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Sound Familiar? Digital Sampling is Taking Center Stage

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Abstract:

In 2018, Kendrick Duckworth, better known by his stage-name Kendrick Lamar, became the first non-classical or jazz musician to win the Pulitzer Prize in Music. Equally as surprising, the album contained a magnitude of digital sampling. As digital sampling has become more prevalent since the 1980's, courts have differed on how to handle the issue. By 2016, the Sixth and Ninth Circuit Courts of Appeals established a circuit split on the issue, with one holding that unlicensed digital sampling is per se unlawful, and the other holding that a more lenient test is needed. Courts have continued to struggle with digital sampling cases. However, a growing trend of treating digital sampling cases through a de minimis lens and applying the fair use exception may mark a new and promising solution to the longstanding controversy.

This note addresses the complex history and evolution of digital sampling within copyright law. Part I introduces the issue of digital sampling, while Part II dives deeper into the historical and legal background of the practice. Part III identifies and analyzes the decisions from the Sixth and Ninth circuits, which have been the keystone of digital sampling jurisprudence. Part IV analyzes the aftermath of the circuit split, and Part V identifies potential legislative, judicial, and industry solutions to the issue. While much is unclear about digital sampling within the United States legal system, one thing is certain: digital sampling is here to stay.

I. INTRODUCTION

In 2018, Kendrick Duckworth, better known by his stage name, Kendrick Lamar, became the first non-classical or jazz musician to win the Pulitzer Prize in Music for his album "*DAMN.*"[1] The Pulitzer Prize described Lamar's album as "a virtuosic song collection unified by its vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing the complexity of modern African-American life."[2]

The award signified not only the growing popularity of rap music, but the acceptance of a departure from traditional music production. Lamar's album was produced through a myriad of digital sampling—the process of "borrowing parts of sound recordings and the subsequent incorporations

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1 *DAMN., by Kendrick Lamar*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/kendrick-lamar (last visited Nov. 18, 2020); KENDRICK LAMAR, DAMN. (Top Dawg Entertainment 2017).

2 THE PULITZER PRIZES, *supra* note 1.

of those parts into a new recording."[3] In short, digital sampling is commonly used in music production by copying components of existing sound recordings and modifying them in various ways to creatively incorporate them into a new work.[4]

By the very nature of digital sampling, original copyright owners and new creative artists are not always in agreement about the use of copyrighted sound recordings. As such, the practice has led to a wide array of legal implications. Copyright owners find solace in the Copyright Act of 1976 ("the Copyright Act" or "the Act"), which codified much of modern copyright law.[5] However, digital sampling has been prevalent long before 1976.

The history of "creative borrowing" began decades, or even centuries, prior to the Copyright Act's implementation. As Jazz grew in popularity in the United States during the early 20th century, so did the practice of jazz musicians establishing a referential nature to their performances.[6] Jazz musicians would often integrate certain notes, sounds, melodies, or segments of another artist's music into their own performances as a way of showing respect to the genre's legends.[7] The practice became more common in a digital medium throughout the 1980's and 1990's, as digital sampling was introduced into the rock and R&B genres.[8]

Today, many of the biggest names in music have integrated digital sampling into their work, such as Jay-Z, Kanye West, and Drake.[9] With the fundamental protections afforded to musicians and artists by the Copyright Act, the trend has resulted in a vast amount of litigation.[10] As long as digital sampling has been used, courts have been conflicted over the extent of protection that should be granted to the original copyright holder. What if an artist uses only three notes from an existing sound recording? What if the artist reverses the existing sound recording and

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3 Carl A. Falstrom, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359 (1994).

4 *See id.*

5 Copyright Act of 1976, Pub. L. No. 94-553 (1976).

6 Smithsonian Jazz, *What is Jazz?*, NATIONAL MUSEUM OF AMERICAN HISTORY, https://americanhistory.si.edu/smithsonian-jazz/education/what-jazz (last visited Nov. 18, 2020).

7 *Steinski Gives a Sampling History Lesson*, NAT'L PUB. RADIO (Oct. 22, 2008, 5:50 AM), https://www.npr.org/templates/story/story.php?storyId=93844583.

8 Ben Myers, *Big Audio Dynamite: More Pioneering than the Clash?*, THE GUARDIAN (Jan. 21, 2011, 7:19 AM), https://www.theguardian.com/music/musicblog/2011/jan/20/big-audio-dynamite-clash.

9 *See, e.g.*, JAY-Z & KANYE WEST, *Otis*, in WATCH THE THRONE (Def Jam 2011); DRAKE & JAY-Z, Pound Cake / Paris Morton Music 2, in NOTHING WAS THE SAME (OVO Sound 2013).

10 *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).

increases the tempo? The possibilities of using and modifying an original recording are endless and can often lead to a new sound being unidentifiable as the original sound recording. This has established the long-contemplated question: when does digital sampling become copyright infringement?

These questions have been analyzed through various perspectives in courts across the United States.[11] Opinions have varied widely, with some considering unlicensed sampling as theft, and others promoting a fair use or *de minimis* exception.[12] There remains no clear standard for deciding a digital sampling lawsuit. There is currently no Supreme Court decision on point, and the legal landscape of digital sampling in the United States currently rests on a circuit split between the Sixth and Ninth Circuit Courts of Appeals.[13]

In *Bridgeport Music, Inc.* v. *Dimension Films*,[14] the Sixth Circuit refused to adopt a *de minimis* standard that had commonly been used in cases decided outside of the circuit, and instead applied a bright-line rule that "sampling is never accidental."[15] The Sixth Circuit's decision was widely criticized and generally not followed outside of the circuit.[16]

When the Ninth Circuit was given the chance to decide a digital sampling case in 2016, *VMG Salsoul, LLC v. Ciccone*, the court did not hesitate to depart from the Sixth Circuit's decision.[17] The Ninth Circuit also did not hesitate to directly attack the Sixth Circuit's logic, noting that the decision was "unpersuasive"[18] and "rest[ed] on a logical fallacy."[19] The court held that a *de minimis* standard should be applied in digital sampling cases, and that copying must be more than trivial to give rise to a copyright infringement claim.[20]

Despite the wide criticism of *Bridgeport*, the future of digital sampling law does not seem bound by *VMG Salsoul*. In recent decisions, courts outside of the Sixth and Ninth circuits have developed alternative standards for analyzing these cases. In 2017, the United States District

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11 *Compare Bridgeport*, 410 F.3d at 800-01 (ruling that digital sampling without a license constitutes per se copyright infringement), *with VMG Salsoul*, 824 F.3d at 883 (ruling that a *de minimis* standard must be applied in digital sampling cases).

12 *See id.*

13 *See id.*

14 *Bridgeport*, 410 F.3d at 792.

15 *Id.* at 801.

16 *See VMG Salsoul*, 824 F.3d at 886 ("[A]s a practical matter, a deep split among the federal courts already exists. Since the Sixth Circuit decided Bridgeport, almost every district court not bound by that decision has declined to apply Bridgeport's rule.").

17 *Id.* at 874.

18 *Id.*

19 *Id.* at 884.

20 *Id.* at 871.

Court for the Southern District of New York refused to cite either case as a basis for their decision in *Estate of Smith v. Cash Money Records, Inc.*[21] Instead, the court applied a standard utilizing the fair use doctrine found in 17 U.S.C. § 107.[22]

As the complexity and popularity of digital sampling grow, a bright-line rule or *de minimis* standard may not have a place in today's music industry. By examining the historical background of digital sampling, the importance and justification for the practice are clear. However, the legal background of digital sampling lawsuits demonstrates the legal system's struggle with balancing the creative benefits of the practice with copyright protection. The Sixth Circuit established a bright-line rule that made it incredibly difficult for small and unwealthy artists to sample copyrighted sound recordings.[23] The Ninth Circuit established a more forgiving approach; however, their decision has proven difficult to apply due to the varying factors behind digital sampling.[24] The Southern District of New York's decision in 2017 may suggest a new era in digital sampling jurisprudence.[25] While the solution seems unclear, there are several possibilities that appear reasonable, including amending the fair use doctrine and relevant copyright statutes, applying the fair use doctrine in digital sampling decisions, or adding an industry solution which could address the issue internally to prevent costly litigation. The expansive history of digital sampling may have finally reached a point where effective solutions can be achieved.

II. HISTORICAL AND LEGAL BACKGROUND OF DIGITAL SAMPLING IN MUSIC

A. From Referential Nature to Today's Commonplace: The History of Digital Sampling in Music

During the early 20th century, the popularity of jazz in the United States exploded in New Orleans, Louisiana.[26] Legendary artists such as Duke Ellington, Louis Armstrong and King Oliver paved the way for jazz musicians to rise to fame in an era of racial tension.[27] Up-and-coming artists strived to pay tribute to the legends that came before them and made

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21 Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017).

22 *See id.*; *see also* 17 U.S.C. § 107.

23 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800-01 (6th Cir. 2005).

24 *See VMG Salsoul*, 824 F.3d at 871.

25 *See Estate of Smith*, 253 F. Supp. 3d at 748-49.

26 Smithsonian Jazz, *supra* note 6.

27 *See id.*

it possible for African-American artists to achieve fame.[28] Jazz morphed into a genre balanced between creating a unique sound and personality, while incorporating musical "shout-outs" to the genre's predecessors.[29] This was achieved by performing certain melodies from previous musicians, or by copying well-known instrumental riffs into instrumental breaks or solo performances.[30]

As the music industry progressed into the digital realm, producers followed the referential nature of sampling from jazz. Instead of repeating sounds and melodies during live performances, producers were able to copy digital sound recordings and use them to create a new song. By copying sound recordings, producers could take a creative stance on existing sounds, and modify them through pitch, tempo, or rhythm distortions to provide the background or melody for a new song. This process became known as digital sampling.

Digital sampling is believed to have originated in Jamaica during the 1960's, when disc jockeys (DJs) used portable sound mixing systems to combine existing sounds with new recordings.[31] During the early 1980's, the rise of digital synthesizers and MIDI (Musical Instrument Digital Interface) controls allowed musicians in the United States to explore new methods of integrating original sound recordings into new productions.[32]

Throughout the 1980's and 1990's, digital sampling was introduced into the genres of rock and R&B.[33] The Beastie Boys are often accredited for introducing digital sampling to R&B, while Big Audio Dynamite is accredited for the same in rock.[34] The Beastie Boys' pioneering in R&B ultimately led to one of the earliest court cases concerning digital sampling.[35]

By the late 1990's, digital sampling was commonplace in music production. DJ Shadow, considered a pioneer in his own right of digital sampling in R&B and hip-hop, was awarded a Guinness World Record for the first album produced entirely from samples.[36] Many of the most famous artists in music today have found success with songs produced by

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28 *See id.*

29 NAT'L PUB. RADIO, *supra* note 7.

30 *Id.*

31 *See* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004).

32 *Id.*

33 Ben Myers, *Big Audio Dynamite: More Pioneering than the Clash?*, THE GUARDIAN (Jan. 21, 2011, 7:19 AM), https://www.theguardian.com/music/musicblog/2011/jan/20/big-audio-dynamite-clash.

34 *Id.*

35 *See Newton*, 388 F.3d at 1189.

36 *First Album Made Completely From Samples*, GUINNESS WORLD RECORDS, https://www.guinnessworldrecords.com/world-records/first-album-made-completely-from-samples (last visited Nov. 18, 2020).

digital sampling, including Jay Z, Kanye West and Drake.[37] In 2018, Kendrick Lamar was even awarded the Pulitzer Prize in Music for his sample-heavy album, *DAMN*.[38]

Lamar's award showcased the growing acceptance of digital sampling. Lamar was the first non-classical or jazz musician to win the award[39], and his album was produced with dozens of samples including sound recordings by Bruno Mars, U2, and even news broadcasts.[40] As the music industry has evolved, and digital sampling has been integrated into all aspects of sound recording and production, courts have also evolved and differed on how to handle the lawsuits that have followed.

B. The "Blurred Lines" of Digital Sampling and Copyright Law

By definition, digital sampling has obvious legal implications. Copyright law as it exists within the United States was largely codified by the Copyright Act of 1976. ""Copyright Act grants intellectual property protections and exclusive rights to copyright holders from the moment their work is fixated in a tangible medium.[41]

Copyright protections for tangible media include sound recordings, which the Act defines 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."[42] The definition therefore provides protection to the fixed sounds within a musical recording, in addition to other recorded sounds such as podcasts or voice memos.[43]

From the moment a musician records their music into a tangible sound recording, the recording is protected under the relevant provisions of the Copyright Act. As such, original owners of these works do not need to register their work with the U.S. Copyright Office in order to be afforded copyright protection.[44] However, registration is a prerequisite for filing a

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37 *See* JAY-Z & WEST, *supra* note 9; DRAKE & JAY-Z, *supra* note 9.

38 *DAMN., by Kendrick Lamar*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/kendrick-lamar (last visited Nov. 18, 2020).

39 *Id.*

40 *See* Carl Lamarre, *Listen to the Samples from Kendrick Lamar's New Album 'DAMN.'*, BILLBOARD (Apr. 14, 2017), https://www.billboard.com/music/rb-hip-hop/kendrick-lamar-damn-samples-7760393/.

41 17 U.S.C. § 102.

42 17 U.S.C. § 101.

43 *See id.*

44 *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010).

lawsuit for infringement in federal court, because copyright law is exclusively federal.[45]

The owners of a copyrighted sound recording are granted exclusive rights under the Act.[46] Title 17 of the United States Code provides the framework for copyright protections and rights.[47] 17 U.S.C. § 106 contains the general exclusive rights of copyright owners, while section 114 limits and specifies these exclusive rights for owners of a copyright in a sound recording.[48] The basis for exclusive rights of an owner of copyright in a sound recording are listed by section 106: (1) reproducing the copyrighted work in copies or phonorecords, (2) preparing derivative works based upon the copyrighted work, (3) distributing copies or phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending, and (4) performing the copyrighted work publicly.[49] Section 114 limits these rights further for owners of a copyright in a sound recording, including limiting the right to prepare a derivative work to only where the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.[50]

Further, the exclusive right to transfer ownership granted by section 106 permits owners of a copyright in a sound recording to license portions or the entirety of their sound recording to other artists seeking to sample their work.[51] This was common practice in the music industry when producers wanted to use sounds which existed in another copyrighted sound recording. However, the growth of digital sampling in the 1980's and 1990's turned digital sampling into a more complex practice, which borrowed only small portions of sound recordings or modified an existing sound recording to the extent where it was barely recognizable. As producers became willing to sample existing sound recordings without obtaining a license, lawsuits soon followed.[52]

The practice of digital sampling commonly includes using copyrighted sound recordings, and then adjusting the pitch, tempo, rhythm, or order of notes, and integrating the modified sound into a new recording.[53] Thus, the common potential for copyright infringement comes from the exclusive right of an original copyright owner to prepare derivate

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45 *Id.*
46 Copyright Act of 1976, Pub. L. No. 94-553 (1976).
47 *See* 17 U.S.C. §§ 101-122.
48 *See* 17 U.S.C. §§ 106, 114.
49 *See* 17 U.S.C. §§ 106.
50 *See* 17 U.S.C. § 114.
51 *See* 17 U.S.C. § 106.
52 *See generally* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004).
53 *See* Falstrom, *supra* note 3.

works.[54] Courts have ultimately struggled to determine what constitutes copyright infringement through digital sampling, and whether the borrowing of original works to create a new sound recording which is not substantially similar to the original satisfies the requirements of copyright infringement.[55]

Given the nature of the music industry, many lawsuits end in a settlement, which was the case with one of the more famous and recent digital sampling offenses, where Robin Thicke reached a $5 million settlement with the estate of Marvin Gaye over Thicke's use of samples in his hit song "Blurred Lines."[56] However, the first case concerning digital sampling to proceed to trial was *Grand Upright Music Ltd. v. Warner Bros. Records, Inc*.[57] The United States District Court for the Southern District of New York decided *Grand Upright* in 1991, during the exponential growth of the digital sampling practice.[58] The decisions' opening sentence lived on throughout digital sampling cases thereafter; "[t]hou shall not steal."[59] The court's introductory statement made it clear how the first major decision would proceed.

The *Grand Upright* case arose from the use of three words and a portion of a sound recording owned by the plaintiffs.[60] The defendants used the plaintiff's sound recording to produce and release a new rap song without first obtaining a license.[61] The defendant's argued that digital sampling and borrowing sound recordings was custom practice within the industry, and therefore unlicensed digital sampling should not be copyright infringement.[62] The court rejected the argument, calling the defendant's' actions a "callous disregard for the law and for the rights of others."[63]

Grand Upright established the clear-cut rule that unlicensed sampling, in any capacity, is unlawful and therefore copyright infringement.[64] While

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54 *See* 17 U.S.C. §§ 106, 114.

55 *See generally* Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 138-41 (2nd Cir. 1998); Newton, 388 F.3d at 1192; Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

56 Althea Legaspi, *'Blurred Lines' Copyright Suit Against Robin Thicke, Pharrell Ends in $5M Judgment*, ROLLING STONE (Dec. 13, 2018), https://www.rollingstone.com/music/music-news/robin-thicke-pharrell-williams-blurred-lines-copyright-suit-final-5-million-dollar-judgment-768508/.

57 *Grand Upright Music*, 780 F. Supp. at 183.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at 185.

64 *See id.* at 183.

the decision from the Southern District of New York was the first major court decision on digital sampling and copyright infringement, it did not take long for other courts to depart from that logic. In 1993, the United States District Court for the District of New Jersey refused to apply a bright line rule that sampling is per se unlawful in *Jarvis v. A & M Records*.[65] Instead, the court ruled that in cases involving fragmented literal similarity, courts should apply a substantial similarity test.[66]

Fragmented literal similarity occurs when one party directly copies portions of a copyrighted sound recording and incorporates them into the new work.[67] In *Jarvis,* defendants directly copied several words and riffs from the plaintiff's copyrighted sound recording and integrated them into a new song.[68] While this conduct was direct copying, the court refused to rule that the unlicensed use of the plaintiff's sound recording was per se unlawful.[69] Instead, the court denied the defendant's' motion for summary judgment because the court needed to decide whether the borrowed portions were significant to the plaintiff's song, and whether the defendant's' work was substantially similar to the plaintiff's.[70]

The substantial similarity test has found more acceptance than the strict rule established in *Grand Upright*. The Southern District of New York eventually departed from their holding in *Grand Upright* in 2001, and applied a substantial similarity test as well.[71] The first major case that involved digital sampling to reach a Circuit Court of Appeals was in 2004, when the Ninth Circuit decided *Newton v. Diamond*.[72] In *Newton*, James Newton composed the song "Choir," with the sound recording rights being owned by ECM Records.[73] Newton retained the rights to the underlying composition, which is treated as a separate work under copyright law.[74] In 1992, the Beastie Boys obtained a license to use the sound recording of "Choir" as a sample from ECM Records, but did not obtain a license from Newton for the underlying composition.[75] While the case arose from the unlicensed use of a copyrighted composition, the court's reasoning paved the way for later sound recording disputes.

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65 Jarvis v. A & M Records, 827 F.Supp. 282, 289-91 (D. N.J. 1993).
66 *Id.*
67 *See id.*
68 *Id.* at 286.
69 *Id.* at 292.
70 *Id.*
71 *See* Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001).
72 Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004).
73 *Id.* at 1191.
74 *Id.*
75 *Id.*

Speaking generally, the Ninth Circuit clearly stated that if sampling in any form is *de minimis*, it is not actionable.[76] The ruling held that while there may in fact be copying, the copying is not infringement unless it is substantial.[77] The decision in *Newton* paved the way for the Ninth Circuit's later decision which established the current circuit split on digital sampling of copyrighted sound recordings.[78]

Ultimately, in order to prevail on a copyright infringement claim, a plaintiff must be able to prove that the defendant violated any of the exclusive rights granted to the copyright owner by sections 106 through 122 of Title 17.[79] The action will be brought civilly, and any court with jurisdiction to hear a civil case arising under Title 17 may grant several remedies to the original copyright owner.[80] These include injunctive relief,[81] a potential for impounding and destroying the unlawfully copied material,[82] damages and profits,[83] and costs and attorney's fees.[84] In certain circumstances, copyright infringement may also be a criminal offense.[85]

For infringement of a copyrighted sound recording, a plaintiff must be able to prove that they owned a valid copyright in the sound recording,[86] and that the defendant violated one of the exclusive rights granted to the copyright owner through Sections 106 and 114.[87] While that much is clear in a digital sampling lawsuit, the inconsistencies in court interpretation have created an almost unpredictable outcome. The uncertainty within digital sampling jurisprudence continued into the mid-2000's and after, as the Sixth Circuit announced the *Bridgeport* decision in 2005.[88]

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76 *Id.* at 1192.
77 *Id.*
78 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).
79 *See* 17 U.S.C. §§ 106-122.
80 *See* 17 U.S.C. §§ 501-513.
81 17 U.S.C. § 502.
82 17 U.S.C. § 503.
83 17 U.S.C. § 504.
84 17 U.S.C. § 505.
85 17 U.S.C. § 506.
86 17 U.S.C. § 501.
87 *See* 17 U.S.C. §§ 106, 114.
88 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

III. CREATING A CIRCUIT SPLIT: THE AFTERMATH OF *BRIDGEPORT* AND *VMG SALSOUL*

A. No License? Don't Sample: The Sixth Circuit's Bright-line Rule in Bridgeport

Before 2005, when the Sixth Circuit decided *Bridgeport Music, Inc. v. Dimension Films*, courts were divided on how to treat digital sampling cases. Between *Grand Upright*'s decision in 1991 and 2005, district courts cycled through applying *de minimis* standards,[89] substantial similarity tests,[90] and fragmented literal similarity tests.[91] When the Sixth Circuit had their chance to clear the waters on the issue, they did not hesitate to establish a strong and strict bright-line rule in an attempt to settle the discussion on digital sampling analysis permanently. Not only did this attempt fall short, it also led to even more dispute on how to handle these cases.[92]

In 2001, Bridgeport Music, Inc. filed nearly 500 claims against approximately 800 defendants for copyright infringement relating to unlicensed digital sampling used in various new songs.[93] One of these claims was brought against No Limit Films in conjunction with Priority Records.[94] No Limit released a movie titled *I Got the Hook Up* along with an associated soundtrack in 1998.[95] The soundtrack contained the song "100 Miles," which was authorized to use a sample of the sound recording "Get Off" by George Clinton, Jr. and the Funkadelics.[96] Bridgeport owned the composition and sound recording rights to "Get Off" jointly with Westbound Records.[97]

The sample from "Get Off" used in "100 Miles" was a three-note guitar riff, which was shortened to only two notes, lowered in pitch, and extended to last for about seven seconds.[98] This process of modifying and looping the guitar riff from "Get Off" was repeated five times throughout "100 Miles."[99] There was no doubt as to whether "100 Miles" was

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89 *See* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004).
90 *See* Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001).
91 *See* Jarvis v. A & M Records, 827 F.Supp. 282 (D. N.J. 1993).
92 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).
93 *See Bridgeport*, 410 F.3d at 795.
94 *Id.*
95 *Id.* at 796.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*

authorized to use the sample, or whether Bridgeport and Westbound Records had ownership rights to the sample.[100]

The issue arose when No Limit used the song "100 Miles" in their film, *I Got the Hook Up*.[101] No Limit was authorized to use "100 Miles" in their film, however, they did not seek authorization to use the sample contained within "100 Miles" owned by Bridgeport and Westbound.[102] Bridgeport's claims were ultimately dismissed, due to Release and Agreement contracts which barred Bridgeport from seeking judgment.[103] Westbound's claims were analyzed to see whether No Limit's use of "100 Miles" rose to the standard of copyright infringement.[104]

The district court applied a *de minimis* standard and ruled in favor of No Limit, holding that the "Get Off" sample used in "100 Miles" was so distorted and altered that it did "not rise to the level of a legally cognizable appropriation."[105] The *de minimis* standard is best described as copying that has occurred at such a minimal extent as to fall below the qualitative threshold of being substantially similar.[106] Based on the various alterations that occurred between the original "Get Off" sound and the use of the sample in "100 Miles", the district court found that such use was *de minimis*.[107] The district court therefore granted summary judgment in favor of No Limit Films.[108]

The Sixth Circuit, however, did not agree.[109] The court's analysis begins with a summary of their conclusion, that "the music industry, as well as the courts, are best served if something approximating a bright-line test can be established."[110] The court did not fail to establish such a rule; citing the ease of copyright enforcement and the clear language of copyright statutes, the Sixth Circuit decided that the solution was "[g]et a license or do not sample."[111] This decision was supported by a few understandable attributes within the music industry.[112] First, the court noted that sampling is not accidental, and if a musician samples, they

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100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 797.
105 *Id.*
106 David S. Blessing, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2408 (2004).
107 *Bridgeport*, 410 F.3d at 797.
108 *Id.*
109 *Id.* at 798.
110 *Id.* at 798-99.
111 *Id.* at 801.
112 *See id.* at 801-04.

already know and are aware of who owns that recording.[113] Therefore, it would not be hard to seek authorization. Second, sound recordings are valuable, and prices can easily be controlled by market activity itself.[114] Third, the industry and artists are knowledgeable and capable of establishing a schedule of license fees, and to make them readily available for interested artists.[115] Finally, the court notes that it is cheaper and easier to license than to litigate.[116]

The Sixth Circuit's reasoning, in addition to their self-admitted literal reading of the copyright statutes,[117] were meant to justify a bright-line rule of either getting a license, or avoiding sampling altogether. While the court claimed that this decision would not stifle creativity[118], their own reasoning failed to address the alternative outcomes of such a rule. The court was correct in noting that sampling is not accidental. Many artists want to pay tribute to music's legends or use samples to create a new and unique sound. The court is therefore not wrong that when an artist samples, they know where, and who, that sample is coming from. However, this does not mean it is easy or efficient to seek out the artist or record label that owns the copyright. Just because a small artist wants to use a sample and knows who owns the sample does not mean that they will succeed in contacting them. The discrepancies between rising artists' and established artists' access to contacting the appropriate parties will make it difficult for small artists to have access to licensed samples. While authorization and licensing should be required, it is not equally as easy among various levels of talent and artists, and for that reason, could stifle creativity.

The two points made in the analysis regarding fee schedules and market prices are also easier said than done. Sound recordings can be sampled in movies, new songs, commercials, and anything else that is a new sound recording. Each of these types of media will also vary in the popularity of the artist, the amount of people reached, the amount of profit made, or the purpose of the sample's use. Not only would it be incredibly difficult to establish a clear and concise fee-schedule, it would also further the disparities of access between smaller and more popular artists. Smaller artists are not going to be able to afford as much as well-established artists, and larger artists would be capable of buying up copyright ownership rights if prices were set low enough for small artists.

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113 *Id.* at 801.
114 *Id.*
115 *Id.* at 804.
116 *Id.* at 802.
117 *Id.* at 805 (noting that the court analyzed copyright law as what Congress intended in writing the copyright statutes, and that the music industry could go back to Congress for clarification if it does not like it).
118 *See id.* at 804.

Following the *Bridgeport* decision, legal scholars and courts were quick to question the Sixth Circuit's opinion. In an article released several months after the *Bridgeport* decision, the decision was described as "problematic and potentially harmful,"[119] and that it "contravene[d] the purpose of copyright law."[120] The article continues to note that the Sixth Circuit expressly declined to apply existing precedent when establishing their bright-line rule, due to the *de minimis* standard being consistently applied in copyright cases generally.[121] In fact, *Bridgeport* and *Grand Upright* became two clear exceptions from the application of the *de minimis* standard, and were regularly rejected by other courts.[122]

Another source notes how the *Bridgeport* decision demonstrated that "current copyright law and principles cannot fairly and effectively resolve the complications introduced by the technology of digital sampling."[123] The Sixth Circuit may even have been unable to understand previous precedent and the different tests and standards applied throughout early sampling cases.[124] This is shown through their refusal to adopt any standard or test, and instead establish a per se rule for infringement without relying on precedent or thorough analysis.[125] The article further notes that while the Sixth Circuit claimed that this rule would help reduce litigation, the outcome could actually be the opposite.[126] The court even noted in their decision that there would be the need to review the facts and issues on a case-by-case basis, which seems contradictory to their claims that litigation will be reduced after their decision.[127]

These concerns were correct. After *Bridgeport*, many courts struggled to adopt and apply a per se rule against digital sampling copyright infringement.[128] The Ninth Circuit's opinion in *VMG Salsoul*[129] clearly identified the aftermath and legacy of the *Bridgeport* decision.[130] The Ninth Circuit noted that outside of the Sixth Circuit and the district court's

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119 John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 210 *(2005)*.

120 *See* Schietinger, *supra* note 119 at 210.

121 *See* Schietinger, *supra* note 119 at 230.

122 *See* Schietinger, *supra* note 119 at 240.

123 *See* 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, 520 (2006).

124 *See* Ponte, *supra* note 123 at 521.

125 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005) (noting that the analysis did not rest on precedent).

126 *See Ponte*, *supra* note 123 at 518.

127 *See Ponte*, *supra* note 123 at 545.

128 *See infra* note 133.

129 *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).

130 *See infra* note 135.

bound by that precedent, they were "aware of no case that has held that the de minimis doctrine does not apply."[131] The court outlined their view on the de minimis standard years earlier in *Newton*, noting that the rule "applies throughout the law of copyright, including cases of music sampling."[132] Courts outside of the Sixth Circuit agreed, and many refused to apply the *Bridgeport* precedent.[133]

The Sixth Circuit's goal to reduce litigation and create a clear and consistent method of deciding digital sampling cases was largely unsuccessful. As the Ninth Circuit later described, the decision led to an increasingly difficult analysis, while giving copyright owners more of a reason to bring an action even after an extremely slight instance of sampling.[134] The per se rule enabled copyright holders to seek a judgment under the bright-line rule regardless of the extent of use, modification, alteration, or purpose behind the digital sampling. There would be no consideration of whether the new sound recording even resembled the original, or whether the new recording altered the original sample so much as to not even satisfy well-established infringement standards. Courts, including the Ninth Circuit, did not hesitate to note their criticism of the decision.[135] When the Ninth Circuit had the opportunity to extend their decision in *Newton* to sound recordings during the *VMG Salsoul* decision, they did not hesitate.

B. The Ninth Circuit Splits in "Well Charted Territory"[136]

Between the 2005 *Bridgeport* decision and the 2016 *VMG Salsoul* decision, the Ninth Circuit noted that they found no court decision outside of the Sixth Circuit which applied *Bridgeport*'s precedent.[137] The application of the *de minimis* standard persisted despite the Sixth Circuit's attempt to establish a bright-line rule against digital sampling. Courts found it important to consider whether a new sound recording which used digital sampling resembled the original sound recording. If a new song differed so much from the original sample to the point where no one would notice, what protections should a copyright holder retain? What is the purpose of granting any protections when the protected work is no longer recognizable? The Ninth Circuit did not hesitate to confront these issues and denounce the *Bridgeport* decision.

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131 *VMG Salsoul*, 824 F.3d at 881.
132 Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004).
133 *VMG Salsoul*, 824 F.3d at 886 (citing several district court decisions that rejected the *Bridgeport* rule).
134 *See id.*
135 *See supra* note 135.
136 *VMG Salsoul*, 824 F.3d at 886.
137 *See id.*

In 2016, the Ninth Circuit decided *VMG Salsoul, LLC v. Ciccone*.[138] The case arose from events during the 1980's, when Shep Pettibone recorded the song "Love Break," with VMG Salsoul owning the copyright.[139] In 1990, Pettibone later partnered with Madonna Ciccone, known professionally as Madonna, to produce the hit-song "Vogue."[140] VMG Salsoul alleged that Pettibone sampled a certain horn segment from "Love Break" and incorporated it into Madonna's "Vogue."[141] The segment, known as a horn-hit, appeared in "Love Break" in two forms: a single hit and a double hit.[142] Both types of horn hits contained the same four notes, and, combined, appeared 50 times throughout "Love Break."[143]

In the song "Vogue," the same notes were used for a horn-hit, which also occurred in both single and double hits, were raised in pitch by a half-step, and were played in a different pattern alternating between single and double hits.[144] There were two separate recorded versions of "Vogue," and they both used the horn-hits less than six times throughout the song.[145] In addition, there were many different and unique instruments playing during the horn-hit sections.[146]

VMG Salsoul brought suit against Madonna and Pettibone, alleging that the modified version of the sample from "Love Break" was direct copying, and therefore copyright infringement based on the *Bridgeport* precedent.[147] The district court rejected this argument, holding that the use of the horn hit was "de minimis or trivial."[148] When VMG Salsoul appealed, the Ninth Circuit was prepared to denounce *Bridgeport* and return to the "well charted territory" of copyright law.[149]

In affirming the district court's decision, the Ninth Circuit immediately drew upon their existing precedent established in *Newton v. Diamond*, and extended the ruling to sound recordings.[150] The court noted that proof of actual copying is not enough to succeed in a copyright infringement case, unlike the precedent established in *Bridgeport*.[151] The court relied on precedent from outside of the two circuits, where even in

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138 *Id.* at 871.
139 *Id.* at 875.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* at 876.
146 *Id.*
147 *See id.* at 880.
148 *Id.* at 876.
149 *Id.* at 886.
150 *See supra* notes 72-78 and accompanying text.
151 *VMG Salsoul*, 824 F.3d at 877.

the presence of factual copying, no legal consequences will result unless that copying is substantial.[152] This principle is referred to by courts, including the Ninth Circuit, as *de minimis*.[153] The court notes that in order for the plaintiff to establish an infringement claim, the copying must be greater than the *de minimis* standard.[154]

The Ninth Circuit's earlier decision in *Newton* was not the decision which established the circuit split on digital sampling between the Sixth and Ninth Circuits. In *Newton*, the court held that the *de minimis* standard applied routinely throughout copyright law, but the decision was based solely on whether the standard should apply for copying musical compositions.[155] Prior to *VMG Salsoul*, the Ninth Circuit did not establish a standard for sound recordings and digital sampling. The *Newton* decision was therefore extended to digital sampling in *VMG Salsoul*, noting that copying is considered *de minimis* "only if it is so meager and fragmentary that the average audience would not recognize the appropriation."[156] When it comes to sound recordings and digital sampling, the court notes that "what matters is how the musicians *played* the notes, that is, how their rendition distinguishes the recording from a generic rendition of the same composition."[157] Put simply, courts should compare the allegedly copied new work to a direct copy of the original sound recording.[158]

Ultimately, the Ninth Circuit decided that the sound recording of "Vogue" did not exceed the *de minimis* standard, and that a reasonable juror would not be able to recognize the original sound recording in the new song.[159] However, the Ninth Circuit did not stop their opinion there. They took every opportunity to criticize *Bridgeport* and make their complete disagreement with that decision known. The court described the *Bridgeport* decision as "rest[ing] on a logical fallacy."[160] The Ninth Circuit compared the Sixth Circuit's reasoning to the proposition that "if it has rained, then the grass is not dry,"[161] which does not logically suggest that "if it has not rained, then the grass is dry."[162]

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152 *Id.*
153 *Id.*
154 *Id.*
155 *See* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004).
156 *VMG Salsoul*, 824 F.3d at 878 (quoting Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986)).
157 *Id.* at 879.
158 *See id.*
159 *Id.* at 880.
160 *Id.* at 884 (quoting 4 Melvile B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A][2][b], at 13-61).
161 *Id.* at 885.
162 *Id.*

The Ninth Circuit proceeded to list numerous occasions where the *Bridgeport* decision was criticized by scholars and rejected by courts.[163] The strong opinion issued by Circuit Judge Graber summarized the contempt of the *Bridgeport* precedent by the legal profession. However, the Ninth Circuit's opinion and rule that was clearly supported by other precedent did not lead to a final outlook on digital sampling cases. Absent a decision from the Supreme Court, courts outside of the Sixth and Ninth circuits remain free to choose whether to follow one of the existing rules. Currently, there are no cases lined up to advance to the Supreme Court, and the Court did not hear appeals to either of these cases. The aftermath of *Bridgeport* and *VMG Salsoul* still extends to cases decided outside of those circuits and is still a matter of discussion when recommending possible solutions to the digital sampling problem.

IV. THE UNCLEAR PATH AHEAD: INCONSISTENCIES AFTER *VMG SALSOUL*

After *VMG Salsoul*, scholars seemed hopeful that a digital sampling case may finally reach the Supreme Court for clear guidance on the issue. Those hopes ultimately did not come to fruition. Instead, courts outside of the Sixth and Ninth circuits were left to decide how to proceed with digital sampling cases, and whether to apply the precedent of either. The result was a new era in digital sampling jurisprudence, and new possibilities to decide these cases.

Shortly after the *VMG Salsoul* decision, the District Court for the Southern District of New York heard *Estate of Smith v. Cash Money Records, Inc*.[164] This court already had digital sampling precedent of its own resulting from the *Grand Upright*[165] decision in 1991 and the *Williams v. Broadus*[166] decision in 2001. The court's per se rule in *Grand Upright* and the substantial similarity test of *Williams v. Broadus* were both thrown out for a new rule.[167] The new rule was also not borrowed from either the *VMG Salsoul* or *Bridgeport* decisions.[168] Instead, the court applied the fair use doctrine as a defense to digital sampling.[169]

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163 *See id.* at 886.
164 Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737 (S.D.N.Y. 2017).
165 Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).
166 Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004).
167 *See Estate of Smith*, 253 F. Supp. 3d 737.
168 *See id.*
169 *See id.*

In the case, the estate of Jimmy Smith brought suit against Cash Money Records over the release of a song by the artist Drake.[170] On the album, there is an approximately 35-second intro to the song "Pound Cake" which features a sample of a Jimmy Smith spoken-word recording.[171] Almost all of the original recording reappeared in the new song, with the exception of a few deleted or modified words.[172] With such similarity between the original and new sound recordings, a *de minimis* standard or substantial similarity test would likely lead to a judgment in favor of the original copyright owner. However, the court took a different approach. Instead of relying on *VMG Salsoul* or *Bridgeport*, the court here decided to avoid citing either case as precedent, and instead applied a fair use exception.[173]

In applying the fair use doctrine, the Southern District of New York examined four factors outlined in 17 U.S.C. § 107 to decide whether actual copying can be excused from infringement.[174] First, the court examined the purpose and character of the use of the sample.[175] When a new work which incorporates a sample is transformative, the fair use doctrine may be an exception to infringement.[176] Second, the court analyzed the nature of the copyrighted work to decide whether the work was more expressive and creative, or factual and informational.[177] Work that is expressive and creative should be afforded more copyright protection than factual or informational work.[178] Third, the court considered the amount and substantiality of the portion used.[179] The length of the copied portion compared to the length of the entire original recording is not necessarily important, but rather whether the length copied was needed to achieve the new work's transformative purpose.[180] Finally, the court analyzed the effect of the new use on the potential market for or value of the copyrighted work. If a new work has no negative impact to the potential market for the original work or its value, the fair use doctrine may provide an exception for infringement.[181] Ultimately, the court found that the defendant's inclusion of the copied portion from the original sound recording fell

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170 *Id.* at 742.
171 *Id.* at 743.
172 *Id.*
173 *See id.* at 737.
174 *Id.* at 748; *see also* 17 U.S.C. § 107.
175 *Id.* at 749.
176 *Id.*
177 *Id.* at 751.
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.* at 752.

within the fair use exception and thus did not infringe on the copyright owner's rights.[182]

In 2020, the Fifth Circuit had a chance to comment on the digital sampling issue in *Batiste v. Lewis*.[183] The case arose from a suit brought by a local jazz musician against the famous hip-hop duo Macklemore and Ryan Lewis.[184] Although the court granted summary judgment in favor of the defendants for the plaintiff's failure to prove actual copying,[185] the court was still able to add criticism toward *Bridgeport*. The court described *Bridgeport*'s rule as "widely criticized"[186] and further noted that a substantial similarity analysis is necessary in digital sampling cases, despite the Sixth Circuit's bright-line rule.[187] Other circuits, such as the Eleventh Circuit, have followed their own precedent through applying substantial similarity tests.[188]

With the wide array of decisions and analyses on digital sampling after *VMG Salsoul*, it is clear that neither case within the circuit split accomplished the goal of establishing a long-standing rule. Legal scholars and courts continue to offer new solutions, insights, and ideas into the realm of digital sampling jurisprudence. With ideas ranging from legislative action to expanding existing doctrines, the future of digital sampling remains unclear.

V. EMERGING SOLUTIONS FOR DIGITAL SAMPLING: THE RISE OF FAIR USE AND THE MODERN MUSIC INDUSTRY

As technology progresses and the music industry becomes increasingly production-focused, the practice of digital sampling seems here to stay. This does not mean that digital sampling is necessarily detrimental to the music industry or copyright law. Digital sampling has ushered in a new era in music creativity, promoted the rise of new genres, and has even been shown to have positive impacts in the music market. However, until courts are able to consistently analyze digital sampling lawsuits, or legislative action is taken, copyright owners and digital sampling artists alike are left worse off.

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182 *Id.*
183 *See generally* Batiste v. Lewis, 976 F.3d 493 (5th Cir. 2020).
184 *Id.* at 499.
185 *Id.* at 509.
186 *Id.* at 506.
187 *Id.* at 502.
188 *See* Saregama India Ltd. v. Mosley, 687 F.Supp.2d 1325 (S.D. Fla. 2009) (Affirmed by 11th Cir.).

A. Possible Legislative Action: Amending the Copyright Statutes

Dating back to the earliest digital sampling cases, such as *Grand Upright*, many scholars have called upon legislative action to standardize digital sampling law. This concept isn't an outlandish one; most of copyright law stems from the statutes set forth by the Copyright Act of 1976.[189] The history of digital sampling began taking off throughout the 1980's and 1990's, and therefore was not much of a concern to lawmakers during the passage of the Act. Yet after years of digital sampling lawsuits and legal commentary, lawmakers have failed to amend the copyright statutes or add any laws regarding digital sampling. Some possible legislative solutions have been suggested in light of the more recent history of digital sampling cases.

A potential solution would be to amend the copyright statutes and add a section specifically addressing digital sampling of sound recordings. This could either be done by amending 17 U.S.C. § 114 (Exclusive Rights in Sound Recordings), or by adding an additional section covering digital sampling of sound recordings. In section 114, the exclusive rights of a copyright owner granted in section 106 are limited for sound recordings. Section 114 states "the exclusive rights of the owner of a copyright in a sound recording. . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate . . . those in the copyrighted sound recording."[190] This section could be amended to address digital sampling as well, and establish a standard for which the exclusive rights of the original copyright holder do not apply. For example, the section could add that copying a portion of a copyrighted sound recording for use in digital sampling is permissible under certain circumstances only, such as for the creation of another sound recording in which the original sound recording is not readily identifiable. A standard such as this would create a statutory *de minimis* or substantial similarity guideline and would help guide courts and create consistency in judicial analyses.

Another legislative solution which has gained traction over recent years is to establish a compulsory licensing system in the digital sampling market. After the passage of the Music Modernization Act in 2018,[191] Congress demonstrated a willingness to modify copyright law after decades of stability. The passage of the Act gave scholars some hope that Congress would also address the long-standing problem of digital

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189 Copyright Act of 1976, Pub. L. No. 94-553 (1976).
190 17 U.S.C. § 114.
191 Music Modernization Act, Pub. L. No. 115-264 (2018).

sampling. Compulsory licensing became a highly discussed solution, taking the idea from the copyright law's treatment of cover songs.[192]

A compulsory licensing system allows "certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty."[193] The general basis of such a system, however, is that artists can use copyrighted material after meeting the procedural requirements contained within 17 U.S.C. § 115.[194] Compulsory licensing is traditionally used by cover artists, where cover artists are permitted to perform the original work of a copyright owner without first obtaining the owner's permission.[195] While the cover artist is empowered with the right to perform a copyrighted work, the original owner is entitled to statutory royalty payments based on the cover artist's distribution of the work.[196] The benefits of such a system are described as mutual, where new artists are able to promote creativity and popularity, while old artists can receive royalties and often a renewed popularity of their original work.[197]

In digital sampling, such a system may be more complex than with cover songs. However, modern technology may provide support. Digital streaming, blockchain, and licensing databases make it easier to keep track of the success of new songs.[198] A database could be created where new artists can upload their song information, including any samples used, and copyright owners would be notified. While copyright owners would not have an option of declining the license, they would be able to know in advance that their work was being used in a digital sample. From there, any digital streams, radio plays, or album sales can be monitored using advanced technology and tracked within the database. Under the compulsory licensing system, the statutory royalty fee will then be tracked and charged to the sampling artist. This solution would avoid any surprises, and likely reduce litigation over unlicensed sampling.

However, a compulsory licensing system has its downsides as well. First, original copyright holders would not be able to decline use of a digital sample. For artists that seek to maintain their originality and purpose of their work, this may be unfavorable. In addition, the current landscape of compulsory licensing for cover songs is often controlled by the media providers which help artists complete the licensing

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192 *See* 17 U.S.C. § 115.
193 *License*, BLACK'S LAW DICTIONARY (10th ed. 2014).
194 17 U.S.C. § 115.
195 *See id.*
196 *See id.*
197 *See* Christopher R. Sabbagh, *Envisioning a Compulsory-Licensing System for Digital Samples Through Emergent Technologies*, 69 DUKE L.J. 231, 235 (2019).
198 *Id.* at 255.

requirements.[199] Artists may not be well aware of the licensing system and requirements, and therefore media providers, such as YouTube, have assisted in the licensing process.[200] Such a problem with a lack of knowledge and access to the licensing system would likely arise in digital sampling as well, and it is uncertain whether media providers that handle digitally sampled sound recordings would be up for such a task.

While there have also been calls for the music industry itself to step up and establish such a licensing system or database, progress has been slow. The music industry and licensing system are incredibly profit-driven, and large-scale record labels and artists have been able to control the market of legally licensing sound recordings. Ultimately, smaller artists often sample illegally, and unless their work becomes popular, their creativity is often unpunished. These discrepancies show the inefficiencies in the current market, the loss of potential creativity, and the loss of value that could be gained given a more standardized and consistent legal solution.

Fortunately, in 2018, Congress passed the Music Modernization Act,[201] and with it the Mechanical Licensing Collective ("MLC").[202] The MLC was intended to simplify digital audio licensing for self-administered artists, enabling the artists to recover royalties when their copyrighted work is used by others.[203] While the MLC is a step in the right direction for efficient and lawful digital sampling, there has been some criticism with the program. For example, there have been reports of different registrants claiming ownership of a work, combined with a lack of knowledge among smaller artists.[204]

While compulsory and mechanical licensing have grown in popularity among scholars and lawmakers alike, there may be another solution from a federal court in New York.

B. The Middle Ground: Pairing De Minimis Analysis and Fair Use Exceptions

Without a decision from the Supreme Court on point, it is up to courts to decide how they will approach digital sampling cases. The Sixth and Ninth circuits have made their views clear, while sparking debate outside of their circuits. The Southern District of New York may have pointed to

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199 *Id.* at 251.
200 *Id.*
201 Music Modernization Act, Pub. L. No. 115-264 (2018).
202 *See generally* Stephen Carlisle, *The Ins and Outs, the Good and the Bad, of the Mechanical Licensing Collective*, NOVA SOUTHEASTERN UNIVERSITY, http://copyright.nova.edu/mechanical-licensing-collective/ (May 13, 2021).
203 *See id.*
204 *See id.*

an appropriate solution going forward in universally applying the fair use doctrine and thus helping to promote creativity and existing copyright principles.[205]

The fair use doctrine has been described as a "middle ground"[206] between the *Bridgeport* and *VMG Salsoul* decisions. Digital sampling has been compared to artwork appropriation, a much longer standing practice, with more understood judicial precedent.[207] Fair use has been consistently applied in artwork appropriation, as this type of sampling is understood to be a form of respect and tribute to the legends of art. While the history of digital sampling, and the legal history behind it, are not as established, the two art forms share the same reasoning. Sampling in music grew out of an appreciation for music legends, starting from tributes in jazz performances and moving into other genres. The purpose has been to use existing work, create a new transformative form of art, and promote creativity. The idea of transformative work is the basis of the fair use defense and should permit a universal application of the concept in digital sampling.

While applying fair use in digital sampling can also be accomplished through legislative action such as amending 17 U.S.C. § 107, it is more likely that courts can establish a standard of their own. This is exactly how the Southern District of New York approached fair use in *Estate of Smith*.[208] The court relied on the existing statutory language from section 107 to achieve a fair use standard in digital sampling.[209]

From the Southern District of New York's opinion, there is a clear and understandable way to apply fair use to digital sampling cases. The court outlined the four statutory factors and applied them to the facts of the case.[210] The first factor is to determine the purpose and character of sample as compared to the original work.[211] If a sample is used to create a new work in an entirely new genre with an entirely different purpose and audience, the fair use exception should lean toward permitting the use. In this case, the work is described as achieving the transformative effect necessary in applying the fair use exception.[212] On the contrary, if a sample

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205 Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017).

206 *See generally* Tyler B. Burns, *And They Sayin' it's Because of The Internet: Applying the De Minimis Exception to Digital Sound Sampling in the Wake of VMG Salsoul, LLC v. Ciccone*, 10 DREXEL L. REV. 445 (2018).

207 *See generally* Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371 (2019).

208 *See Estate of Smith*, 253 F. Supp. 3d 737.

209 *Id.*

210 *Id.* at 748.

211 *Id.* at 749.

212 *Id.* at 750.

is used within the same genre, in the same way, with the same purpose and audience, then that use leans more toward stealing and "free-riding" on the original artist's creativity. In this case, fair use should not be applicable. When the use of a sample falls somewhere in between, courts may have more discretion when deciding whether the fair use exception should permit the use regardless of unlicensed infringement.

The second factor to consider in applying a fair use exception is the nature of the original copyrighted work.[213] Copyrighted works are generally described to be one of two forms – either creative or expressive, or factual or informational.[214] More protections and rights should be afforded to owners of creative or expressive works.[215] These types of works contain more elements of uniqueness and independence and are therefore less likely to be recreated out of pure chance. These types of works also usually serve a specific and unique purpose, and the artist should have more control over the preservation of that goal. On the contrary, works that are more factual or informational should be afforded less protections.[216] These types of works promote knowledge and information and should be more easily replicable and publicly available. The fair use exception would therefore be more applicable in the sampling of factual or informational works than creative works.

The third factor considers the amount and substantiality of the portion of the original recording used in the new sample.[217] Should a new recording use, say, 80% of the original recording in the new recording, courts may feel less inclined to apply a fair use exception. The theory is that if a smaller portion of the original recording is used in the new recording, fair use may be more applicable. However, the Southern District of New York interpreted this statutory guideline in a different view. The court noted that the fair use exception may apply to any copying that is only as long as needed to accomplish the transformative effect.[218] In their decision, the court noted that the almost direct copying of a 35-second original sample did not exceed the length and substantiality test, because the inclusion of almost the full original recording was used solely to achieve a transformative goal.[219] The reasoning and decision seem almost contradictory to the fair use doctrine, when an entire original recording can be directly copied with the exception of a few words omitted and satisfy the fair use exception.

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213 *Id.* at 751.
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.*
219 *Id.*

The final factor is the effect on the original work's value in the market. Some scholars have argued that the same impacts apply in digital sampling as they do in cover songs.[220] For cover songs, the original song is often brought into a new sense of popularity, the original artist receives royalties, and the new artist is able to create their own creative style based on the original work.[221] The same could apply to digital sampling, although the original copyright holder would not receive royalties absent a compulsory licensing system which exists for cover songs. However, a recent study has shown that digital sampling may have positive effects throughout the music industry.[222] The study showed that digital sampling may actually increase the sales of the original work.[223] Digital sampling can therefore promote creativity in the new work, while increasing the value of the original.

The fair use exception has clear applicability in digital sampling cases. Even if a sample fails to satisfy one of the four factors, the courts may apply a balancing test between each factor as shown in the Southern District of New York's opinion.[224] However, the fair use exception may only be necessary in cases where substantial portions of the original work appear in the new work, as was the case in *Estate of Smith.*[225] In cases where a very minimal portion of an original sound recording is used and is modified to an extent where the original sound is nearly unidentifiable, courts should continue to apply a *de minimis* standard where an infringement claim would not be actionable. By pairing the de minimis standard and a fair use exception consistently and universally throughout courts, artists will have much greater liberty to creatively incorporate existing sound recordings into new songs. In addition, original copyright holders will also benefit from the middle ground by knowing that blatant and substantial copying of their original work for a similar purpose will be protected.

VI. IT'S A WRAP: DIGITAL SAMPLING IS HERE TO STAY

The use of sampling has grown exponentially since the referential nature of performing tributes in jazz performances. The growth of computerized production and online access to the vast history of sound recordings has made digital sampling easier than ever. As more artists

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220 *Id.* at 752.
221 *See Ponte*, *supra* note 123 at 547-48.
222 Schuster, ET AL., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 208 (2019).
223 *Id.*
224 *Estate of Smith*, 253 F. Supp. 3d at 749.
225 *Id.* at 748.

reach historic levels of success by employing digital sampling, the practice is set to continue growing and making an impact in the music industry and courtrooms. This does no't mean that digital sampling is entirely negative. The access to a vast history of sound recordings and music has given producers the ability to create new sounds, pay respect to music's legends, and produce unique compilations of existing sound recordings. The rap artist, Kendrick Lamar, even reached the level of receiving a Pulitzer Prize for his album, *DAMN.*, which was largely based on digital sampling.[226] The prize further elaborated the growing acceptance and admiration for creative uses of digital sampling. The music industry and original artists have also benefitted from the practice. A recent study suggested that digital sampling actually increases sales of original works, while promoting the growth of new artists within the industry.[227]

Despite the apparent benefits of this practice, there are clear copyright implications to digital sampling. Owners of a copyright in a sound recording are granted exclusive rights within United States copyright law.[228] Courts have long debated where those rights fit within the digital sampling issue. Early cases considered any level of digital sampling as stealing, and a per se infringement of the original artist's rights.[229] The Sixth Circuit made it clear that they agreed with this concept in *Bridgeport*.[230] *Bridgeport* established one side of the current circuit split on digital sampling, and set a bright-line rule that sampling without a license is illegal in any capacity.[231] After this decision, courts struggled to apply the Sixth Circuit's reasoning, and often rejected applying it.[232] The Ninth Circuit clearly disagreed a few years later when deciding *VMG Salsoul*.[233] Their decision established a *de minimis* standard to digital sampling, noting that minor and unrecognizable uses of an original copyrighted work should not be actionable as copyright infringement.[234]

Since the circuit split established in 2016, many courts have followed the Ninth Circuit, while some have expanded their analyses. A growing trend among legal scholars and courts is to consider the application of the fair use doctrine, codified as 17 U.S.C. § 107. The fair use standard has

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226 THE PULITZER PRIZES, *supra* note 1.
227 *Schuster*, *supra* note 222.
228 *See* 17 U.S.C. §§ 106-122.
229 *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).
230 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 795 (6th Cir. 2005).
231 *Id.*
232 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) (citing several district court decisions that rejected the *Bridgeport* rule).
233 *Id.*
234 *Id.*

been described as a "middle ground,"[235] promoting creativity while protecting copyright interests. A universally applied fair use exception, and a standard interpretation of it among courts, may be the best way to create consistency in digital sampling court decisions. By pairing the fair use exception with the *de minimis* standard, new and original artists will have a consistent middle ground without the need to contemplate different outcomes across different courts.

Without a Supreme Court decision on point, non-judicial solutions have also been discussed among legal scholars. Many suggest creating amendments to the current copyright statutes to specifically address digital sampling,[236] while others propose the addition of a compulsory licensing system similar to the cover song industry.[237]

Whatever the future holds, the current state of the music industry and digital sampling is comprised of inconsistency and inequities. Artists looking to use digital sampling are unfortunately unaware of what might be considered infringement or when a license is necessary, and copyright owners are unable to predict whether they will succeed in an infringement lawsuit. The current licensing system in the music industry favors well-established and wealthy artists. Smaller or new artists are often unable to even initiate a licensing negotiation, let alone obtain a license, and may decide to risk sampling illegally. Until an appropriate solution emerges, digital sampling will remain a heated controversy in copyright law.

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235 *See* Tyler B. Burns, *And They Sayin' it's Because of The Internet: Applying the De Minimis Exception to Digital Sound Sampling in the Wake of VMG Salsoul, LLC v. Ciccone*, 10 DREXEL L. REV. 445 (2018).

236 *See, 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, 521 (2006).

237 *See, e.g.*, Christopher R. Sabbagh, *Envisioning a Compulsory-Licensing System for Digital Samples Through Emergent Technologies*, 69 Duke L.J. 231, 235 (2019).