Comments and Notes

Morality in *Vogue*: Balancing Moral Rights in Sound Recording Copyrights

By ADAM KWON*

Introduction

IN A WORLD WITH GHOSTWRITING PRODUCERS,[1] YouTube cover artists,[2] and mainstream DJs,[3] those who wish to succeed in the music industry must understand certain fundamental rules of copyright law, such as the differences between musical works and sound recordings.[4] For example, in practice, anyone may copy someone else's "musical work" (i.e., anyone may cover a song), even absent express licensing from the owner, so long as the copier pays a royalty to acquire a compulsory license and complies with statutory notice re-

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1. *See* Jemayel Khawaja, *"Ghost-Producing" Is EDM's Dirty Little Secret*, L.A. WKLY. (July 29, 2013, 9:31 AM), http://www.laweekly.com/music/ghost-producing-is-edms-dirty-little-secret-4170623 [https://perma.cc/X6XB-WP9S] (characterizing ghostwriters as "[t]he guys who pen the words someone else performs, and get no credit for it").

2. *See* Noah Nelson, *Covering Pop Hits On YouTube Is Starting To Pay*, NPR (May 13, 2013, 5:00 AM), https://www.npr.org/sections/therecord/2013/05/13/182880665/covering-pop-hits-on-youtube-is-starting-to-pay [On file with USF Law Review] ("The issue is the legal rights to the song. That's held by publishers or songwriters, and if anyone wants to make money on a recording of a song, he has to make a deal.").

3. *See* Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES (Aug. 6, 2008), http://www.nytimes.com/2008/08/07/arts/music/07girl.html [On file with USF Law Review] (discussing how Gregg Gillis, more popularly known as the D.J. Girl Talk, has yet to be sued for copyright infringement, even though "[a]rtists who sample a recording also need permission from the owner, in most cases the record label").

4. *See What is the Difference Between a Composition and a Sound Recording?*, TUNECORE, https://support.tunecore.com/hc/en-us/articles/115006502747-What-is-the-difference-between-a-composition-and-a-sound-recording- [https://perma.cc/X4BT-E78Y] (attempting to explain the differences between musical works and sound recordings for digital music distribution purposes).

quirements.[5] That is because under 17 U.S.C. § 115, a compulsory license grants the licensee the privilege of copying someone else's musical work (with certain limitations), and the law protects the copier from infringement liability, regardless of whether the musical work's copyright holder approves.[6]

In contrast, "sound recordings" are explicitly excluded from the compulsory licensing scheme of section 115.[7] According to the statute, one may *not* copy someone else's sound recording without an express license from the copyright holder; rather, a license to sample someone else's sound recording can only be obtained by express authorization from a willing licensor.[8]

Within this framework exists a grey area in the law that has recently resulted in a circuit split—the question of de minimis copying of sound recordings.[9] In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit held that there can be *no* de minimis exception to the copying of a sound recording, regardless of how small the copied portion is.[10] By eliminating the de minimis exception as to an entire category of copyright, the *Bridgeport* decision significantly shaped the music industry for over a decade as the highest relevant legal authority until the Ninth Circuit recently rejected the bright-line rule set forth by the *Bridgeport* court.[11] In *VMG Salsoul, LLC v. Ciccone*, the Ninth Circuit held that the doctrine of de minimis copying *does* apply to sound recordings and took "the unusual step of creating a circuit split by disagreeing with the Sixth Circuit's contrary holding in *Bridgeport*."[12]

5. Scott L. Bach, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 379 (1986).

6. *Id.* at 379–80 ("This is true even if the original composer does not want others to record his composition.").

7. 17 U.S.C. § 115(a)(1) (2012) ("A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless . . . such sound recording was fixed lawfully . . . .").

8. *Id.*

9. *See* Steven Seidenberg, *US Perspectives: US Courts Split On Legality of Music Sampling*, INTELL. PROP. WATCH (June 28, 2016), http://www.ip-watch.org/2016/06/28/us-courts-split-on-legality-of-music-sampling/ [https://perma.cc/B9KG-N778].

10. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005) (en banc).

11. Christian Palmieri & Monica B. Richman, *Music Sampling: Has the Tune Changed?*, 35 ACC DOCKET 52, 54 (2017) ("Until recently, the Sixth Circuit's *Bridgeport* decision was the only circuit ruling on whether the 'de minimis' defense applies to the unauthorized sampling of sound recordings.").

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

To be sure, in the years leading up to *VMG Salsoul*, the *Bridgeport* decision was not free from criticism.[13] Moreover, courts that are not bound by Sixth Circuit precedent have largely declined to follow its holding.[14] Still, others continue to defend *Bridgeport*.[15] In any event, it remains the law in the Sixth Circuit that there can be no de minimis exception to copying of sound recordings.

The tension between *Bridgeport* and *VMG Salsoul* has created uncertainty in the music industry licensing landscape.[16] On one hand, legal scholars and professionals have suggested that *VMG Salsoul* could result in much needed reform of the post-*Bridgeport* regime for licensing music samples, eventually bringing clarity to an underdeveloped part of the law.[17] On the other hand, others have suggested that the national nature of music licensing and distribution will not alter music industry practices for sampling sound recordings because forum shopping will allow copyright holders to simply sue defendants in the Sixth Circuit.[18]

13. *See, e.g.*, Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 121 (2006) ("One could persuasively argue that [*Bridgeport*] was decided incorrectly, and thus other courts should disregard the Sixth Circuit's erroneous analysis when analyzing future digital sample cases."); Rahmiel David Rothenberg, *Sampling: Musical Authorship Out of Tune with the Purpose of the Copyright Regime*, 20 ST. THOMAS L. REV. 233, 253–54 (2008) ("[T]he failure of the courts to fully acknowledge the diverse forms of authorship, most recently in Bridgeport, does not establish a judicial precedent, in relation to the use of sound recordings, which stays true to this purpose [of encouraging creativity to progress the arts for society's benefit]."); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (2018) (observing that the *Bridgeport* court's holding relies on a "logical fallacy").

14. *VMG Salsoul*, 824 F.3d at 886 (citing Saragama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1340–41 (S.D. Fla. 2009)); Batiste v. Najm, 28 F. Supp. 3d 595, 625 (E.D. La. 2014); Pryor v. Warner/Chappell Music, Inc., No. CV 13–04344, 2014 WL 2812309, at *7 n.3 (C.D. Cal. June 20, 2014); Zany Toys, LLC v. Pearl Enters., LLC, No. 13–5262, 2014 WL 2168415, at *11 n.7 (D.N.J. May 23, 2014); EMI Records Ltd v. Premise Media Corp., No. 601209/08, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008)).

15. *See, e.g.*, Michael G. Kubik, Note, *Rejecting the De Minimis Defense to Infringement of Sound Recording Copyrights*, 93 NOTRE DAME L. REV. 1699, 1699 (arguing that *Bridgeport*, and not *VMG Salsoul*, was decided correctly as a matter of statutory interpretation).

16. Palmieri & Richman, *supra* note 11, at 54 ("Ironically, the *Bridgeport* court decision—which famously declared 'Get a license or do not sample'—reasoned that its ruling would simplify the negotiation process and lower the cost of clearing samples. The effect, however, has been just the opposite.").

17. *See* Tamany Vinson Bentz & Matthew J. Busch, *VMG Salsoul, LLC v. Madonna Louise Ciccone, et al.: Why a Bright Line Infringement Rule for Sound Recordings is no Longer in Vogue*, LEXOLOGY (June 28, 2016), https://www.lexology.com/library/detail.aspx?g=cb00162a-3c71-4853-9b0f-4f6cb644f556 [https://perma.cc/M2T5-TJ3Q].

18. *See* Mark Wittow & Eliza Hall, *9th Circ. And German High Court Weigh In On Music Sampling*, LAW360 (Aug. 9, 2016, 11:21 AM), https://www.law360.com/articles/824098/

This Note contends that the Ninth Circuit was correct in disagreeing with the Sixth Circuit, and that *VMG Salsoul* marks the first step in reigning in the main effects of *Bridgeport*: the improper extension of absolute moral rights protection for sound recordings and, consequently, the disruption to the inherent balance upon which United States copyright law is founded.

Parts I and II establish the backdrop over which this Note contemplates the issue presented by briefly outlining the histories of moral rights and digital sampling, respectively, as they relate to copyright law. Part III suggests that the decision in *Bridgeport* was, at its core, rooted in moral rights protection by comparing the Sixth Circuit case with *Kraftwerk, et al. v. Moses Pelham, et al.*—a German digital sampling case with facts not dissimilar to those of *Bridgeport* or *VMG Salsoul*. Part IV supports the argument presented in Part III by explaining how *Bridgeport* was poorly disguised as statutory interpretation in the name of judicial efficiency and further comparing *Kraftwerk* to *VMG Salsoul*. This Note concludes by reiterating why the de minimis exception ought to apply to sound recording copyrights, as to deny such an exception would be to improperly extend absolute moral rights protection to owners of sound recordings, thereby undermining the very essence of copyright protection in the United States.

I. Moral Rights in the United States: A History

Traditionally, moral rights (e.g., rights of attribution and integrity of one's work) originated in civil law countries, primarily in Europe.[19] Those countries tend to favor a Dualist Theory of ownership, under which an author's economic interests in a work of art are distinct from her personal interests, which are protectable by separate sets of laws.[20] Under this theory, an author possesses inalienable rights in her works because her works are extensions of herself.[21] In contrast, common law countries like the United States developed under a Monist Theory, which favors the idea that an author's economic interests are a deeply intertwined subset of her personal interests in the work; one

9th-circ-and-german-high-court-weigh-in-on-music-sampling [On file with USF Law Review].

19. Symposium, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON J. INT'L COM. L. 1, 9 (2016) [hereinafter Moral Rights Symposium].

20. Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performance Regulations*, 24 B.U. INT'L. L.J. 213, 213–14 (2006).

21. Moral Rights Symposium, *supra* note 19, at 9.

set of rights is inseparable and indistinguishable from the other, and therefore, only economic rights are protected.[22]

As products of Dualist Theory, civil law countries developed to protect moral rights early on, while common law countries under Monist Theory originally developed to protect only economic rights. For example, traditional civil law countries like France, Germany, and Italy have long protected moral rights, while common law nations had copyright regimes which originated to protect only economic rights.[23] Recently, however, common law nations like the United States, Canada, Australia, New Zealand, Ireland, and the United Kingdom have begun to adopt the civil law concept of protecting moral rights.[24]

A. The Berne Convention

These developments in common law countries have been described as "eliminat[ing] the key feature that distinguished common law from civil law copyright systems,"[25] and the drastic shift against the canonical norm of comparative copyright law can be largely attributed to international copyright treaties such as the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention"), which is administered by the World Intellectual Property Organization ("WIPO") and obligates signatory members to protect certain moral rights for authors.[26] In relevant part, Article 6*bis* of the Berne Convention reads:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
> . . .

22. *Id.*

23. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L. L.J. 353, 355 (2006).

24. *Id.* at 353 ("[O]ver the past twenty years has been the adoption of statutory moral rights regimes in a number of countries that had previously ardently rejected the civil law concept of moral rights as completely alien to their legal tradition, including the United States, the United Kingdom, Australia, Ireland, and New Zealand."); Bird & Ponte, *supra* note 20, at 216 ("[O]ther common law nations, such as Canada, Australia, and New Zealand, have already adopted broader statutory schemes granting moral rights for creative works, including moral rights for music.").

25. Rigamonti, *supra* note 23, at 354.

26. *See generally*, *id.* at 356–58 ("Currently, Article 5 of the WPPT and Article 6*bis* of the Berne Convention are the only relevant moral rights provisions on the international level.").

> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.[27]

The first section of Article 6*bis* acknowledges two primary moral rights: the right of attribution (also known as the right of paternity) and the right of integrity.[28] Generally, the right of attribution is the author's right to claim authorship of a published work, and the right of integrity is the author's right to prevent another from altering the work in a way that would be prejudicial to the author.[29]

A closer look at the language of 6*bis* reveals that the language in the Berne Convention is the result of compromise between civil law countries and common law countries.[30] The third paragraph of 6*bis* establishes that moral rights need not be codified in a specific code of enforcement; rather, the means for protecting moral rights comes from the laws of the individual signatories.[31] This reflects the compromise that was made by civil law countries to allow traditionally common law countries like Australia and the United Kingdom to join the treaty without having to amend their laws, so long as their laws provided sufficient means of protecting moral rights.[32] In this manner, the United States became signatory to the Berne Convention in 1988 and adopted a legal concept from civil law nations.[33] Although the protection of moral rights is clearly at odds with the United States' foundational focus on economic rights, it is not impossible to fit moral protections into a common law framework.[34]

The United States' view on property law has traditionally favored dynamic property ownership as opposed to static ownership, and most scholars agree that early copyright law was based on an ownership theory of natural rights—property ownership represented a means to survive.[35] Other scholars argue that copyright law in the United States is based on utilitarianism, perhaps because the Framers of the Constitution conferred to Congress in the IP Clause the power to promote the

27. Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, *as revised at Paris on* July 24, 1971 *and amended in* 1979, S. TREATY DOC. NO. 99–27 (1986) [hereinafter Article 6*bis*].

28. *Id.*; Moral Rights Symposium, *supra* note 19, at 8, 10, 13.

29. Bird & Ponte, *supra* note 20, at 221.

30. *See* Moral Rights Symposium, *supra* note 19, at 9–10.

31. Article 6*bis*, *supra* note 27.

32. Moral Rights Symposium, *supra* note 19, at 9–10.

33. *Id.* at 12 ("By adopting the Berne Convention, the U.S. embraced a legal transplant, and that legal transplant has European roots.").

34. *Id.*

35. *Id.* at 11.

useful arts.[36] However, such arguments tend to blur the line between economic property and notions of morality.[37] Nevertheless, even the consequentialist justification for copyright is premised on the notion that authors need incentives to create new works, and in any event, the protection of the ineffable bond between an author and her work is noticeably scarce in United States copyright law.[38]

Nonetheless, United States law does protect rights of attribution and integrity. For example, U.S. law protects rights of privacy and publicity, punishes acts of defamation or misappropriation, and prohibits infringement of trademarks and unfair competition.[39] Moreover, a historical look into the Berne Convention's implementation shows that the United States has been, and is, in compliance with the provisions of the Berne Convention, including those mandating protection of moral rights.[40]

Additionally, under instructions from Congress, the Copyright Office conducted a study on moral rights which ultimately resulted in the National Film Preservation Act of 1988 (the "NFP Act"), which protected moral rights in motion picture works.[41] However, the study was not due to be completed until after the United States acceded to the Berne Convention, which indicates that Congress did not contemplate the NFP Act as a necessary step in accession.[42] In any event, the NFP Act expired after three years.[43] And although the NFP Act has been reauthorized each time it has expired, it no longer addresses moral rights—rather, its focus is film preservation.[44]

36. *Id.*; U.S. CONST. art. I, § 8, cl. 8.

37. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1856–57 (2007) ("The relationship between property and morality has been obscured by . . . the related tradition . . . of examining questions about property law from a utilitarian perspective. Utilitarianism is, of course, a moral theory.").

38. *See* Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1227 (2002) ("Moral Rights protection is limited in the United States, where the only viable course of action for non-visual authors is through the Lanham Act.").

39. *See* Bird & Ponte, *supra* note 20, at 252 n.303 ("Most observers agree that current [U.S.] law, including the Lanham Act and laws relating to defamation, privacy, publicity, and unfair competition, contains the basic elements of moral rights sufficient to comply with Berne." (citations omitted)).

40. *Id.*; *see also* Moral Rights Symposium, *supra* note 19, at 18–19 ("The House and Senate ultimately concluded after many hearings and extensive consultations with U.S. agencies, meetings in Geneva with WIPO and other governments, and experts, that explicit new moral right legislation was not necessary for Berne implementation.").

41. Moral Rights Symposium, *supra* note 19, at 20.

42. *See id.*

43. *Id.*

44. *Id.*; *see generally* 2 U.S.C. § 179l (2012).

A couple of years later, Congress passed the Visual Artists Rights Act of 1990 ("VARA"), which provides protection of moral rights for visual works of art; however, those rights are limited.[45] Under VARA, the right of integrity may give rise to *both* monetary and injunctive relief, but the right of attribution may give rise to injunctive relief only.[46] Protection under VARA lasts only for the life of the author, and the right of integrity is only available for works of recognized stature.[47] Perhaps most restrictively, VARA only protects works of art with a single copy or less than two hundred limited edition copies which are signed and consecutively numbered by the author.[48] Yet, despite criticisms that VARA was simply enacted to give the appearance that the United States was in compliance with the Berne Convention,[49] VARA was passed more as a post-accession continuation of the already-settled attitude that the United States was Berne-compliant.[50]

Then, in 1995, the United States and the other nations of the World Trade Organization entered into the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[51] Significantly, TRIPS obligates member countries to adhere to Articles 1–21 of the Berne Convention, with the exception of Article 6*bis*.[52] This is because the United States viewed TRIPS as a trade agreement, as opposed to a copyright convention, and relatedly, TRIPS contains a dispute settlement provision whereas the Berne Convention is not self-executing.[53] Article 6*bis* of the Berne Convention was omitted from the TRIPS Agreement because including it would have created a material liability where previously there had been none, especially for

45. *See* 17 U.S.C. § 106A (1990).

46. *See* Massachusetts Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 55 (1st Cir. 2010) (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06[B][1]).

47. *See* 17 U.S.C. § 106A.

48. *See* 17 U.S.C. § 101 (2010) ("A 'work of visual art' is . . . a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.").

49. *See* Suhl, *supra* note 38, at 1228 ("To truly comply with the Berne Convention, it may be necessary for U.S. law to depart from its utilitarian, market-driven tradition, and to affirmatively provide protection to authors in a manner consistent with that provided by other member countries of the Berne Convention.").

50. Moral Rights Symposium, *supra* note 19, at 21 ("VARA was passed for a limited set of works and rights, and with the continuing feeling in Congress and the U.S. Government that [the U.S. was Berne compliant]").

51. Moral Rights Symposium, *supra* note 19, at 22.

52. *Id.* at 21.

53. *Id.* at 22.

countries like the United States that rely on the totality of the nation's laws to account for protection of moral rights.[54]

Finally, in 2003, the Supreme Court held in *Dastar*[55] that a work may be reproduced and distributed once its copyright expires, even without attribution.[56] Thus, *Dastar* marks a specific limit to moral rights in the United States, in stark contrast to the traditional civil law grant of moral rights, which sometimes last for eternity.[57]

In sum, the question of whether the United States is compliant with the Berne Convention's Article 6*bis* moral rights provisions is an often contested subject of comparative law,[58] but it is generally accepted that U.S. law, in its entirety, satisfies those requirements.[59] Indeed, legislation proposing the codification of moral copyright protection has been repeatedly rejected.[60] Some scholars contend that the insertion of additional moral rights into U.S. copyright statutes would result in a great imbalance, ultimately failing even in its purported mission to benefit authors[61] because moral rights can exist as a conceptual, substantive body of principles on the one hand or as a set of labels and rules on the other, and the contemplated statutory regimes are the latter.[62] Under this theory, the adoption of explicit

54. *Id.*

55. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

56. *See id.* at 24 (noting that extending the right of attribution beyond economic rights "would cause it to conflict with copyright law, which is precisely directed to that subject, and which grants the public the right to copy without attribution once a copyright has expired."); *see also* Moral Rights Symposium, *supra* note 19, at 21.

57. *See* Lesley Ellen Harris, *Moral Rights in Works of Visual Art in the U.S.*, COPYRIGHTLAWS.COM https://www.copyrightlaws.com/wp-content/uploads/2010/01/Moral-rights-in-the-US.pdf [https://perma.cc/S6GX-4725] (observing that, e.g., in France, authors may not waive their moral rights, which are perpetual).

58. *See* Rigamonti, *supra* note 23, at 353 (identifying "[t]he two classic questions of comparative moral rights law, namely whether the common law countries fulfill the requirements for moral rights protection under international law and whether the common law countries provide a degree of protection comparable to that available in civil law countries.").

59. *See generally id.* at 371 ("[M]uch of the controversy about moral rights in the United States stems from the selective expansion of moral rights beyond the scope of European moral rights protection, which exacerbates the tension."); *see also* Moral Rights Symposium, *supra* note 19, at 18.

60. Bird & Ponte, *supra* note 20, at 277 (citing Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Right Act*, 68 FORDHAM L. REV. 1935, 1941 n.36 (2000)).

61. Rigamonti, *supra* note 23, at 355 ("[I]f the goal was to increase the overall protection of authors, it was a step in the wrong direction for the common law countries to adopt the civil law concept of moral rights, because the statutory moral rights regimes that were enacted in the United States and the United Kingdom have likely reduced rather than increased the aggregate level of authorial protection.").

62. *Id.* at 412.

moral protections in U.S. copyright law is unnecessary at best, and harmful at worst, because the substantive body of U.S. law is the result of a carefully balanced regime, established by centuries of law addressing inherently economic *and* moral rights.

B. The WPPT

Notably, the Berne Convention only mandates protection for *authors*—it does not require protection of moral rights for owners of copyrights in sound recordings; however, the reasoning regarding compliance with the Berne Convention also applies to copyright holders of sound recordings as a result of the WIPO Performances and Phonograms Treaty of 1996 (the "WPPT").[63] The relevant portion of the WPPT, Article 5, reads:

> (1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.
>
> . . .
>
> (3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.[64]

The language of Article 5 of the WPPT is nearly identical to the language of the Berne Convention's Article 6*bis*. Functionally, the WPPT creates Berne Convention-like moral rights for owners of sound recording copyrights, and accordingly, much of the history around the United States' implementation of the Berne Convention is relevant to the WPPT. As a formal distinction, however, the Berne Convention does not apply to the sampling of sound recordings—the WPPT governs the United States' obligations in that sector of copyright law.

63. Moral Rights Symposium, *supra* note 19, at 13 ("The Berne rights are about authors only. But . . . Performers have acquired internationally the same level of recognition as authors in international treaties. Article 5 of the [WPPT] has a moral right for, essentially, music performers . . . and the U.S. actually is party to that treaty.").

64. WIPO Performances and Phonograms Treaty of 1996, Article 5 (Dec. 20, 1996) [hereinafter WPPT].

II. Digital Sampling: A History

Digital sampling involves taking a part of an existing sound recording (i.e., a "sample"), and copying that sample in a new sound recording.[65] Digital sampling occurs both legally and illegally every day,[66] and the practice plays a fundamental role in the mixing process across almost all genres of music, including rap,[67] hip-hop,[68] rock,[69] and electronic music,[70] to name a few. Meanwhile, as technology has developed over the last forty years, the growing practice of digital sampling has given rise to extensive copyright litigation.[71]

A. Early Cases: Origins of De Minimis Digital Sampling

The first iconic case on digital sampling[72] came from the Southern District of New York in *Grand Upright Music Ltd. v. Warner Bros. Records*.[73] In *Grand Upright*, rap artist Biz Markie released a song titled "Alone Again" that featured unauthorized samples taken from another song called "Alone Again (Naturally)," which was recorded by Gilbert O'Sullivan.[74] Specifically, Biz Markie sampled the opening eight bars of O'Sullivan's recording and looped the sample to form

65. Shun-Ling Chen, *Sampling as a Secondary Orality Practice and Copyright's Technological Biases*, 17 J. HIGH TECH. L. 206, 208 n.1 (2017).

66. *See generally* W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443, 465–67 (2015).

67. *See* Phillip Mlynar, *A History Of Static Sampling In Rap Music: Why Do Rap Producers Love Sonic Imperfections So Much?*, VINYL ME, PLEASE (Oct. 25, 2017), http://www.vinylmeplease.com/magazine/history-static-sampling-rap-music/ [https://perma.cc/2ND6-RTMD].

68. *See The Hip-Hop Songs You Didn't Know Were Samples But Really Should*, CAPITAL XTRA, http://www.capitalxtra.com/features/lists/famous-hip-hop-samples-loops/ (last accessed Jan. 27, 2018) [https://perma.cc/T339-3TKS] ("Hip-Hop's relationship with samples is legendary.").

69. *See generally* Joe Albano, *The Art of Mixing Rock, Part 1: Drums*, ASK AUDIO (Oct. 23, 2014), https://ask.audio/articles/the-art-of-mixing-rock-part-1-drums [https://perma.cc/3565-A4AV].

70. Glenn Jackson, *Modern Approaches: Sampling*, RED BULL MUSIC ACADEMY (July 26, 2016), http://daily.redbullmusicacademy.com/2016/07/modern-approaches-sampling [https://perma.cc/J8G6-25PE].

71. Steven D. Kim, Note, *Taking De Minimis Out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 VILL. SPORTS & ENT. L.J. 103, 103 (2006) ("While digital sampling allows artists to push the boundaries of musical creativity, it likewise pushes at the conventions of copyright law, spawning a myriad of litigation.").

72. Palmieri & Richman, *supra* note 11 (referring to *Grand Upright* as "the first digital sampling dispute [to go] to court").

73. 780 F. Supp. 182 (S.D.N.Y. 1991).

74. *Id.* at 183.

the backing track in "Alone Again."[75] Notably, the evidence in *Grand Upright* clearly showed that Biz Markie had unsuccessfully attempted to obtain a license from O'Sullivan, yet he used the sample anyway.[76]

Ultimately, in *Grand Upright*, the court held in favor of the copyright owner O'Sullivan without even considering the doctrine of de minimis copying.[77] The court did, however, explicitly address the morality (or lack thereof) of Biz Markie's actions several times,[78] and District Judge Duffy went so far as to refer the case, on record, to the United States Attorney for the Southern District of New York to consider criminal prosecution of Biz Markie's theft.[79]

Shortly after *Grand Upright*, the New Jersey District Court addressed the issue of digital sampling[80] in *Jarvis v. A & M Records*.[81] In *Jarvis*, the defendants released three versions of a song titled "Get Dumb! Free Your Body" that featured unauthorized samples taken from a song titled "The Music's Got Me," which was co-written and recorded by the plaintiff, Boyd Jarvis.[82] Specifically, the defendants sampled five words—"ooh . . . move . . . free your body"—and distinctive keyboard instrumentals from Jarvis's song.[83]

Ultimately, the *Jarvis* court held in favor of the copyright owner on the defendants' motion for summary judgment because the samples that were taken were not clearly insignificant; on the contrary, they were "distinct and attention-grabbing" elements of the plaintiff's song.[84] Notably, *Jarvis* did not directly concern a sound recording copyright because the defendants had in fact acquired a sound recording license; rather, the defendants were sued for failing to obtain a musical works license.[85] Despite this distinction, *Jarvis* stands for the proposition that in cases of "fragmented literal similarity,"[86] as digital

75. Thomas W. Joo, *Remix Without Romance*, 44 CONN. L. REV. 415, 430 (2011).

76. *Grand Upright*, 780 F. Supp. at 184–85.

77. *See id.*; 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, 541 (2006).

78. *Grand Upright*, 780 F. Supp. at 183–85.

79. *Id.* at 185.

80. Suppappola, *supra* note 13, at 103.

81. 827 F. Supp. 282 (D.N.J. 1993).

82. *Id.* at 286.

83. *Id.* at 289.

84. *Id.* at 292.

85. *Id.* at 292; Suppappola, *supra* note 13, at 103.

86. *See Jarvis*, 827 F. Supp. at 289 (citing NIMMER ON COPYRIGHT, § 13.03[A][2] at 13–46 ("When there is literal similarity . . . between plaintiff's and defendant's works . . . it is not necessary to determine the level of abstraction at which similarity ceases . . . . But suppose the similarity, although literal, is not comprehensive—that is, the fundamental

sampling cases often are, the appropriate test is one of substantial similarity, and an unauthorized sample might not constitute actionable infringement if it is clearly insignificant in the context of the original work.[87]

The next major development came again from the Southern District of New York in *Williams v. Broadus*.[88] In *Williams*, rapper-producer-actor Snoop Dogg released a song titled "Ghetto Symphony" that featured unauthorized samples taken from a song called "The Symphony," which was recorded by the plaintiff, hip-hop artist Marley Marl.[89] The notable fact of *Williams*, however, is that the plaintiff's song, "The Symphony," actually featured unauthorized samples from another song titled "Hard to Handle," as recorded by the American singer, Otis Redding.[90] Specifically, Marley Marl had sampled two measures—ten notes—from "Hard to Handle," which were repeated throughout "The Symphony."[91] Based on Marley Marl's copying, Snoop Dogg moved for partial summary judgment on a theory of unlawful appropriation.[92]

Thus, in order to determine the question of whether Snoop Dogg could be liable to Marley Marl, the court first determined whether Marley Marl's copying constituted infringement or a lawful taking, and therefore, the court conducted a substantial similarity test between "The Symphony" and "Hard to Handle."[93] In doing so, the court cited, *inter alia*, *Jarvis* to invoke the doctrine of fragmented literal similarity, also known as the doctrine of de minimis copying.[94] The court decided that because no lyrics were taken from "Hard to Handle," and the lyrics were the most significant portion of "The Symphony," the taking of just two measures constituted no more than de minimis copying.[95] Accordingly, Snoop Dogg's motion for partial summary judgment was denied,[96] and *Williams* stands for the proposi-

substance, or skeleton or overall scheme, of the plaintiff's work has not been copied . . . . At what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement?")).

87. *See id.* at 288, 292.

88. No. 99 Civ. 10957, 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001).

89. *Id.* at *1.

90. *Id.*

91. *Id.* at *3.

92. *Id.* at *1–2.

93. *Id.* at *3.

94. *Id.* at *3 (citing Jarvis v. A & M Records, 827 F. Supp. 282, 291 (D.N.J. 1993); and Warner Bros., Inc. v. American Broadcasting Co., 720 F.2d 231, 242 (2d Cir. 1983)).

95. *Id.* at *5.

96. *Id.* at *6.

tion that the de minimis doctrine can apply to copyrighted musical works, even if the copied portion is prevalent in the derivative work; the relevant inquiry is whether the portion taken is significant.[97]

The last major developmental case leading up to the question of de minimis digital sampling of sound recordings came out of the Ninth Circuit in *Newton v. Diamond*.[98] In *Newton*, the hip-hop group, the Beastie Boys, released a song titled "Pass the Mic" that featured *semi-authorized* samples taken from another song called "Choir," which was recorded by jazz musician James Newton.[99] Specifically, the Beastie Boys had taken a six-second portion—a three-note progression—from "Choir," which was repeated throughout "Pass the Mic."[100]

Notably, the Beastie Boys had in fact acquired a license to copy the sound recording from ECM Records, to whom Newton had assigned the rights. However, Newton retained the rights to the underlying musical work, and the Beastie Boys acquired neither a voluntary license from Newton nor a compulsory, statutory license for the musical work. Newton thus brought suit against the Beastie Boys for infringing the musical work via digital sampling.[101]

At the district court level, the Beastie Boys moved for summary judgment arguing that the portion of the musical work taken lacked originality, and even if the portion taken was original, the sampling was de minimis.[102] The district court agreed with the argument that the notes taken lacked originality and granted summary judgment accordingly.[103] However, in doing so, the district court also opined that even if the originality argument had failed as a defense, the Beastie Boys' sampling of Newton's work was de minimis, and therefore not actionable as fragmented literal similarity.[104]

On appeal, the Ninth Circuit affirmed the district court's decision on the ground that the sampling had been de minimis because the Beastie Boys' song and Newton's song were not substantially similar.[105] Thus, although *Newton* centered on the issue of de minimis cop-

97. Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 409–10 (2004).

98. 388 F.3d 1189 (9th Cir. 2003).

99. *See id.* at 1191.

100. *Id.* at 1190–91.

101. *Id.* at 1192.

102. *Id.* at 1190.

103. *Id.*

104. *Id.* at 1190.

105. *Id.* at 1196–97.

ying *of a musical work* (as opposed to a sound recording), it holds great significance as the first time a circuit court affirmatively upheld the de minimis exception in a digital sampling case, and it provided the initial step towards the Ninth Circuit's later decision in *VMG Salsoul*.[106]

B. Current Law: Competing Authorities

Today, despite this line of cases, the law governing digital sampling remains unsettled. Indeed, "[courts] have struggled in their handling of digital sampling disputes, failing to reach any consensus on the proper mechanism for reviewing and protecting economic rights."[107] One approach follows the bright-line rule of the Sixth Circuit in *Bridgeport*,[108] that digital sampling of any kind constitutes *per se* infringement.[109] Another approach follows the more flexible rule of the Ninth Circuit in *VMG Salsoul*,[110] which first determines whether a taken sample constitutes a de minimis taking.[111]

1. The Sixth Circuit's Approach: *Bridgeport*

In *Bridgeport*, the American hip hop group N.W.A. released a song titled "100 Miles and Runnin'" that featured a sample taken from another song called "Get Off Your Ass and Jam," recorded by the band Funkadelic.[112] Specifically, N.W.A. sampled two seconds of a four-second guitar solo riff from "Get Off Your Ass and Jam" and looped the sample in five instances in "100 Miles and Runnin'" after pitch-adjust-

106. *See* Suppappola, *supra* note 13, at 111.

107. Bird & Ponte, *supra* note 20, at 272–73.

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

109. *See, e.g.*, Stephen Carlisle, *Sounds Great! But It Sounds Very Familiar . . . Where to Draw the Line on Digital Sampling of Sound Recordings*, 9 LANDSLIDE 14, 14 (2017); Robert Potter, Andrew Gerber, & Olivia Harris, *So What'cha Want? The Need for Clarity in Copyright Infringement Cases Based on Digital Sampling*, 21 N.Y. ST. B. ASSOC. BRIGHT IDEAS 17, 17 (2012), https://www.kilpatricktownsend.com/~/media/Files/articles/2012/Potter%20Harris%20Gerber%20IPNewsFall12.ashx [https://perma.cc/NP43-FE9C].

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

111. *See, e.g.*, Jacob Quinn, Note, *VMG Salsoul, L.L.C. v. Ciccone: The Ninth Circuit Strikes a Pose, Applying the De Minimis Exception to Music Sampling*, 20 SMU SCI. & TECH. L. REV. 61 (2017).

112. *See* Michael Jude Galvin, Note, *A Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in Bridgeport Music v. Dimension Films*, 9 VAND. J. ENT. & TECH. L. 529, 533–34 (2007).

ing the sampled riff.[113] "By the district court's estimation, each looped segment lasted approximately 7 seconds."[114]

Consequently, Bridgeport (the owner of Funkadelic's copyrights) brought an infringement suit against N.W.A., and the district court concluded that under the de minimis copying doctrine, "or [ ] the so-called 'fragmented literal similarity' test, the sampling in this case did not rise to the level of a legally cognizable appropriation."[115] Accordingly, the district court granted summary judgment to the defendants, and Bridgeport appealed.[116] On appeal, however, the Sixth Circuit reversed that portion of the district court's ruling,[117] concluding that it is not possible to sample "something less than the whole" when it comes to sound recordings.[118]

The primary reason for the court's decision was based in statutory interpretation.[119] Specifically, the court noted that copyright protection for sound recordings developed separately and subsequent to copyright protection of musical works, and the court read 17 U.S.C. § 114 as illustrative of the fact that Congress intended to treat sound recordings differently.[120] The court focused on the fact that Congress found a balance "to give sound recording copyright holders the exclusive 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.'"[121]

The Sixth Circuit reasoned that strict liability was appropriate because it provides "ease of enforcement[;] . . . the market will control the license price and keep it within bounds[;] . . . [and] sampling is never accidental."[122] Perhaps most powerful of the three arguments is the last; as the court succinctly stated, "[w]hen you sample a sound recording you *know* you are taking another's work product."[123]

The Sixth Circuit did not end its reasoning there; instead, it gave several other reasons for why the de minimis defense to copyright in-

113. *Id.*
114. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796 (6th Cir. 2005) (en banc).
115. *Id.* at 797 (quoting *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002)).
116. *Id.*
117. *Id.* at 797–98.
118. *Id.* at 800.
119. *Id.* at 799 ("Our analysis begins and largely ends with the applicable statute.").
120. *Id.* at 800–01.
121. *Id.*
122. *Id.* at 801.
123. *Id.* (emphasis added).

fringement should never apply to sampling. In addition to its statutory considerations, the court relied on the rationale that samples represent a unique form of taking because they are only taken for valuable qualities—in other words, if there were no value in the sample it would not have been taken.[124] Thus, the *Bridgeport* court reasoned that sampling represents "a physical taking rather than an intellectual one."[125]

Finally, the court added five observations to further support its decision.[126] First, they noted that the music industry would be split between being supportive and opposed to its holding depending on varying circumstances; therefore, the decision did not inherently favor anyone in particular.[127] Second, the court noted that a significant number of artists and record companies had already been in the practice of obtaining licenses for samples.[128] Third, the court noted that the music industry was already capable of executing licensing agreements as a matter of know-how.[129] Fourth, the court made clear that its holding should not apply retroactively.[130] Lastly, the court opined that it essentially did the best that it could to interpret the relevant statutes, and should Congress desire to correct the *Bridgeport* court, Congress could amend the statutes for clarity.[131]

124. *Id.* at 801–02.

125. *Id.* at 802.

126. *See id.* at 802–05. ("Since our holding arguably sets forth a new rule, several other observations are in order.").

127. *Id.* at 802–04 ("As is so often the case, where one stands depends on where one sits."); *See, e.g.*, COMMENTS OF ARTISTS RIGHTS SOCIETY, *Study on the Moral Rights of Attribution and Integrity: Notice and Request for Comments*, Library of Congress, U.S. Copyright Office Docket No. 2017-2 (2017) ("ARS supports any steps taken to strengthen of moral rights for visual artists and their works in both analog and digital forms."); COMMENTS OF ASSOCIATION OF AMERICAN PUBLISHERS, *Study on the Moral Rights of Attribution and Integrity: Notice and Request for Comments*, Library of Congress, U.S. Copyright Office Docket No. 2017-2 (Mar. 30, 2017) ("[D]espite changes in technology and in the industry . . . AAP members' evolving contributions to the mass production and wide distribution of high-quality works of original expression today would be significantly impaired under a statutory 'moral rights' framework imposed on the Copyright Act.").

128. *Bridgeport*, 410 F.3d at 804 ("[I]t is clear that a significant number of persons and companies have elected to go the licensing route.").

129. *Id.* ("[T]he record industry, including the recording artists, has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose.").

130. *Id.* at 805.

131. *Id.* ("unfortunately, there is no Rosetta stone for the interpretation of the copyright statute").

2. The Ninth Circuit's Approach: *VMG Salsoul*

Eleven years later, the Ninth Circuit addressed digital sampling of sound recordings for itself.[132] In *VMG Salsoul*, American singer-songwriter Madonna Louise Ciccone ("Madonna"), released a song titled "Vogue" that featured an unauthorized sample taken from another song called "Love Break,"[133] which was recorded by the band, the Salsoul Orchestra ("Salsoul").[134] Specifically, Madonna sampled a single quarter-note horn chord—lasting 0.23 seconds—comprised of four simultaneous notes that were shortened, pitch-adjusted, and repeated six times in "Vogue."[135]

Consequently, Salsoul brought suit against Madonna for infringement of their sound recording, and at the district court level, the court granted summary judgment in favor of Madonna on two alternative grounds.[136] Based on defense arguments similar to those raised in *Newton v. Diamond*,[137] the district court held (1) that the single horn hit lacked originality and was therefore ineligible for copyright protection, and (2) even if, *arguendo*, the chord possessed originality, the sampling was "de minimis or trivial."[138]

On appeal, the Ninth Circuit affirmed, holding that the de minimis exception does apply to sound recording copyrights.[139] Accordingly, the court applied the test for de minimis copying, which depends on whether "the average audience would not recognize the appropriation."[140]

Madonna's use of the sample was so small, it may never have been recognized as copying at all, but for the fact that both "Vogue" and "Love Break" were recorded and produced by the same recording engineer, Shep Pettibone.[141] Certainly, the Ninth Circuit questioned the

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

133. *Id.* at 874.

134. *See* Eric Goldman, *De Minimis Music Sampling Isn't Infringement—Salsoul v. Madonna*, TECHNOLOGY & MARKETING LAW BLOG (June 3, 2016), https://blog.ericgoldman.org/archives/2016/06/de-minimis-music-sampling-isnt-infringement-salsoul-v-madonna.htm [https://perma.cc/M2VC-9F78].

135. *VMG Salsoul*, 824 F.3d at 879–80.

136. *Id.* at 875–76.

137. *See* Newton v. Diamond, 388 F.3d 1189, 1190, 1196–97 (9th Cir. 2003).

138. *VMG Salsoul*, 824 F.3d at 876.

139. *Id.* at 874.

140. *Id.* at 878 (citing *Newton*, 388 F.3d at 1193; Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986); Dymow v. Bolton, 11 F.2d 690, 692 (2d Cir. 1926)).

141. *Id.* at 874–75.

likelihood of such an event[142] when it arrived at the "common-sense conclusion" that "a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit."[143]

To support its conclusion, the Ninth Circuit observed that Salsoul's own expert witness misidentified the source of some of the samples featured in "Vogue."[144] Salsoul's track featured two types—single and double—of horn hits. Madonna's track also featured single and double horn hits, but the double horn hit in "Vogue" was not actually a sample of the double horn hit in "Love Break." Rather, the double horn hit in "Vogue" used the same edited sample of Salsoul's single horn hit, copy-and-pasted twice into the track.[145] However, Salsoul's expert failed to recognize this upon listening to the tracks and did not realize his mistake until later, when he had the chance to listen to the isolated horn track from "Vogue." The court further observed that Salsoul's expert was "a highly qualified and trained musician," hired "with the express aim of discerning which parts of the song had been copied."[146] Thus, the court reasoned, "an average audience would not do a better job."[147]

In ruling for Madonna, the Ninth Circuit directly addressed the merits of *Bridgeport* and the jurisprudential proposition that there ought not be a de minimis exception for copyrighted sound recordings. The court began its analysis by citing the well-established principle that only substantial copying can constitute infringement, and by articulating the justification for this principle—"[t]he reason for the [de minimis] rule is that the plaintiff's legally protected interest [is] the potential financial return from his compositions which derive from the lay public's approbation of his efforts."[148] In other words, the core justification for a de minimis exception, generally, is that copyright law only protects economic interests, consistent with the theory that moral rights are accounted for elsewhere in the totality of the

142. *Id.* at 880 ("Even if one grants the dubious proposition that a listener recognized some similarities between the horn hits in the two songs, it is hard to imagine that he or she would conclude that sampling had occurred.").

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 880–81 (quoting Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1165 (9th Cir. 1977); Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946)) (internal quotations omitted).

nation's laws.[149] Moreover, the court noted, *Bridgeport* represents the only categorical exception to the de minimis doctrine in all of copyright law, and even in light of the *Bridgeport* court's ruling, most if not every court not bound by *stare decisis* has declined to follow *Bridgeport*'s bright-line rule.[150]

Next, the court explicitly rejected *Bridgeport*'s interpretation of 17 U.S.C. § 114(b),[151] which states in relevant part:

> 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.[152]

The court noted that the *Bridgeport* court interpreted this portion of section 114(b) as intending for owners of sound recording copyrights to have a unique-in-copyright-law, literally exclusive right to sample their work.[153] In contrast, the Ninth Circuit observed that a plain interpretation of the language simply indicates that sound recording copyrights do not extend to musical covers.[154] Furthermore, the court cited a House Report written specifically in regard to section 114(b), which clearly contemplates the de minimis doctrine as applicable to sound recordings: "[I]nfringement takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords . . . ."[155]

Thus, in light of such clear legislative contemplation of a substantiality requirement for infringement, specifically regarding sound recordings, the *VMG Salsoul* court concluded that Congress did not

149. *See generally id.* ("The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts.").

150. *See VMG Salsoul*, 824 F.3d at 881 ("Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the de minimis doctrine does not apply in a copyright infringement case."); *see also* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2003) (observing that the substantial similarity requirement "applies throughout the law of copyright, including cases of music sampling").

151. *See VMG Salsoul*, 824 F.3d at 882–84.

152. 17 U.S.C. § 114(b) (2012).

153. *VMG Salsoul*, 824 F.3d at 882–83.

154. *Id.* at 883.

155. *Id.* at 883–84 (quoting H.R. Rep. No. 94-1476, at 106 (1976), *as reprinted in* 1976 U.S.C.C.A.N. at 5721).

intend to expand protections for sound recording copyrights, contrary to *Bridgeport*'s own statutory interpretation.[156]

Next, the court addressed the Sixth Circuit's reasoning that all samples taken are taken because they are *per se* valuable, either by increasing production value or by reducing production costs, and that therefore, digital sampling represents a "physical taking rather than an intellectual one."[157] In response, the Ninth Circuit raised three counterarguments. First, the possibility of physical takings exists in several areas of copyright law (e.g., a copier might literally "sample" a portion of a photograph and physically input the sample into a new photograph) where the de minimis exception has not been denounced.[158] Second, even if sound recordings *could* inherently and uniquely warrant an exception to the rule of substantial copying for infringement, "that theoretical difference does not mean that Congress *actually adopted* a different rule."[159] And third, it violates settled law to premise a right of infringement on value derived from saving production costs—U.S. law squarely rejects the sweat of the brow justification for copyright protection.[160]

Finally, the Ninth Circuit concluded by acknowledging that the normal concerns with creating circuit splits did not apply as strongly in this instance because "as a practical matter, a deep split among [ ] federal courts *already exists*."[161] Significantly, although the court had the option of affirming for lack of originality (because the district court granted summary judgment on alternative grounds),[162] the Ninth Circuit concluded instead that "the district court correctly held that summary judgment to [Madonna] was appropriate on the issue of de minimis copying," thus opting to address the question of de minimis sampling head on.[163] In doing so, the Ninth Circuit joined the great weight of the academy in determining that *Bridgeport* incorrectly decided the issue of de minimis digital sampling.[164]

156. *Id.* at 883–84.
157. *Id.* at 885.
158. *Id.* (citing Sandoval v. New Line Cinema Corp., 147 F.3d 215, 216 (2d Cir. 1998)).
159. *Id.*
160. *Id.* (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991)).
161. *Id.* at 886.
162. *Id.* at 876.
163. *Id.* at 880.
164. *See generally supra* note 13.

III. Not so Krafty: Disguising Morality in *Bridgeport*

The majority of scholars agree that *Bridgeport*'s statutory interpretation is based on a logical fallacy.[165] Yet, others still contend that *Bridgeport*'s bright-line rule against de minimis sampling is a proper reading of 17 U.S.C. § 114.[166] In an attempt to resolve that tension, this Note suggests that the *Bridgeport* decision is not rooted in logical rationale, but it purports to do so because U.S. law rejects the legal theory which motivates *Bridgeport* at its core: moral rights protection. In other words, the *Bridgeport* decision becomes far less puzzling when viewed as a decision to extend moral rights protection for sound recording copyrights, published by a court that knew moral rights could not be the justification for its decision.

To support this hypothesis, this Note analyzes *Bridgeport* and *VMG Salsoul* against the German cases *Kraftwerk I*[167] and *Kraftwerk II*,[168] respectively, which involved incredibly similar facts and outcomes despite arising out of a civil law country.[169]

A. *Kraftwerk I*

In *Kraftwerk I*, German rappers Moses Pelham and Sabrina Setlur (together, "Pelham") recorded a track titled "Nur mir" that featured an unauthorized sample taken from another song called "Metall auf

165. *See, e.g.*, *id.*

166. *See, e.g.*, Tracy Reilly, *Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in* Metall auf Metall, 13 MINN. J.L. SCI. & TECH. 153, 187 (2012) ("At least one scholar other than myself has embraced the *Bridgeport Music* court's willingness to distinguish that there is a difference between the taking of basic melodies from a composition, which rightly belong in the public domain should it be proved that such use is de minimis, and the taking of those same melodies as captured in a sound recording.").

167. *Metall Auf Metall (Kraftwerk, et al. v. Moses Pelham, et al.)*, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 2008 No. I ZR 112/06 [hereinafter *Kraftwerk I*]; Neil Conley & Tom Braegelmann, *Metall auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany*, 56 J. COPYRIGHT SOC'Y U.S.A. 1017, 1022–37 (2009) (providing the English translation for the German Federal Supreme Court decision in *Kraftwerk I*).

168. *Metall Auf Metall (Kraftwerk, et al. v. Moses Pelham, et al.)*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 31, 2016, 1 BvR 1585/13, http://www.bverfg.de/e/rs20160531_1bvr158513.html [https://perma.cc/ZMM3-4T6A] [hereinafter *Kraftwerk II*].

169. *See* Conley & Braegelmann, *supra* note 167, at 1018 (comparing *Bridgeport* to *Kraftwerk I*); Mark H. Wittow & Eliza Hall, *Sometimes Borrowing Isn't Stealing: De Minimis Sampling of Music Sound Recordings Isn't Copyright Infringement, Say Two Key Courts in the United States and Germany*, K&L GATES (June 16, 2016), http://www.klgates.com/sometimes-borrowing-isnt-stealing-de-minimis-sampling-of-music-sound-recordings-isnt-copyright-infringement-say-two-key-courts-in-the-united-states-and-germany-06-16-2016/ [https://perma.cc/3UBE-EQHB] (comparing *VMG Salsoul* to *Kraftwerk II*).

Metall," which was recorded by the plaintiff, German electronic DJ band, Kraftwerk.[170] Specifically, Pelham sampled a two second percussion sequence and looped it throughout "Nur mir."[171] Consequently, Kraftwerk sued Pelham in Regional Court and won a decision against Pelham for infringing the "Metall auf Metall" sound recording.[172]

Pelham appealed the Regional Court's decision to the German Federal Supreme Court based on what was effectively a de minimis argument—Pelham argued that the court should not find infringement "against the appropriation of the smallest parts of a sound sequence," because to do so would improperly expand the rights of sound recording copyright owners beyond the scope of rights afforded to musical work copyright holders.[173] In other words, Pelham argued that since minimal copying of musical works is permitted by law, minimal copying of sound recordings should be permitted as well.

However, the court rejected Pelham's argument because in Germany, sound recordings and musical works are protected under different theories of rights. There, musical works are protected by "copyright law," but sound recordings are not; instead, they are protected by "neighboring rights."[174] As explained by the court, German copyrights protect "the financial, organizational, and technical effort of the producer of [sound recordings]," while neighboring rights protect "the personal intellectual creation of the composer."[175] Accordingly, the court held that the owner of neighboring rights cannot be forced to waive his rights, no matter how small of an infringement occurs.[176]

This Note contends that the copyright versus neighboring right regime in Germany is analogous to the economic right versus moral right regime in the United States, and that the substantive meaning underneath the labels is functionally interchangeable in this regard.[177] Additionally, this Note theorizes that *Bridgeport* was implicitly

170. Conley & Braegelmann, *supra* note 167, at 1025.

171. *Id.*

172. *Id.*

173. *Id.* at 1031.

174. *Id.* ("The comparison the Defendants make is not valid because the neighboring right protection for phonograms and copyright protection for musical works protect different subject matter.").

175. *Id.* at 1031–32.

176. *Id.* at 1032.

177. *See* Mira T. Sundara Rajan, *Center Stage: Performers and Their Moral Rights in the WPPT*, 57 CASE W. RES. L. REV. 767, 770–71 (2007) (explaining that the moral rights at-

decided for substantially the same reason as *Kraftwerk I*—moral rights protection. Relatedly, scholars have noted:

> The Kraftwerk Decision mirrors, in many ways, [*Bridgeport*]. Both cases dealt with the issue of music sampling of sound recordings and a determination of how much of a sound recording must be used to constitute infringement. Both courts held that the quality or quantity of sampled material is irrelevant in the determination of whether there has been an infringement of a party's exclusive right to reproduce and distribute their sound recording. Both courts ultimately held that if it is proven that any part of a sound recording has been copied without permission, then infringement has occurred . . . . The courts, therefore, came to the same conclusion. Interestingly, however, the law that the Sixth Circuit and the German Federal Supreme Court used to come to their conclusions is quite different.[178]

Moreover, this Note argues that neither *Bridgeport* nor *Kraftwerk I* squares with any ideal of balance between economic and moral rights. Given the similarities between the two cases, *Bridgeport* is particularly vulnerable to this criticism because *Kraftwerk I* is illustrative of overprotective moral rights, *in a civil law country*, especially in light of *Kraftwerk II*.

B. *Kraftwerk II*

In the wake of the German Federal Supreme Court's decision in *Kraftwerk I*, Pelham appealed yet again to the German Constitutional Court, which ultimately reversed the lower court's decision.[179] Specifically, the German Constitutional Court held that the harmful impact to Kraftwerk's moral rights in this instance did not outweigh public policy concerns for artistic freedom considering the widespread use of sampling in music.[180] In other words, Pelham's sampling did not rise to the level of being actionable, even under Germany's established neighboring (moral) rights regime as a civil law country.

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tached to sound recordings under the WPPT have more traditionally been referred to and protected as "neighboring" rights).

178. Conley & Braegelmann, *supra* note 167, at 1018.

179. "The German Federal Constitutional Court, although not an appellate court, takes precedence over all other courts in the judicial hierarchy. It is the highest tribunal in Germany, being entrusted with the adjudication of all (justiciable) constitutional issues." Hans G. Rupp, *The Federal Constitutional Court in Germany: Scope of Its Jurisdiction and Procedure*, 44 NOTRE DAME L. REV. 548, 548 (1968).

180. *Kraftwerk II*, *supra* note 168; *see* Jon Blistein, *Kraftwerk Lose Copyright Case in German High Court*, ROLLING STONE (May 31, 2016, 1:47 PM), https://rollingstone.com/music/news/kraftwerk-lose-copyright-case-in-german-high-court-20160531 [https://perma.cc/D4GU-M865].

C. *Bridgeport* is to *Kraftwerk I* as *VMG Salsoul* is to *Kraftwerk II*

Taken together, the *Kraftwerk* cases are comparatively instructive and substantively analogous to the United States' cases on the same issues. *Bridgeport*, like *Kraftwerk I*, established *per se* liability for any unauthorized sampling, no matter how small.[181] And although the Sixth Circuit claimed to base its holding on statutory interpretation, this author suspects that the core issue in the Sixth Circuit's mind was in fact the moral turpitude of knowingly sampling without authorization. Indeed, as cited in Part II(B)(i) of this Note, the *Bridgeport* court stated in dicta, "When you sample a sound recording you *know* you are taking another's work product."[182] Thus, it is reasonable to conclude at least in some respects that *Kraftwerk I* and *Bridgeport* were both rooted in notions of morality.

As *Bridgeport* is to *Kraftwerk I*, *VMG Salsoul* is to *Kraftwerk II*. In both cases, the courts disagreed with previous decisions granting absolute moral rights protections for sound recordings,[183] and both courts held that the sampling in question was de minimis,[184] or at least too insignificant to outweigh the countervailing interests.[185]

While much can be drawn from the similarities, the differences between *Kraftwerk II* and *VMG Salsoul* are equally illuminating. *Kraftwerk II* was decided by the highest court in Germany and supersedes *Kraftwerk I* as a matter of law.[186] In contrast, *VMG Salsoul* and *Bridgeport* carry the same precedential authority as decisions from federal appellate circuit courts, and the Supreme Court has not been provided the opportunity to address the matter at this time.[187] Thus, while the law in Germany is more clear,[188] the law is decidedly unset-

181. *See supra* note 109 (noting *Bridgeport*'s bright-line rule); *supra* note 176 (noting *Kraftwerk I*'s bright-line rule).

182. *See supra* note 123 (emphasizing the Sixth Circuit's hint at a morality-based justification).

183. *See supra* notes 139, 179–80.

184. *See supra* notes 142–43.

185. *See supra* note 180.

186. *See supra* note 179.

187. *See* Mary Catherine Amerine, Note, *Searching for a Sound: A Proposal for Creating Consistent De Minimis Sampling Standards in the Music Industry*, ENT. L. INITIATIVE TRIBUTE J. (Mar. 29, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939723 [On file with the USF Law Review] ("[T]he deadline for the plaintiff in *VMG Salsoul* to submit a petition for certiorari to the Supreme Court passed this past September . . . .").

188. Although *Kraftwerk II* provides little guidance as to what takings constitute as de minimis, it still established the rule that neighboring (moral) rights are not absolute. For an argument that *Kraftwerk II* is not binding on future cases, *see* Eamonn Forde, *Kraftwerk's defeat in sampling lawsuit doesn't set a precedent*, THE GUARDIAN (June 1, 2016, 10:50 AM),

tled in the United States, and ultimately, the question for American litigants depends on jurisdiction.[189]

IV. Sampling Captures the U.S. Tension Between Economic and Moral Rights

Practically speaking, the consequence of current copyright law in the United States is simple, yet uncomfortable—liability for the unauthorized digital sampling of a sound recording may either be severe or nonexistent, and the outcome may simply depend on the location and approach of the jurisdiction within which a defendant finds herself.[190] However, this Note contends that the resulting incentive to forum shop is simply a necessary externality of the basic tension between economic and moral rights as the law realigns itself to a more appropriate balance.

A. The Pre-Existing Balance of Economic and Moral Rights

As explained in Part I, property law in the United States formed under a fundamental natural rights theory, later evolved with concepts of utilitarianism, and only recently began to adopt express moral rights theories regarding the justifications of ownership laws.[191] However, as also mentioned in Part I, the U.S. legal system is designed to protect moral rights under alternative labels like rights of publicity and protection against defamation, unfair competition, and wrongful appropriation.[192] The resulting balance between economic protection and moral protection under the totality of U.S. law is complex in detail, and comprehensive in protective scope.[193] Despite its intricate nature, however, this Note asserts that the balance can be easily disrupted—and was so disrupted by *Bridgeport*—by the substantial over-protection of moral rights.

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https://www.theguardian.com/music/2016/jun/01/kraftwerk-sampling-lawsuit-defeat-sabrina-setlur-precedent [https://perma.cc/SZH2-2UEV].

189. *See* Wittow & Hall, *supra* note 18 ("Let the forum shopping for music sampling copyright infringement claims and declaratory judgment actions begin!").

190. *Id.*

191. *See generally supra* notes 35–62.

192. *See supra* note 39.

193. *See* Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap"*, 2007 UTAH L. REV. 659, 660–62 (2007) ("American scholars who have been critical of the patchwork protection argument have often been unfamiliar with Berne implementation in other countries and have not judged the U.S.'s Berne compliance by public international law standards.").

The balance referred to here is the same balance upon which all of U.S. copyright law has been based—the bargain for incentives between the public and those who create useful arts is uniquely designed to protect economic rights while simultaneously balancing the protection of moral rights in other areas of the law.[194] Additionally, in light of this balance, the United States could never adopt a strict moral rights approach for all copyrights because such an approach "would result in uncertainty and disruption in the marketplace, trigger frivolous and counter-productive law suits, and would stifle innovation and investment in the independent music community."[195]

This Note identifies *Bridgeport* as one such adoption.[196] Thus, in seeking to reestablish the balance between economic and moral rights under U.S. law, this Note applauds the Ninth Circuit's decision in *VMG Salsoul* as the first step in the undoing of the improper extension of moral rights protection set in motion by the Sixth Circuit in *Bridgeport*.

Notwithstanding *Bridgeport* and any decisions following its precedence, the United States' official position on moral rights is that it sufficiently meets the protection requirements set forth in the Berne Convention and, by extension, the WIPO Performances and Phonograms Treaty governing moral rights protections for the owners of sound recording copyright.[197] Like many other member nations to the treaty, the United States fulfills its obligation under the WPPT to protect moral rights for sound recording copyright holders under the totality of protection afforded by the patchwork of federal, state, and common law.[198]

B. Sidebar: The Case Against a Hypothetical Musical Artists Rights Act

Over the past several decades, Congress has repeatedly declined to adopt stricter and more explicit statutory moral law protections, with the exception of the Visual Artists Rights Act.[199] However, this

194. *See* STINA TEILMANN-LOCK, THE OBJECT OF COPYRIGHT: A CONCEPTUAL HISTORY OF ORIGINALS AND COPIES IN LITERATURE, ART AND DESIGN 16 (2016).

195. COMMENTS OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC, *Study on the Moral Rights of Attribution and Integrity: Notice and Request for Comments*, Library of Congress, U.S. Copyright Office Docket No. 2017-2 at 3 (2017) (arguing against the adoption of increased moral rights protections).

196. *See supra* note 16.

197. *See supra* notes 40, 63.

198. *See supra* notes 39, 192.

199. *See supra* note 60.

Note acknowledges that even if, *arguendo*, the codified limitations of VARA also applied to moral rights in sound recordings, arguably no sound recordings would qualify for protection under the statute.

Under VARA, the right of integrity can only be asserted as a right of action if an artist can show that a distortion, mutilation, or modification of the work would be prejudicial to the artist's reputation.[200] Additionally, the right to protect a work from destruction requires the work to have "recognized stature."[201] This requirement alone, if applied to sound recordings, would automatically eliminate moral rights for a substantial share of sound recordings that would remain theoretically protectable under an economic rights theory. Admittedly, the moral right of attribution under VARA does not have any such recognized stature requirement.[202] However, this is revealed to be problematic because VARA only gives rise to monetary recovery for violations of the right to integrity; "failure to attribute is remediable solely through injunction."[203] Thus, as a means for seeking monetary redress, the moral rights protections under VARA are structurally limiting.

Still, if VARA were applied to sound recordings, millions of sound recordings would nevertheless pass the structurally limiting threshold. Incidentally, since integrity claims under VARA require showing prejudice or establishing recognized stature, most, if not all, of the sound recordings which survive the structural limitation to monetary relief would nevertheless be disqualified from protection. This is because under 17 U.S.C. § 101, a "work of visual art"—i.e., a work protected under VARA—is restricted by definition to works "existing in a single copy [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the [artist]."[204] Clearly, imposing the same limit of two hundred copies on sound recordings would effectively result in zero monetarily-compensable protection for the right of integrity because any work that can rise to the level of harmable reputation or recognized stature would almost certainly be fixed in more than two hundred copies.

Thus, extending the moral rights protections of VARA to the likes of sound recording copyrights would have little to no consequences

200. 17 U.S.C § 106A (1990).

201. *Id.*

202. *See id.*

203. Massachusetts Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 55 (1st Cir. 2010); *see supra* note 46.

204. *See* 17 U.S.C. § 101 (2010).

without a major overhaul of the statutory scheme.[205] Significantly, this indicates that the remainder of moral rights protection for sound recordings in the United States is not incomplete for lack of a musical corollary to VARA. Moreover, the fact that Congress has repeatedly declined to increase moral rights protections further indicates that the balance between the United States' obligation to protect moral rights under the WPPT on the one hand, and the United States' interest in *not* overprotecting moral rights under the totality of the law on the other, had already been struck before *Bridgeport* and ought not have been disrupted.

Conclusion

Of course, statutory protections are not the only form of legal protection available in the United States, and the balance between economic and moral rights protections can just as easily be disrupted by the courts. Such was the effect of *Bridgeport*. Following the *Bridgeport* decision, the music industry was forced to conform its business practices to acknowledge the risk that unauthorized digital sampling was punishable by strict liability, by order of the Sixth Circuit.[206] However, rather than providing judicial efficiency and litigation certainty as the Sixth Circuit predicted, the music industry has instead been burdened by the very disruption sought to be avoided by the proper balancing of moral and economic rights.

Thus, *Bridgeport* improperly extended the protection of moral rights as to one specific yet highly consequential form of property—sound recording copyrights—under the guise of statutory interpretation. As explained in Part II, the Sixth Circuit's statutory interpretation is widely considered to be illogical, and Part III proposes a theoretical explanation for the logical inconsistency by comparing the two leading U.S. court decisions on de minimis sampling (*Bridgeport* and *VMG Salsoul*) with two analogous German court decisions (*Kraftwerk I* and *Kraftwerk II*).

VMG Salsoul represents only a step in the right direction, not a complete return to the pre-*Bridgeport* balance between moral and economic rights. Until the issue is settled, the interim discord between economic and moral rights for sound recording copyrights represents a feature of the American legal system, not a bug. But in order for

205. *See generally* COMMENTS OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC, *supra* note 195, at 2 (arguing that there is "[n]o need yet for U.S. Statutory Moral Rights Law").

206. *See supra* notes 16–17.

proper balance to be restored, something else must occur. For example, Congress could clarify section 114(b) to legislatively settle the matter; the Supreme Court could grant *certiorari* on a future case to issue instructions; or the Sixth Circuit could simply overrule its decision in *Bridgeport* should the opportunity arise. In any event, *VMG Salsoul* is valuable in answering the normative question regarding de minimis sampling, and while America waits for the law to settle, the Ninth Circuit has done its part to fundamentally realign the law in accordance with reasonableness and fairness.