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## "Hits & Writs, Take Two": Revising the Laws of de minimis Music Sampling

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# “Hits & Writs, Take Two”: Revising the Laws of *de minimis* Music Sampling

Jeffrey Prystowsky\*



Biz Markie released “All Samples Cleared” after losing a suit in the early 1990s over a sample that was not cleared.<sup>1</sup>

## INTRODUCTION

Have you ever noticed that, in re-recording her catalog, Taylor Swift did not use the snare beat from her original recordings, say, from “Red”? And why is Danger Mouse’s *The Grey Album* not on Spotify? Is sampled music being censored?<sup>2</sup> Consider the Danger Mouse example. He spent 100 hours making *The Grey Album*, a

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1. Still frame from the film, *COPYRIGHT CRIMINALS* (ITVS & PBS 2009).

2. See Stephanie Convery, *DJ Shadow: ‘Music has Never Been Worth Less, and Yet Sampling has Never Been More Risky,’* THE GUARDIAN (Mar. 27, 2022), <https://www.theguardian.com/music/2017/may/24/dj-shadow-music-has-never-been-worth-less-and-yet-sampling-has-never-been-more-risky> [https://perma.cc/68TF-74TA].

mash-up of The Beatles' "*White Album*" and Jay-Z's *Black Album*, and although he released it online, it is nowhere to be found.<sup>3</sup> Why can't anyone listen to *The Grey Album*?

Music sampling law protects the copyright owner of the sound recording and composition at the expense of the sampling artists and their listeners.<sup>4</sup> The Beatles sent cease and desist letters and Danger Mouse's album was blacklisted.<sup>5</sup> Both the Ninth and Sixth Circuits would agree that without a license, Danger Mouse's mash-up sampling was unlawful.<sup>6</sup> But what if he had only used a snippet of The Beatles' album?

This Comment argues that Congress should amend Section 114(b) of the Copyright Act to make clear that a *de minimis* defense is permitted for digital music sampling pursuant to the Ninth Circuit's ruling in *VMG Salsoul, LLC v. Ciccone*, in which the court held that a *de minimis* defense is available in a music infringement lawsuit over a sampled split-second horn hit.<sup>7</sup> The Sixth Circuit's bright-line rule in *Bridgeport Music, Inc. v. Dimension Films*<sup>8</sup> of no *de minimis* defense, by contrast, (1) is out of sync with copyright law; (2) reinforces structural racism; and (3) stifles artists' creative sampling of music. This Comment will explore how the Sixth Circuit wrongly jettisoned the *de minimis* defense in sound recording infringement cases and why Congress should adopt the Ninth

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3. Marc Dolech, *EMI Traps Danger Mouse*, ROLLING STONE (Mar. 27, 2022), <https://www.rollingstone.com/music/music-news/emi-traps-danger-mouse-114954/> [<https://perma.cc/X38K-X8VF>].

4. See KEMBREW MCCLEOD & PETER DiCOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 191 (2011) ("When you can't sample, I think it definitely loses a big part of what hip-hop is."); see also *id.* at 139 ("Hip-Hop started with people using old records in a new way.").

5. Dolech, *supra* note 3.

6. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016) (holding that the *de minimis* doctrine should apply to sound recordings when a "reasonable juror could conclude that the average audience would recognize the appropriation"); *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004) (holding that the owner of a sound recording has the exclusive rights to that recording, and no one else may sample that recording without a license); see *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437–38 (6th Cir. 1992) (reversing the District Court's finding of parody and holding that 2 Live Crew took too much of the original Roy Orbison's "Pretty Woman," and for blatantly commercial purposes), *rev'd*, 510 U.S. 569 (1994).

7. *VMG Salsoul, LLC*, 824 F.3d at 874.

8. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800–02 (6th Cir. 2005).

Circuit's reading of the copyright statute permitting the *de minimis* defense for digital sampling.

Part I explores the history of hip hop sampling and the circuit split over whether the *de minimis* doctrine should apply to claims of infringement of a sound recording. Part II examines the Ninth and Sixth Circuits' conflicting interpretations of Section 114(b) of the Copyright Act and why the Sixth Circuit's bright-line rule of no *de minimis* defense for any amount copied from a sound recording is out of step with copyright law, reinforces structural racism, and stifles artistic creativity. Finally, Part III discusses the Ninth Circuit's rejection of the Sixth Circuit's strict liability approach to sound recording infringement and addresses why Congress should act to revise the copyright laws of *de minimis* digital sampling in accord with the Ninth Circuit.

Public Enemy's "Night of the Living Baseheads" Track Sheet: each box represents a different sample on the track. Ultimately, the band used forty-five different samples on the track.<sup>9</sup>

#### I. HITS: HIP HOP SAMPLING IS PUBLIC ENEMY #1

"Sampling is not theft. It's recycling."—Siva Vaidhyanathan<sup>10</sup>

The *de minimis* doctrine, which allows a judge to dismiss trivial instances of copying as not infringing, has a long history in

9. Still frame from the film, COPYRIGHT CRIMINALS (ITVS & PBS 2009).

10. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 145 (2001).

copyright law.<sup>11</sup> The *de minimis* doctrine allows the defendant to prevail on the defense that what the defendant copied was trivial and insubstantial, either qualitatively or quantitatively,<sup>12</sup> and no reasonable jury could find that the element of substantial similarity was met.<sup>13</sup> For example, words and short phrases such as names, titles and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; and mere listing of ingredients and contents are all examples of works not subject to copyright.<sup>14</sup> This is in line with the purpose of copyright law: “[t]o promote the progress of science and the useful arts.”<sup>15</sup>

The Ninth Circuit in *VMG Salsoul* found that a *de minimis* defense of a split-second horn hit was permissible,<sup>16</sup> but the Sixth Circuit in *Bridgeport* rejected the *de minimis* defense for a three-note guitar solo. In *Bridgeport Music, Inc. v. Dimension Films*, the film *I Got the Hook-Up* used a N.W.A. song from 1991 titled, “100 Miles

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11. CRAIG JOYCE ET AL., COPYRIGHT LAW 654 (9th ed. 2013) (explaining that the *de minimis* defense excludes trivial copying, such as short phrases or single notes, from being actionable as copyright infringement); see MCLEOD & DiCOLA, *supra* note 4, at 141 (“A key rationale for the *de minimis* rule is to avoid the administrative cost of lawsuits when takings are small.”); *id.* at 233 (excluding single notes or short phrases from being actionable as copyright infringement in all other areas of the copyright law).

12. *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004) (“Substantiality is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole.”).

13. *Allen v. Scholastic, Inc.*, 739 F. Supp. 2d 642, 653 (S.D.N.Y. 2011) (footnotes and quotations omitted) (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109–10 (2d Cir. 2001); *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 601 (S.D.N.Y. 2010)) (“To prevail on a claim of copyright infringement, the plaintiff must demonstrate both (1) ownership of a valid copyright and (2) infringement of the copyright by the defendant. The second element is further broken down into two components: a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff’s work; and (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiff’s.”).

14. 37 C.F.R. § 202.1 (2021).

15. *Intellectual Property Clause*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intellectual\\_property\\_clause](https://www.law.cornell.edu/wex/intellectual_property_clause) [<https://perma.cc/RE3D-SVHX>] (last visited Sept. 8, 2022) (explaining that the Constitution grants Congress the enumerated power “[t]o promote 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”).

16. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878–79 (9th Cir. 2016).

and Runnin’.”<sup>17</sup> The song sampled two seconds and used three notes from a guitar solo taken from the Funkadelic song “Get Off Your Ass and Jam.”<sup>18</sup> N.W.A. looped the sample fairly low in the mix and repeated it intermittently throughout the song.<sup>19</sup> The court held not only that three notes excluded a *de minimis* defense, but that a defendant could not bring a *de minimis* defense at all in a sound recording infringement case.<sup>20</sup> The Sixth Circuit, reversing the District Court’s holding,<sup>21</sup> adopted an unprecedented bright-line rule that required would-be samplers to obtain a license before digitally sampling any sound recording, regardless of the amount taken or artistic transformation of the sample; the *de minimis* defense and substantial similarity analysis were inapplicable.<sup>22</sup> The Ninth Circuit disagreed and created a circuit split.<sup>23</sup>

For much of the history of hip hop, sampling has been an inherent part of what makes hip hop music identifiably hip hop.<sup>24</sup> The practice of hip hop sampling became prevalent in the late 1980s, with sampled loops serving as hip hop backing tracks, and as hip hop moved mainstream in the 1990s, the legality of sampling

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17. MCLEOD & DiCOLA, *supra* note 4, at 30 (“The potential for sampling lawsuits increased after the *Bridgeport Music v. Dimension Films* case of 2005 . . . that centered around an N.W.A. song from 1991 titled, ‘100 Miles and Runnin’’. This . . . rap song was used in the film *I Got the Hook-Up*. The song sampled two seconds and used three notes from a guitar solo taken from the Funkadelic song ‘Get Off Your Ass and Jam.’ The sample was looped by N.W.A. and repeated intermittently throughout the song, where it was placed fairly low in the mix.”).

18. *Id.*

19. *Id.*

20. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004).

21. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841–42 (6th Cir. 2002) (“The sample here does not rise to the level of a legally cognizable appropriation. . . . No reasonable jury . . . would recognize the source of the sample without having been told of its source.”).

22. BRUCE P. KELLER & JEFFREY P. CUNARD, *COPYRIGHT LAW: A PRACTITIONER’S GUIDE* 49 (Keith Voelker ed., 2d ed. 2015) (“In *Bridgeport Music, Inc. v. Dimension Films*, [2004] the Sixth Circuit adopted an unprecedented ‘bright-line’ rule that requires musicians to obtain a license before digitally sampling a sound recording; the *de minimis* defense and substantial similarity analysis are inapplicable.”).

23. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).

24. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context*, 84 N.C. L. REV. 547, 630 (2006).

came to the fore.<sup>25</sup> In the late 1980s, a unique music sampling law did not exist, and artists made hit records with hundreds of uncleared samples per record.<sup>26</sup> But by the early 1990s, after seminal lawsuits against Public Enemy, Biz Markie,<sup>27</sup> 2 Live Crew,<sup>28</sup> the Beastie Boys, and De La Soul,<sup>29</sup> the cost of clearing samples had significantly increased.<sup>30</sup> With hip hop's commercial viability in the late 1980s came increased legal scrutiny over samples.<sup>31</sup> In other words, with the hits came the writs.

A circuit split currently exists between the Sixth and Ninth Circuits over the status of *de minimis* copying of a sound recording, and the stakes are high for hip hop. In a hip hop music sampling copyright infringement lawsuit before the Ninth Circuit, a defendant could properly argue that (1) they copied too little of the work to matter (*de minimis*),<sup>32</sup> or (2) even if they copied a substantial amount, the work incorporating the copied material is not "substantially similar" to the copied work because they so altered the copied material as to render it unrecognizable to a lay observer.<sup>33</sup>

25. KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 162–63 (2012) ("The practice [of sampling] became prevalent in the late 1980s, with sampled loops serving as the backing tracks or the lyrical rhyming and rapping of hip-hop. As the genre moved mainstream, the legalities of sampling came to the fore.").

26. MCLEOD & DiCOLA, *supra* note 4, at 27. Each of the early Public Enemy albums included "one hundred to two hundred" samples. *Id.*

27. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

28. Luke Records, Inc. v. Navarro, 960 F.2d 134, 135 (11th Cir. 1992).

29. In 1991, the Turtles sued De La Soul for using a portion of "You Showed Me" on Soul's "Transmitting Live from Mars." They settled for \$1.7 million, or \$141,666.67 per second. See VAIDHYANATHAN, *supra* note 10, at 141.

30. MCLEOD & DiCOLA, *supra* note 4, at 27 ("By the early 1990s . . . the cost of clearing samples—and the legal risks of *not* clearing samples—had significantly increased.").

31. *Id.* ("With [hip hop's] commercial validity also came increased scrutiny over samples.").

32. No reasonable jury could find that a *de minimis* sample is substantially similar. See *id.* at 16 ("The creative freedoms associated with brief quotation, mimicry of style, and cover versions often don't apply for those who wish to sample fragments of sound recordings.").

33. See *id.* at 145 ("The first argument would be that too little was taken to count in the first place. The second argument would be that even if the amount taken was not trivial, the work incorporating the copied material is not 'substantially similar' to the copied work because the copied material has been so altered. If the copied work is not substantially similar, it's not

Therefore, if the copied work is not substantially similar or if the defendant copied a trivial amount, the use is not infringing.<sup>34</sup> In a hip hop music sampling copyright infringement case before the Sixth Circuit, however, a defendant is not permitted to argue a *de minimis* defense at all, pursuant to the holding in *Bridgeport Music*.<sup>35</sup> And because the music from the allegedly infringing work is “the same” regardless of the amount taken, there is no need for a “substantial similarity” analysis at all.<sup>36</sup> In short, any hip hop sample in the Sixth Circuit is illegal without a license.<sup>37</sup>

## II. WRITS: HOW *BRIDGEPORT* MAKES HIP HOP SAMPLING ILLEGAL

### A. *Bridgeport’s Bright-Line Rule for Digital Sampling is an Unprecedented Outlier in Copyright Law*

Section 106 of the Copyright Act outlines what exclusive rights a copyright owner of a musical recording has, including an exclusive right to reproduce and make a derivative work of the musical sample: “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.”<sup>38</sup>

However, Section 114(b) of the Copyright Act limits the sound recording copyright holder’s exclusive rights to the “actual” sounds of the recording, leaving open another’s right to slavishly copy the recording using their own instruments—that is, to cover the song:

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

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infringing. Either way, there is no infringement up front, so we don’t even get to fair use.”).

34. *Id.*

35. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 391 (6th Cir. 2004).

36. *See id.*

37. *See id.*

38. 17 U.S.C. § 106.



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.<sup>39</sup>

What these two statutes mean when read together is that the record label,<sup>40</sup> which usually owns the copyright in the sound recording, generally has a right to sue a sampling artist for using a sample (actual sounds) of their recording because it infringes on the label's right to reproduce and prepare derivative works based on the recording.<sup>41</sup> Consider the rights to a bass line. The record label has a right to reproduce that bass line on a greatest hits record or to remix it. However, the label's right is limited to the "actual" sounds of the recording, and that right cannot be exercised to stop an artist from playing the bass line themselves in their own studio in a cover of the song. The artist's bass line, even if it sounds identical, would not fall under the "actual" sounds of the recording.

But even if an artist takes an "actual" sample, and the sample is not re-created by live studio musicians in a cover song, whether that leads inexorably to a cause of action for copyright infringement—irrespective of the amount of "actual" sample taken—is the subject of the circuit split. The courts primarily part ways over the interpretation of the word "entirely."<sup>42</sup> Section 114(b) states that the record label's rights "do not extend to the making or duplication of another sound recording that consists *entirely* of an independent

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39. 17 U.S.C. § 114(b) (emphasis added).

40. It is interesting to note that three of the four major record labels, Sony BMG, UMG, and Warner, were opposed to *Bridgeport's* ruling. See Brief for Sony BMG Music Ent. et al. as Amicus Curiae Opposing Ruling at 1, *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004) (No. 301–0412), 2005 WL 6142263.

41. See 17 U.S.C. §§ 106, 114(b).

42. Compare *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016), with *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004).

fixation of other sounds.”<sup>43</sup> The heart of the debate between the Sixth and Ninth Circuit is the importance and meaning of that one word, “entirely.”

According to the Sixth Circuit, “entirely” means that Section 114(b) prohibits even a *de minimis* sample because the infringing work is not “entirely of an independent fixation.”<sup>44</sup> That is, the court improperly inferred that copyright protection attaches if the copying artist did sample “actual sounds” from the recording; but that inference cannot be drawn logically from the proposition that no copyright protection attaches if the copying artist didn’t sample the “actual sounds” from the recording.<sup>45</sup> The inverse of a conditional is not necessarily true. For example, “if there are no clouds in the sky, then it will not rain” does not necessarily lead to “if there are clouds in the sky, then it will rain.”<sup>46</sup> Copyright law has long used a substantial similarity analysis that requires proof of both actual copying and substantial similarity (copying of original expression) to establish a *prima facie* case for infringement, and long held that a *de minimis* copy is not actionable.<sup>47</sup> In the Ninth Circuit’s words, “proof of actual copying is insufficient to establish copyright infringement. . . . Plaintiff must show that the copying was greater than *de minimis*.”<sup>48</sup>

By contrast, the Sixth Circuit in *Bridgeport* argued that Section 114(b) of the copyright code explicitly excluded “entirely independently created” works from the ambit of copyright, which implied that any work *not* entirely independently created must

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43. 17 U.S.C. § 114(b) (emphasis added).

44. See *Bridgeport Music, Inc.*, 383 F.3d at 400–01 n.14; see also ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT CASES AND MATERIALS 599 (7th ed. 2006) (“[T]he text of Section 114(b) gives the sound-recording copyright owner the exclusive right physically to reproduce its own sounds. [The court] inferred from this that *any* unauthorized sampling of *any* part of a sound recording will infringe. ‘The import of this language is that it does not matter how much a digital sampler alters the actual sounds or whether the ordinary lay observer can or cannot recognize the song or the artist’s performance of it. Since the exclusive right encompasses rearranging, remixing, or otherwise altering the actual sounds, the statute by its own terms precludes the use of a substantial similarity test.’”).

45. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884–85 (9th Cir. 2016).

46. *Id.* at 884.

47. See *id.* at 874.

48. *Id.* at 877.

infringe.<sup>49</sup> The Sixth Circuit thus held that any amount taken from a sound recording constituted infringement.<sup>50</sup> Therefore, even if a defendant copied a mere split second of a recording, the court would treat them as if they copied whole sections of the music.<sup>51</sup> For example, under the Sixth Circuit's holding in *Bridgeport*, it would not matter if Taylor Swift copied the kick drum from the chorus of "You Belong With Me" or the whole chorus. The result would be the same: an infringement. The music industry, fearful of impending sampling lawsuits, has thus fostered a rigid clearance culture in which it assumes that every audio quote should be licensed, regardless of its length.<sup>52</sup>

The Ninth Circuit found that the Sixth Circuit's interpretation of Section 114(b) was out of sync with the existing body of copyright law and was not warranted by the statute's legislative history.<sup>53</sup>

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49. MCLEOD & DiCOLA, *supra* note 4, at 141. Section 114(b) of the copyright code explicitly excludes "entirely . . . independently created" works from the reach of the reproduction and derivative-works rights that come with the sound recording copyrights. *Id.* "To the appellate court, this implied that any work *not* entirely independently created must infringe." *Id.*

50. MCLEOD & DiCOLA, *supra* note 4, at 290 ("In some sampling cases, it appears that tiny enough samples could be deemed *de minimis* by a court and thus not constitute infringement. But in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), the U.S. Court of Appeals for the Sixth Circuit held that any amount taken from a sound recording constituted infringement.").

51. MCLEOD & DiCOLA, *supra* note 4, at 290.

52. *Id.* at 187 ("The music industry . . . has fostered a very rigid 'clearance culture' in which it is assumed that every audio quote should be licensed.").

53. H.R. REP. NO. 94-1476, at 15 (1976). Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends *only to the particular sounds of which the recording consists and would not prevent a separate recording of another performance in which those sounds are imitated*. Thus, infringement takes place whenever *all or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. *Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible*. See *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1240 (S.D. Fla. 2009). ("It is not clear to this Court, however, why the *Bridgeport* court's reading of Section 114(b) follows inexorably from its text. First, Section 114(b)'s derivative-work provision addresses the scope of protection given to derivative works, not original works. There is no indication that Congress sought to expand the scope of protection for *original* works by redefining the term 'derivative work' to include all works containing *any* sound from the

There is no bright-line ‘no *de minimis* defense’ for any other copyright infringement claim.<sup>54</sup> In essence, the *Bridgeport* rule creates a form of strict liability unique to sound recordings where sampling constitutes copyright infringement *per se*, whether the copied portion is *de minimis* or substantially similar to the original work.<sup>55</sup> This new bright-line rule—applicable to sound recordings but not for copyrights in the composition—is an outlier with no grounding in the copyright statute.<sup>56</sup> But beyond these legal interpretive arguments of the Ninth Circuit, there is another reason why *Bridgeport* is wrong: from a social policy perspective, it continues a line of couching black artistry as thievery, and perpetuates the systemic problem of racial injustice in this country.

B. *How the Bridgeport Rule and Related Judicial Opinions on Sampling Reinforce Structural Racism*

*“This [judicial] role becomes even more challenging when presented with works from two genres of music [funk and hip hop] which many jurists (and most likely many jurors of this District) are not familiar.”—Judge Thomas Aquinas Higgins in Bridgeport*<sup>57</sup>

*“However, playing a musical recording (even tasteless, violent music like 2Pacalypse Now) is fundamentally different from placing a classified advertisement seeking employment as a mercenary. . . . To be sure, Shakur’s music is violent and socially offensive. This fact, by itself, does not*

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*original* sound recording, whether those works bear substantial similarities to the original work or not. In other words, Section 114(b)’s derivative-work provision does not allow the Court to conclude that PYOG is a ‘derivative work’ of, and thereby infringes on, BMBH merely because it contains a one-second snippet of BMBH.”).

54. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

55. *Id.*

56. See *id.* at 877, 880, 884–86 (quoting 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03 (4th ed. 2022)) (“The practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis. To the extent that the resulting product is substantially similar to the sampled original, liability should result. The fact that the sampled material is played through defendant’s song cannot establish liability if the snippet constitutes an insubstantial portion of plaintiff’s composition.”).

57. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002).

*make violence a foreseeable result of listening to [Tupac]. . . . 2Pacalypse Now is riddled with expletives and depictions of violence, and overall the album is extremely repulsive . . . and aesthetically questionable. . . . 2Pacalypse Now is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. . . . [T]he Court cannot recommend 2Pacalypse Now to anyone . . . ."*—Judge John Rainey in *Davidson v. Time Warner*<sup>58</sup>

As a threshold matter, the Sixth Circuit in *Bridgeport* explicitly targeted hip hop in the panel opinion; the judge mentions hip hop three times in reference to sampling.<sup>59</sup> The judge goes on to say that a hip hop sampling artist is not like a composer; the sampler (read: black) is like a thief with an intentional *mens rea*, whereas the composer (read: white) is merely negligent<sup>60</sup>:

*"It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had*

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58. *Davidson v. Time Warner, Inc.*, No. CIV. A. V-94-006, 1997 WL 405907, at \*12–13, 17, 22 (S.D. Tex. Mar. 31, 1997).

59. (1) “Advances in technology coupled with the popularity of hip hop or rap music have made instances of digital sampling extremely common.” *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 396 (6th Cir. 2004). (2) “[D]igital sampling has become so commonplace and rap music has become such a significant part of the record industry.” *Id.* at 400–01. (3) “On the other hand, many of the hip hop artists may view this rule as stifling creativity.” *Id.* at 401.

60. See Anjali Vats, *THE COLOR OF CREATORSHIP* 10 (2020); see also *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 912 (S.D. Cal. 1950) (“The effect of the plaintiff’s recording [read: black] is thick, mechanical, lacking inspiration, containing just the usual accompaniments and the usual intonations which one would find in any common recording. The impression one receives from the Decca recording [read: white] is entirely different. It is rich, against a musically colorful background. It sounds full, meaty, polished. The difference derives from the different quality of the voices of the artists, the more precise, complex, and better organized orchestral background, the fuller harmonization of the responses, the clearer intonation and expression, and the more musical entrances in the Decca record.”) (Quoted in Robert Brauneis, *Copyright, Music and Race: The Case of Mirror Cover Recordings*, GW LAW SCH. PUB. L. AND LEGAL THEORY PAPER NO. 2020-56, Jul. 22, 2022, at 14–15.).

heard before. When you sample a sound recording you know you are taking another's work product . . . ."<sup>61</sup>

A federal court in New York similarly stated that hip hop sampling is akin to theft—and that it is even violative of the Bible:

*"Thou shalt not steal"* has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. *The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.*<sup>62</sup>

The dissent in *VMG Salsoul* similarly stated that black hip hop sampling is analogous to stealing or pirating:

In any other context, this would be called theft. It is no defense to theft that the thief made off with only a "de minimis" part of the victim's property . . . the pertinent inquiry in a sampling case is not whether a defendant sampled a little or a lot, but whether a defendant sampled at all. . . . True, get a license or do not sample doesn't carry the same divine force as Thou Shalt Not Steal, but it's the same basic idea. I would hold that the de minimis exception does not apply to the sampling, copying, stealing, pirating, misappropriation—call it what you will—of copyrighted fixed sound recordings. Once the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission.<sup>63</sup>

Therefore, when faced with a music sampling case in a genre like hip hop in which they are not conversant, the courts have consistently relied on negative racial stereotyping of black artists. The Sixth Circuit and its judicial counterparts reason that black hip hop

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61. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (emphasis added).

62. *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y.1991) (emphasis added).

63. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 888–90 (9th Cir. 2016) (Silverman, J., dissenting) (emphasis added).

sampling is like stealing, theft, and pirating.<sup>64</sup> But the art form of hip hop sampling is one of the great black achievements in American music.<sup>65</sup> When the judiciary furthers this damaging trope of black artists as incapable of the white composer's imagination, they further the existing structural racial hierarchy in this country. By calling sampling artists "thieves" and framing the art as "not like the case of a composer who has a melody in his head," the courts are perpetuating structural racism in America.<sup>66</sup>

The Sixth Circuit's language and rule in *Bridgeport* are structurally racist because they contribute to American copyright law's "role in the construction and maintenance of social domination and subordination" of African-Americans.<sup>67</sup> Structural racism is a system in which public policy, institutional practice, cultural representation, and other norms work to perpetuate racial inequality.<sup>68</sup> Copyright law, in theory, protects every author's exclusive right to their original creations. However, in practice, it does not equally protect and value artists of color and white creators.<sup>69</sup> Copyright law is not, and never was, race-neutral.<sup>70</sup> Judicial opinions such as

64. *See id.*

65. *See* Kevin J. Greene, *The Future is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC'Y U.S.A. 45, 73–74 (2021) [hereinafter Greene, *The Future is Now*].

66. *See* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

67. Cornel West, *Foreword* to KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, xi (1995).

68. "Structural racism is not something that a few people or institutions choose to practice. . . . [I]t [is] a feature of the social, economic and political systems in which we all exist." *Glossary for Understanding the Dismantling Structural Racism/Promoting Racial Equity Analysis*, ASPEN INSTITUTE, <https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/RCC-Structural-Racism-Glossary.pdf> [https://perma.cc/DLL2-VPMX] (last visited Sep. 11, 2022). "Structural racism operates automatically and thus is perpetuated simply by doing nothing about it." William Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 7 (2011).

69. ANJALI VATS, *THE COLOR OF CREATORSHIP* 10–11 (2020).

70. BRIAN WARD, *JUST MY SOUL RESPONDING* 27–28 (1998) ("Racial conventions permeated the organization and structure of the music industry at every level. The very existence of separate 'Race' and, from 17 June 1949, 'Rhythm and Blues' charts for black popular music, symbolized the routine segregation of blacks in American society."). Robert Brauneis, *Copyright, Music and Race: The Case of Mirror Cover Recordings*, SSRN 1, 1 (2020)

*Bridgeport* work to calcify race into intellectual property doctrine and racialize the standard of “true imagination.”<sup>71</sup> The music industry has benefitted from societal inequities that devalued people of color, especially black Americans.

Black artists in America have an assumed cultural inferiority—as whites’ subordinate Other.<sup>72</sup> According to Critical Race Theory, the law in America functions to produce and insulate white dominance.<sup>73</sup> The exercise of racial power is systemic and ingrained in America.<sup>74</sup> Laws produce racial power through rules that continue to reproduce the structures and practices of racial discrimination and sustain hierarchies of racial stratification.<sup>75</sup> What constitutes “progress of the arts” in the Copyright Clause of the Constitution must be construed within the context of slavery, Jim

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3591113#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591113#)  
[\[https://perma.cc/K53E-HTBF\]](https://perma.cc/K53E-HTBF).

71. Interview with Anjali Vats, Professor, B.C. L. (Nov. 10, 2020) (conference on *Copyright and Racial Justice*).

72. CRENSHAW, *supra* note 67, at 115 (“The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it. Nor have the negative stereotypes associated with blacks been eradicated. The rationalizations once used to legitimate black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of blacks through reference to an assumed cultural inferiority. *See id.* at 119 (“[B]lacks are cast simply and solely as whites’ subordinate Other.”).

73. *Id.* at 3 (The law “function[s] in producing and insulating white dominance.”); *see id.* at 113 (“Racist ideology replicates [a] pattern of arranging oppositional categories in a hierarchical order; historically, whites have represented the dominant element in the antinomy, while blacks came to be seen as separate and subordinate. This hierarchy is reflected in the list below; note how each traditional negative image of blacks correlates with a counterimage of whites: Historical oppositional dualities: White images: industrious, intelligent, moral, knowledgeable, enabling culture, law-abiding, responsible, virtuous/pious; Black images: lazy, unintelligent, immoral, ignorant, disabling culture, criminal, shiftless, lascivious. The oppositional dynamic exemplified in this list was created and maintained through an elaborate and systematic process.”).

74. *Id.* at xiv (“[T]he exercise of racial power . . . [is] systemic and ingrained.”); *see id.* at xxviii (“[T]he persistence of societal-wide racial discrimination.”).

75. *Id.* at xxv (“Laws produce[] racial power . . . through myriad legal rules . . . that continue[] to reproduce the structures and practices of racial domination.”); *see id.* at xxviii (“[A]ctive role in sustaining hierarchies of racial power.”).



Crow, lynching, and mass incarceration.<sup>76</sup> Black artists must make artistic “progress” under the Constitution while faced with a culture that devalues their bodies and minds.<sup>77</sup>

Although hip hop has grown exponentially from street music with a limited audience in the Bronx to now occupying the center stage at Super Bowl LVI<sup>78</sup> and mainstream culture, many white Americans still consider it a dangerous outsider art. Hip hop was born in the ghettos of the South Bronx and South Central Los Angeles by unseen black musicians at the bottom of the American caste system<sup>79</sup>—the left-overs after white flight—inspired by disc jockey, or DJ, street culture in Jamaica.<sup>80</sup> As the practice of redlining gutted the black school systems’ arts funding and music programs were stripped of musical instruments, inspired black

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76. *Id.* at xiii; *see id.* at 114 (“Prior to the civil rights reforms, blacks were formally subordinated by the state . . . . Segregation and other forms of social exclusion—separate restrooms, drinking fountains, entrances, parks, cemeteries, and dining facilities—reinforced a racist ideology that blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals.”).

77. *Id.* at xxiv (“[T]he law does not passively adjudicate questions of social power; rather, the law is an active instance of the very power politics it purports to avoid and stand above.”); *see id.* at xxix (“[A] repository of hidden, race-specific preferences for those who have the power to determine the meaning and consequences of ‘merit.’”).

78. Darlene Aderoju, *Dr. Dre, Snoop Dogg, Eminem, Mary J. Blige, Kendrick Lamar & Surprise Guest 50 Cent Deliver Epic Super Bowl 2022 Halftime Show*, BILLBOARD (Feb. 13, 2022) <https://www.billboard.com/music/rb-hip-hop/super-bowl-2022-halftime-show-dr-dre-eminem-snoop-dogg-deliver-epic-performance-1235031012/> [<https://perma.cc/WQ7G-9ZNK>].

79. *See* Clea Simon, *An unflinching look at racism as America’s caste system*, THE HARVARD GAZETTE (Feb. 2, 2021), <https://news.harvard.edu/gazette/story/2021/02/viewing-racism-as-americas-caste-system/> [<https://perma.cc/MY4U-43UA>] (quoting Isabel Wilkerson, author: “For 246 years, you could own property or you could be property. That’s how extreme the options were.”).

80. JEFF CHANG, *CAN’T STOP, WON’T STOP* 39 (2005) (“Fevered dreams of progress had brought fires to the Bronx and Kingston. The hip-hop generation, it might be said, was born in these fires.”); *id.* at 82–83 (“[A]n enormous amount of creative energy was now ready to be released from the bottom of American society, and the staggering implications of this moment eventually would echo around the world.”); *see* McLEOD & DiCOLA, *supra* note 4, at 51 (“Hip-hop was directly shaped by the aural innovations of dub . . . Jamaican sound systems were mobile parties that moved from place to place on the island, and the center of attention was the DJ, who often served as MC as well.”); *id.* at 52 (“DJ Kool Herc brought this sound-system culture with him from Jamaica to the South Bronx.”).

musicians transformed the turntable into a musical instrument.<sup>81</sup> The DJs played at parks, community centers, and clubs, and “backed themselves with area crews who kept the peace” over territory formerly occupied by gangs.<sup>82</sup> DJs practiced the “four elements of hip hop: DJing, MCing, b-boying, and Graffiti Writing.”<sup>83</sup> As soon as hip hop hit the American mainstream media,<sup>84</sup> white parents became worried about the danger of exposing their children to the language of the black ghettos.<sup>85</sup> Hip hop, in this sense, has always posed a threat to white America.

What the Sixth Circuit’s opinion in *Bridgeport* fails to recognize and acknowledge is that hip hop sampling is an art used by black music composers as a tool of their trade, not piracy nor thievery. Hip hop sampling is a black musical artform of true beauty and creativity—it is as much of an artistic expression as blues, R&B, or jazz.<sup>86</sup> The Sixth Circuit’s language, which characterizes hip hop

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81. Interview with Lord Jamar, *SOMETHING FROM NOTHING: THE ART OF RAP* (JollyGood Films 2012) (“[T]hey were taking instruments . . . out of the schools . . . ain’t got room for that shit anyway up in the projects. . . . We took the . . . record player . . . and turned it into an instrument, which it wasn’t supposed to be.”).

82. CHANG, *supra* note 80, at 102 (“DJs backed themselves with area crews who kept the peace . . .”); *see id.* at 133 (“For the next decade and a half, hip-hop music moved away from the parks and the community centers and the clubs and into the lab.”).

83. *Id.* at 90 (“[Bambaataa Kahim Aasim is] [t]he preacher of the gospel of the four elements—DJing, MCing, b-boying, and Graffiti Writing.”).

84. *Id.* at 419 (“[I]t was clear that hip-hop was not only selling \$400 million dollars’ worth of records a year, but hundreds of millions of dollars of other products—shoes, jeans, *haute couture*, soda, beer, liquor, videogames, movies, and more. In marketing terms, hip-hop had become the urban lifestyle.”).

85. *Id.* at 393 (“[T]he record industry began placing Parental Advisory stickers on potentially explicit records. . . . In 1990 [Tipper Gore] wrote an editorial . . . ripping Ice-T for a rap from an album ironically subtitled *Freedom of Speech* . . .”); *see id.* at 396 (quoting Paul Taylor, President, Fraternal Order of Police: “People who ride around all night and use crack cocaine and listen to rap music that talks about killing cops—it’s bound to pump them up. . . . No matter what anybody tells you, this kind of music is dangerous.”).

86. *See* McLEOD & DiCOLA, *supra* note 4, at 23 (“In Public Enemy’s hands, sampling was now a tremendously complex choreography of sound that reconfigured smaller musical fragments in ways that sounded completely new.”); *see also id.* at 24 (“In some cases, the drum track alone was built from a dozen individually sampled and sliced beats.”); *id.* at 111 (quoting Hank Shocklee, hip-hop producer: “[T]here’s something about sampling . . . which in and of itself is very beautiful . . .”).

sampling as pirating, demeans a legitimate black art.<sup>87</sup> *De minimis* sampling is an intricate collage.<sup>88</sup> DJs go “crate digging”<sup>89</sup> through vinyl record stores, searching for the perfect sounds.<sup>90</sup> When one is found, the DJ extracts and transforms a short sample into a new musical context.<sup>91</sup> Hip hop sampling is innovative and compelling—a step forward for music, not a step back.

It is hypocritical to call black hip hop artists thieves when white musicians have borrowed so much of American music from pioneering black artists.<sup>92</sup> White artists like Elvis, Benny Goodman, and Paul Whitehead claimed to be kings of, respectively, rhythm and blues, swing, and jazz; in fact, these are all appropriated art forms created by African-Americans.<sup>93</sup> According to Professor Kevin J. Greene, copyright has not successfully protected

87. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005) (“[A]dvances in technology . . . made the ‘pirating’ of sound recordings an easy task.”); see MCLEOD & DiCOLA, *supra* note 4, at 63 (quoting Bob Power, producer: “[A] lot of engineers at the time believed hip-hop simply wasn’t music. I have to say, honestly, I think that there was an unconscious element of racism.”).

88. MCLEOD & DiCOLA, *supra* note 4, at 20 (quoting Hank Shocklee, hip-hop producer: “Sampling was a very intricate thing for us. We didn’t just pick up a record and sample that record because it was funky. It was a collage. We were creating a collage.”).

89. *Id.* at 22 (“This process of searching for sounds [in albums] is called ‘crate digging,’ and it is central to sample-based music.”); see *id.* at 53 (quoting Greg Tate, musician and producer: “They were mining old records for those break sections.”); *id.* (“[T]hey would buy two copies of the same record, and then mix the two records back and forth.”).

90. *Id.* at 66 (quoting Joe Schloss, musicologist and author: “When you sample something, you’re also at the same time saying, ‘I discovered this rare record.’ It’s very closely tied to the ideas of record collecting.”).

91. *Id.* at 23 (quoting Matt Black, musician: “[T]he ‘kettle noise’ [on ‘Rebel without a Pause’] it’s . . . a sample of the JB’s ‘The Grunt.’”); *id.* (“Public Enemy took that brief saxophone squeal . . . and transformed it into something utterly different, devoid of its original musical context.”).

92. See CHANG, *supra* note 80, at 289 (“[T]his industry has . . . a history of unfair compensation to our Black artists, producers, and talented people involved.”) (quoting Letter from Chuck D., To All Offended, Concerned and Unconcerned (June 19, 1989)).

93. See generally Ruka Hatua-Saar White, *Cultural Appropriation in Music*, BERKLEE ONLINE, <https://online.berklee.edu/takenote/cultural-appropriation-in-music/#:~:text=The%20most%20famous%20example%20is,the%20genre%20they%20essentially%20started> [<https://perma.cc/QR2L-B3KT>] (last visited Sept. 24, 2022).

black American musicians.<sup>94</sup> Wealth has been extracted from pioneering black musicians throughout American music history with neither apologies nor compensation for this exploitation.<sup>95</sup> For example, Thelonious Monk, a black American musical genius, did not own the copyright to, “Round Midnight,” one of the most influential jazz standards.<sup>96</sup> James Brown, “godfather” of funk and hip hop, had a mere 3% royalty rate.<sup>97</sup> Furthermore, pioneering black artists such as Scott Joplin, Jelly Roll Morton, Bessie Smith, Little Richard, Jimi Hendrix, and Chuck Berry, “signed away their musical works for little or no compensation.”<sup>98</sup> A discrepancy exists between theory and practice.<sup>99</sup>

The music industry has further benefited from structural racism through exploitative contracts with black artists<sup>100</sup> and a racial script that treats black creators as infringers, whether in hip hop or the blues.<sup>101</sup> Take, for example, Bessie Smith, a female black American singer who was the most influential and best-selling blues artist of the 1920s.<sup>102</sup> In 1979, Smith’s heirs filed a lawsuit against Columbia Records that claimed the company had wrongly appropriated her material.<sup>103</sup> Smith’s heirs claimed that Columbia paid her on a flat fee, per song basis with no record royalties, and then falsely registered her songs as written by Columbia Records.<sup>104</sup> Her heirs then filed a Section 1981 claim,<sup>105</sup> alleging that “Columbia Records, during the 1920s and 1930s, discriminated against all black performers by fraudulently signing them to

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94. Interview with Kevin J. Greene, Professor, Sw. L. Sch. (Roger Williams Sch. L. IPLA Copyright & Racial Just. Panel Discussion) (Nov. 10, 2020).

95. *Id.*

96. *Id.*

97. *Id.*

98. Greene, *The Future is Now*, *supra* note 65, at 71.

99. *See id.*

100. *Id.* at 66.

101. VATS, *supra* note 69, at 203.

102. Kevin J. Greene, *Copynorms, Black Cultural Production, and The Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L. J. 1179, 1204 (2008) [hereinafter Greene, *Copynorms*].

103. *Gee v. CBS*, 471 F. Supp. 600, 610 (E.D. Pa. 1979).

104. Greene, *Copynorms*, *supra* note 102, at 1204.

105. Civil Rights Act, 42 U.S.C. § 1981 (1866) (amended by Act of 1991). Smith’s heirs brought a Section 1981 race discrimination claim from the Civil Rights Act of 1866). *Id.*

contracts with low payment terms and no royalty provisions, while at the same time signing white performers to contracts for much greater sums, including royalty provisions.”<sup>106</sup> Ultimately, the suit failed to survive a motion to dismiss.<sup>107</sup> However, rather than acknowledging the wrongs Columbia committed, the judge instead wrote, “Smith earned from \$1500 to \$2000 per week, a staggering sum for anyone then to earn, and an awesome achievement for a black woman of that era.”<sup>108</sup>

The implication here is that Smith, a wealthy illiterate black woman, should not be complaining about appropriation of her art. Similarly, in the line of hip hop sampling cases detailed above, one can trace the same condescending language of jurists towards successful African-American musical artists. Whether Bessie Smith or Biz Markie, the explicit message is the same: black musical artistry is not valuable and does not deserve the full protection of the law.

*C. Bridgeport’s Rule is Stifling a New Generation’s Creative Use of Digital Music Sampling*

*“I say there’s two types of samples: the really fucking expensive type, and the really really fucking expensive type.”—Dina Lapolt*

In *Bridgeport*, the Sixth Circuit explicitly stated that its decision would stifle hip hop artists’ creativity:

“Get a license or do not sample. We do not see this as stifling creativity in any significant way . . . the market will control the license price and keep it within bounds. . . . *On the other hand, many of the hip hop artists may view this rule as stifling creativity.*”<sup>109</sup>

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106. *Gee*, 471 F. Supp. at 613.

107. *Id.* at 662.

108. *Id.* at 610.

109. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801, 804 (2005) (emphasis added).

“Get a license,” is language suffused with white privilege<sup>110</sup>—licensing fees for samples are prohibitively expensive.<sup>111</sup> A typical artist today cannot afford to sample more than one or two songs on a record.<sup>112</sup> Many independent labels cannot afford to sample at all.<sup>113</sup> The law according to the Sixth Circuit is clear: even a *de minimis* sample of a few seconds is illegal without a license.<sup>114</sup> The sample clearing system has thus created a class divide separating those who can afford samples and those who cannot.<sup>115</sup>

*Bridgeport’s* ruling has a chilling effect on sampling artists who must either go underground or keep their creations to themselves, to the exclusion of the public’s benefit.<sup>116</sup> From an artist’s perspective, the cost of making the piece of art could preclude its creation.<sup>117</sup> In the late 1980s, artists made hit records with hundreds

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110. “White privilege . . . refers to whites’ historical and contemporary advantages in access to quality education, decent jobs and livable [sic] wages, homeownership, retirement benefits, wealth and so on.” Roundtable on Community Change, *Glossary for Understanding the Dismantling Structural Racism/Promoting Racial Equity Analysis*, ASPEN INSTITUTE, <https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/RCC-Structural-Racism-Glossary.pdf> [<https://perma.cc/N7X3-NXK7>]. For an explanation of white privilege, see “Unpacking the Invisible Knapsack” excerpted from Peggy Macintosh, *Working Paper #189 White Privilege and Male Privilege a Personal Account of Coming to See Correspondences through Work in Women’s Studies*, WELLESLEY, MA: WELLESLEY COLLEGE CENTER FOR THE STUDY OF WOMEN (1989) (excerpt found in *Glossary for Understanding the Dismantling Structural Racism/Promoting Racial Equity Analysis*).

111. MCLEOD & DiCOLA, *supra* note 4, at 153 (“Buyouts today typically range from \$500 to \$15,000 per sample.”); *id.* at 160 (“Usually . . . somewhere between \$5,000 and \$15,000.”); *id.* at 153 (“[B]ut in special cases they can cost as much as \$50,000 or even \$100,000 in some very special cases.”).

112. *Id.* at 27–28. Compared to between 100 to 200 samples on early Public Enemy records, “today it is impractical to license songs with two or more samples.” *Id.*

113. *Id.* at 118 (“Unlike a major label, an independent label cannot afford the cost of many samples.”).

114. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

115. MCLEOD & DiCOLA, *supra* note 4, at 118 (“The sample clearance system has created its own kind of digital divide separating those who can afford samples and those who can’t.”).

116. *Id.* at 14 (“These fiscal and legal realities deter the creation of collaged compositions containing multiple samples, thereby stunting the development of an art form in its relatively early stages.”).

117. *Id.* at 28 (De La Soul: “That’s what’s kind of messed up about sampling. . . . [W]hen you create a song and you think, ‘All right, this is hot, this

of uncleared samples per record.<sup>118</sup> But by the early 1990s, the cost of clearing samples had significantly increased.<sup>119</sup> Even a phrase like ‘uh’ or ‘hit it’ from James Brown could cost between \$6,000–\$8,000 to sample, or \$10,000 for a bass line.<sup>120</sup> At these prices, unestablished artists cannot afford to sample.

The music industry still has no set guidelines for how to price music samples.<sup>121</sup> Today, only the richest artists on major labels can afford to make sampling art—an irony not lost on those early practitioners of the art from humble beginnings.<sup>122</sup> Furthermore, beyond excessive license fees, clearing a sample includes transaction costs of paying a clearance professional to track down all the owners of each copyright in the sample.<sup>123</sup> And because of the

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is it, right here.’ And then you hand the work in to the lawyers to go clear. And either the numbers are just so crazy that you don’t want to pay that kind of money, or some people just clearly say outright, ‘No . . . you’re not using my stuff.’ It kind of spoils the creative process.”); see DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 251 (Simon & Schuster, 10th ed. 2019) (“Clearing samples is a major pain in the butt. You have to get a license from both the owner of the master and the owner of the sampled song. But there’s nothing in the law that requires anyone to let you use a sample of their work, so a record company or publisher who’s been sampled can make you pull it off your record. Or pay the equivalent of a ransom for the ruler of a small kingdom.”); *id.* at 252 (“The lesson in all this is that putting a sample in your record is serious business. So think about it carefully. A moment of pleasure can mean a lifetime of pain.”).

118. MCLEOD & DICOLA, *supra* note 4, at 27.

119. *Id.* (“[B]y the early 1990s . . . the cost of clearing samples—and the legal risks of not clearing samples—had significantly increased.”).

120. *Id.* at 116 (“I’m not making enough money to pay eight grand for an ‘uh’ from James Brown.”); see *id.* at 160 (“\$6,000 . . . just to even sample the words, ‘Hit it!’”); *id.* at 160–61 (“[G]ive me \$10,000 [for this bass line].”).

121. *Id.* at 253 (“[R]ight now it’s a go for yourself, anything goes, wild, wild, west kind of a situation when it comes to sampling.”); see *id.* at 111 (“[L]aws prevent people from sampling music because they can’t afford to do it—because there’s no set guideline to what the person who’s being sampled will charge.”).

122. *Id.* at 117–18 (“[S]ampling still exists . . . for motherfuckers who can afford it . . . it’s pretty sad.”); see *id.* at 146 (“The legal process is both expensive and uncertain.”); *id.* at 158 (“I say there’s two types of samples: the really fucking expensive type, and the really *really* fucking expensive type.”); *id.* at 159 (“Only the ones who are very, very well off can afford to sample anymore.”).

123. *Id.* at 185 (“The problems we heard about include arguably excessive licensing fees; difficulties in clearing songs that contain multiple samples; multiple kinds of transaction costs; outright refusals to license; barriers to licensing for independent musicians who lack business relationships with record labels, publishers, or sample clearance houses; the royalty stacking problem that

Copyright Act's statutory damages, a plaintiff alleging copyright infringement can recover statutory damages of \$150,000 per sample.<sup>124</sup> Thus, by making sampling prohibitively expensive and threatening statutory damages of hundreds of thousands of dollars per sample, the law effectively chills the next generation of hip hop artists and deprives the listening public of future creative uses of digital music sampling.

Congress should amend Section 114(b) in accord with the Ninth Circuit's interpretation in *VMG Salsoul*. It is unlikely that a music sampling case will make it to the Supreme Court, given the rarity of copyright cases decided by the Supreme Court in recent years.<sup>125</sup> Even if one did, given the current composition of the Court, it is unlikely that they would take a digital sampling copyright infringement case that validated hip hop sampling as an art form.<sup>126</sup> Congress, by contrast, has recently promulgated The Music Modernization Act,<sup>127</sup> which already amended key parts of the copyright statute.<sup>128</sup> Congress can clearly and unambiguously resolve this

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occurs when a song contains multiple samples; and the failure of the industry and mash-up artists to develop an approach to licensing mash-ups.”).

124. 17 U.S.C. §§ 502–505.

125. The U.S. Supreme Court takes an average of one copyright case per year. See *List of United States Supreme Court Copyright Case Law*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_Supreme\\_Court\\_copyright\\_case\\_law](https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_copyright_case_law) [<https://perma.cc/MB6D-FV3Z>] (last visited Sept. 10, 2022). Also, the Copyright Clause in the Constitution expressly places the power in Congress to determine and shape IP law to fulfill constitutional goals. And the Supreme Court has emphasized congressional power in this area. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 799 (2003).

126. For instance, the Court's conservative majority overturned *Roe v. Wade*, 410 U.S. 959 (1973), in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (holding no fundamental right to abortion). Likewise, as the Sixth Circuit acknowledges, Congress is best suited to address this comprehensive issue, rather than the courts on a case-by-case basis. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

127. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018).

128. For a brief summary, see *The Music Modernization Act*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/music-modernization/> (last visited Oct. 10, 2022) (“Title I establishes a blanket licensing system for digital music providers to make and distribute digital phonorecord deliveries (e.g., permanent downloads, limited downloads, or interactive streams). . . . Title II brings pre-1972 sound recordings partially into the federal copyright system and provides federal remedies for unauthorized use of sound recordings fixed before February 15, 1972. . . . Title III allows music producers, mixers, and



dispute in favor of the Ninth Circuit's interpretation by amending Section 114(b) through new legislation.<sup>129</sup>

### III. TAKE TWO: A CALL FOR REVISING THE LAWS OF *DE MINIMIS* SAMPLING

*"If you don't own your masters, your master owns you."*—Prince<sup>130</sup>

In the interest of racial and socioeconomic justice, a uniform, reasonable interpretation of the copyright statute, and the affordability of future sampling art forms, Congress should amend the copyright law in accordance with the Ninth Circuit's interpretation of Section 114(b). The Sixth Circuit's ruling in *Bridgeport* and interpretation of Section 114(b) is out of sync with the rest of copyright law, reinforces structural racism, and stifles artists' creative use of digital music sampling. The Sixth Circuit's bright-line rule and its related judicial opinions are couched in racial-stereotyped language that stigmatizes black artistry and perpetuates structural racism in America that is rooted in the history of enslavement and Jim Crow.

Although proponents of the Sixth Circuit's interpretation of Section 114(b) will argue that the policy behind music sampling laws is to protect the copyright owner, the competing policy of remedying a history of racial injustice, the pragmatism of having a unified copyright infringement analysis, and the purpose of the copyright law far outweigh the court's owner-centered position. First, a music sample contains two copyrights—one for the composition and one for the recording—so their argument focusing exclusively on the rights of the recording copyright is only half the battle; a court would still have to engage in a *de minimis* analysis on the composition side.<sup>131</sup> Second, the copyright owner is still protected under

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sound engineers to receive royalties collected for uses of sound recordings by codifying a process for the designated collective (Sound Exchange) to distribute those royalties under a 'letter of direction.'").

129. To the extent that policy considerations come into play (such as the social and political implications of legal decisions), such arguments are best addressed by Congress.

130. VATS, *supra* note 69, at 164.

131. The court would analyze the composition copyright for proof of unlawful copying separate from the recording copyright. See *Allen v. Scholastic, Inc.*, 739 F. Supp. 2d 642, 653–54 (S.D.N.Y. 2011). Two elements must be shown for infringement of a composition copyright: (1) the defendant actually copied from the plaintiff's work (actual copying) and (2) the defendant copied those

the Ninth Circuit's interpretation. If a court deems a sample to be substantially similar and not *de minimis*, the copyright owner will prevail.<sup>132</sup> Finally, the purpose of the copyright law as a whole is to "promote the progress of . . . the useful arts."<sup>133</sup> The Ninth Circuit carefully balanced these competing interests in its decision, whereas the Sixth Circuit's opinion in *Bridgeport* protects the copyright owner *at the expense* of the useful arts.

Proponents of the Sixth Circuit's *Bridgeport* holding would also presumably argue that a bright-line rule for copyright recording owners is facially race-neutral and would protect a black sound recording copyright holder who wanted to sue a sampling artist for strict liability copyright infringement the same it would a white copyright holder. However, that rationale is myopic; the Ninth Circuit's ruling is still the better rule in the aggregate. Individual cases of black artists suing for strict liability infringement does not outweigh the cost of the strict liability rule on the genre of hip hop as a whole. A distinction needs to be made between black artists rightly suing for copyright infringement<sup>134</sup> and the erroneous *Bridgeport* holding that purports to make sampling without a license illegal.<sup>135</sup> The former can be an act of racial justice, but the latter is an act that perpetuates structural racism. Moving forward, Congress should amend the copyright law to allow for a *de minimis* defense for digital sampling pursuant to the Ninth Circuit's ruling in *VMG Salsoul*.

Taking a step back, Professor Bryan Stevenson has said that we cannot understand these present-day issues in black America "without understanding the persistent refusal to view black people

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parts of the plaintiff's work that are protected by copyright (substantial similarity). *See id.* To prove actual copying, the plaintiff must show (1) access and (2) similarity. To prove substantial similarity, the plaintiff must show that the defendant copied a portion of the work that receives copyright protection. *See id.*

132. That is, if the (1) actual copying and (2) substantial similarity prongs are met, then copyright infringement follows, regardless of the *de minimis* defense. *See id.*

133. U.S. CONST. art. I, § 8, cl. 8.

134. *See generally, e.g., Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

135. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 655, 659–61 (6th Cir. 2004).

as equals.”<sup>136</sup> Black bodies in this country carry with them the presumption of dangerousness and criminality—a presumption that creates the notions that black people cannot be trusted and black bodies must be controlled.<sup>137</sup> We have unfortunately excluded the long history of racial injustice from our national discourse, and that omission may be lurking behind these problematic judicial opinions that target hip hop sampling.<sup>138</sup> Questions of black art in America, particularly when the law presumptively treats a black artist as a thief, are intricately connected to the same issues concurrent to policing and mass incarceration of black people.

As Professor Anjali Vats has taught, American copyright discourses have repeatedly questioned whether black people “possess adequate inventiveness, creativity, and capacity to create . . . in ways that fit within the racialized ideals of Americanness, citizenship, and personhood.”<sup>139</sup> Black creations continue to be coded as already unoriginal or infringing and an inappropriate subject for court intervention.<sup>140</sup> True imagination remains a requirement of copyright protection today, and the racial scripts that attach to it have not been deconstructed.<sup>141</sup> Racism has affected the administration of American copyright law from its very beginning and continues to exclude people of color and devalue their voices and work as creators. If that is true, what is happening in the law of digital music sampling today is sadly not the exception but the rule.

#### CONCLUSION

A circuit split currently exists between the Sixth and Ninth Circuits over the status of *de minimis* copying of a sound recording, and the stakes are high for hip hop. Any hip hop sample created today in the Sixth Circuit is presumed illegal without a license,

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136. Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, NEW YORKER (June 1, 2020), <https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests> [https://perma.cc/W4G2-JUV2].

137. *Id.*

138. Ezra Klein, *Bryan Stevenson on How America Can Heal: A Conversation about Truth and Reconciliation in the U.S.*, VOX (July 20, 2020, 9:20 AM), <https://www.vox.com/21327742/bryan-stevenson-the-ezra-klein-show-america-slavery-healing-racism-george-floyd-protests> [https://perma.cc/L4UB-UX5A].

139. VATS, *supra* note 69, at 203.

140. *Id.*

141. *Id.* at 151.

even if *de minimis*. Established artists like Taylor Swift or Jay-Z can afford to hire new musicians to re-record their old albums or pay exorbitant fees to license a sample, thus getting around music sampling law, but less established musicians cannot afford such liberties. Thus, they are left to either compromise their art or go underground.<sup>142</sup>

Critics attack this position by framing sampling as “thievery” of the copyright owner’s work. But, as this Comment discussed, this position has no grounding in copyright law and is fraught with overtones of racism. Thus, the real critical question cuts deeper: when will Black people and their art be treated with the same rights and opportunities as White people and their art? Copyright law is not immune from structural racism. “Get a license” is language suffused by white privilege. Until we see that, our music culture will suffer accordingly.

Therefore, in the interest of racial and socioeconomic justice, a uniform, reasonable interpretation of the copyright statute, and the affordability of future sampling art forms, Congress should amend the Copyright Act in accord with the Ninth Circuit’s interpretation of Section 114(b) to allow for a *de minimis* defense for music sampling.

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142. See *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1296–97 (11th Cir. 2011) (discussing Timbaland *de minimis* sample).