permitting the music industry to continually expand and create new sounds without the constant fear of liability. “The [Bridgeport Music] ruling, with its unprecedented twists and turns, can hardly be seen as encouraging creativity. And that’s bad news for everyone.”190 To keep the hip hop and rap genres flourishing, one can only hope that the other circuit courts realize the harm in the Sixth Circuit’s decision and categorize that opinion as an anomaly in copyright law.

Courtney Bartlett
