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A Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in *Bridgeport Music v. Dimension Films*

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On June 3, 2005, the Sixth Circuit issued its final amended opinion in *Bridgeport Music v. Dimension Films*,[1] in which it held that any amount of unauthorized digital sampling from a sound recording is *per se* copyright infringement.[2] The court justified this ruling on what it termed a "literal reading" of Section 114 of the Copyright Act, which covers the rights a copyright holder has in a sound recording.[3] While such a bright-line rule may have some superficial appeal, the court's efforts at harmonizing current music industry practices with copyright laws written long before such practices were commonplace has resulted in greater protection for a sound recording copyright than a musical composition copyright, a result not intended by the statute.[4]

Under the Constitution, the "primary objective of copyright is not to reward the labor of authors, but 'to 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

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1. 410 F.3d 792 (6th Cir. 2005).
2. *Id.* at 800.
3. *Id.* at 805.
4. *See* 17 U.S.C. § 114(a) (2000).

Discoveries]."'[5] "To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[6] Therein lies the tension at the heart of the digital sampling dilemma: the desire to incentivize creativity by granting authors some control over their creations, while at the same time trying not to stifle creativity by limiting others' access to those creations.[7]

I. COPYRIGHT PROTECTION OF RECORDED MUSIC

Recorded music involves two separate copyrights: one in the sound recording and the other in the musical composition.[8] Performing another's copyrighted material involves the copyright in the musical composition.[9] Sampling, the actual copying of a portion of an existing recording, potentially involves both the sound recording and the musical composition copyrights.[10] "Under the Copyright Act there is a well-established distinction between sound recordings and musical compositions."[11] Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights.[12] The rights of a copyright in a sound recording do not extend to the composition itself, and vice-versa.[13] While a musical composition's copyright protects the generic sound that would result from any performance of the work, the sound recording copyright protects the collection of musical, spoken, or other sounds captured in the recording.[14] Under the language of the copyright statute, owners of musical compositions have more rights than owners of sound recordings, as the rights of public display and performance belong exclusively to owners of musical compositions.[15]

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5. Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

6. *Id.* at 349-50.

7. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 383 F.3d 390, 398 (6th Cir. 2004) (noting this tension in the context of digital sampling), *amended by* 410 F.3d 792 (6th Cir. 2005).

8. 17 U.S.C. § 102(a)(2), (7).

9. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4 (1979).

10. Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection,* 74 N.Y.U. L. REV. 1660, 1670 (1999).

11. Jarvis v. A&M Records, 827 F. Supp. 282, 292 (D.N.J. 1993).

12. *See* 17 U.S.C. § 102(a)(2), (7).

13. T.B. Harms Co. v. Jem Records, Inc., 655 F. Supp. 1575, 1577 n.1 (D.N.J. 1987).

14. Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff'd,* 388 F.3d 1189 (9th Cir. 2004), *cert. denied,* 545 U.S. 1114 (2005).

15. 17 U.S.C. §§ 106(4)-(5), 114(a).

II. ESTABLISHING AND DEFENDING INFRINGEMENT

In order to succeed in an infringement action, copyright holders must prove three elements: (1) ownership of a valid copyright; (2) proof a protected work was copied; and (3) that the copying was "substantial enough to constitute improper appropriation of [the] work."[16] As direct evidence of copying is rare, a copyright holder may, in the absence of a clear admission, prove copying inferentially by showing both substantial similarity with and access to the protected work.[17] Access will be inferred when there has been a reasonable opportunity to see, hear, or otherwise know of the protected work.[18] Proof of appropriation is established by a two-part test containing both an extrinsic and an intrinsic element.[19] The extrinsic element "requires that the plaintiff identify concrete elements based on objective criteria."[20] If this element is satisfied, the fact finder applies the intrinsic element, which subjectively asks "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[21] Substantial similarity can occur in two situations.[22] The first, called "comprehensive nonliteral similarity," refers to a situation in which the works as a whole are similar, but not identical.[23] The second, "fragmented literal similarity," refers to situations in which only a small portion of the works are identical.[24] Digital sampling cases involve the latter.

Even if there was actual copying, if substantial similarity does not exist the infringement will likely be considered "*de minimis*," meaning that the infringement is too trivial to be actionable.[25] Alternatively, even if substantial similarity is established, an infringer may argue the affirmative defense of "fair use."[26] Courts consider four non-exclusive factors in evaluating a fair use defense:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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16. *Jarvis*, 827 F. Supp. at 288.
17. *Id.* at 289.
18. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).
19. *Id.*
20. *Id.*
21. *Id.* (quoting Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991) (internal quotations omitted).
22. Ringgold v. Black Entm't Tel., Inc., 126 F.3d 70, 75 n.3 (2d Cir. 1997).
23. *Id.*
24. *Id.*
25. *Id.* at 74 (quoting the full legal maxim "*de minimis non curat lex*," which is sometimes translated as "the law does not concern itself with trifles").
26. 17 U.S.C. § 107 (2000).

> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[27]

The Supreme Court has articulated that courts must explore and weigh these four factors together in light of copyright's purpose of promoting the arts and sciences.[28] However, the Court has also explained that the fourth factor is "undoubtedly the single most important element of fair use."[29]

III. DIGITAL SAMPLING ON TRIAL

It was only a matter of time before the growing popularity of digital sampling,[30] combined with easy and affordable access to the technology used to accomplish it, led to a courthouse debate. One of the earliest courts to address this issue was the Southern District of New York. In *Grand Upright Music v. Warner Brothers Records*,[31] the defendant admitted to using the background music and three words from a sound recording, the copyright in which was held by the plaintiff.[32] While the case is widely known for its opening citation to the Bible's Seventh Commandment, "Thou shalt not steal,"[33] the court's lack of analysis explaining how it arrived at what sounds like a *per se* rule against digital sampling offered other courts little guidance.[34] While the central issue in the case was ownership of the plaintiff's copyright, the court nevertheless found infringement based solely on the fact that the defendant released the infringing album despite the plaintiff's expressed denial of a license to use the work.[35]

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27. *Id.*

28. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

29. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566 (1985).

30. Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004) (defining digital sampling as "the incorporation of short segments of prior sound recordings into new recordings").

31. 780 F. Supp. 182 (S.D.N.Y. 1991).

32. *Id.* at 183.

33. *Id.*

34. *See* Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 804 n.16 (6th Cir. 2005).

35. Grand Upright Music v. Warner Brothers Records, 780 F. Supp. 182, 185 (S.D.N.Y. 1991).

The court's analysis was simply wrong, as this is not how infringement is proven.[36] The first problem is that the court engaged in no substantial similarity analysis at all.[37] Therefore, infringement of both the sound recording and the musical composition to the *Grand Upright* court is established upon (1) proof of actual copying and (2) the commercial character of the defendant's use.[38] The fact that the defendant knowingly released an album containing an infringing work may be relevant to the statutory damages analysis once infringement has been established, but it certainly did not establish infringement *per se* under any known standard at the time.[39] Furthermore, factor (2), the commercial character of the defendant's use, is not part of the threshold infringement inquiry at all, but rather is the first prong of the affirmative defense of fair use; this defense is relevant only after substantial similarity has been established.[40] Despite an utter lack of mooring in either statutory or case law, the positive result of *Grand Upright* was "a significant increase in licensing requests and changes in the way some artists and recording companies approached the issue of digital sampling."[41] In this respect, *Bridgeport Music* can be understood as the Sixth Circuit's desire to entrench the *Grand Upright* decision. The Sixth Circuit, however, sought to avoid the fatal misstep of *Grand Upright* by offering support for its commandment: "[g]et a license or do not sample."[42]

A. Bridgeport I*: The Decision in the District Court*

In 2001, Bridgeport Music, Westbound Records and other plaintiffs filed a complaint alleging nearly "five hundred causes of action against approximately eight hundred defendants."[43] The district court severed the case into 476 separate actions, one of which was *Bridgeport Music v. Dimension Films*.[44] This particular action involved the hip hop group N.W.A.'s two-second sample of a three-

36. Jarvis v. A&M Records, 827 F. Supp. 282, 288 (D.N.J. 1993).

37. *Grand Upright*, 780 F. Supp. at 185.

38. *Id.*

39. *See Jarvis*, 827 F. Supp. at 295 (indicating that one of the considerations in assessing statutory damages is whether a plaintiff willfully or intentionally infringed the copyright).

40. *See infra* text accompanying notes 26-30.

41. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 804 n.16 (6th Cir. 2005).

42. *Id.* at 801; *see id.* at 801-805.

43. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport I*), 230 F. Supp. 2d 830, 830 n.1 (M.D. Tenn. 2002).

44. *Id.*

note, four-second guitar riff from the George Clinton and Funkadelic song "Get Off Your Ass and Jam" ("'Get Off'") in the N.W.A. song "100 Miles and Runnin'" ("'100 Miles'").[45] The N.W.A. song was used in the film "I Got the Hook Up."[46] The pitch of the sample from "Get Off" was first lowered; then the three-note sample was looped to create a fourteen to sixteen beat segment lasting approximately seven to eight seconds.[47] The looped segment appeared five times throughout "100 Miles."[48] Thus, the total length of all copied material was approximately forty seconds.[49] The owner of the sound recording of "Get Off," Westbound Records, sued the producer of "I Got the Hook Up," No Limit Films LLC ("No Limit"), for infringement.[50]

In moving for summary judgment, No Limit did not contest that N.W.A. copied from the sound recording of "Get Off."[51] Rather, No Limit argued that there was no infringement because the sampled portion of "Get Off" consisted of "a commonly used three-note figure," and therefore was not original and not protected by copyright law.[52] Additionally, No Limit claimed that the sampled portion of "Get Off" was "legally insubstantial" and therefore the copying did not constitute actionable infringement.[53] In denying the originality argument, the court focused on the "aural effect produced by the way the notes in the chord are played" and concluded that a reasonable jury could find that the way the notes are played on "Get Off," rather than the chord itself, is original and creative, which would entitle the sampled portion to copyright protection.[54]

The court then examined No Limit's argument that the sample was neither qualitatively nor quantitatively significant to "Get Off."[55] In addressing this *de minimus* argument, the court explained that in addition to actual copying, "the plaintiff must show . . . that the copied work and the allegedly infringing work are substantially similar," an element that is "always required" for actionable infringement.[56] The substantial similarity test it employed asked whether an "average lay observer would recognize the alleged copy as having been

45. *Id.* at 833, 838.
46. *Id.* at 833.
47. *Id.* at 841.
48. *Id.*
49. *Id.*
50. *Id.* at 838.
51. *Id.*.
52. *Id.* at 839.
53. *Id.* at 838.
54. *Id.* at 839.
55. *Id.*
56. *Id.* at 840.

appropriated from the copyrighted work."[57] The court further explained that most courts focus the *de minimis* analysis on "whether the defendant appropriated, either quantitatively or qualitatively, constituent elements of the work that [we]re original," and that this analysis was more or less the same as the fragmented literal similarity test.[58]

Examining the work quantitatively, the court found that the total running time of "Get Off" was approximately two and half minutes, and therefore, at only two seconds, the sample comprised "a mere fraction of the whole" of the plaintiff's work.[59] While the total running time of "100 Miles" was approximately four and half minutes and the copied material lasted as long as forty seconds, the court articulated that the substantial similarity inquiry focuses on "whether so much has been taken as would sensibly diminish the value of the original; and whether the labors of the party entitled to copyright are substantially to an injurious extent appropriated by another."[60]

Examining the works from a qualitative perspective, the court explained that "Get Off" was essentially a celebratory song about dancing, while "100 Miles" was about being chased by the police.[61] Accordingly, the court found that the two songs exhibited "no similarities in mood or tone."[62] The court further stated that plaintiffs' work in "100 Miles" would not be recognizable to a lay observer (or even to an "aficionado" of Clinton's work) as being appropriated from "Get Off."[63]

The district court held that "the minimal quantitative copying and lack of qualitative similarity" warranted dismissal of the plaintiff's claim.[64] The court concluded its analysis by explaining that, while there was "blatant copying" in this case, the defendant's use was "creative," and emphasized that a "balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works. Since the advent of Western music, musicians have freely borrowed themes and ideas from other

57. *Id.* (quoting Tuff 'N' Rumble Mgmt., Inc. v. Profile Records, Inc., No. 95 Civ. 0246, 1997 U.S. Dist. LEXIS 4186, at *15 (S.D.N.Y. Apr. 2, 1997)).

58. *Id.* at 841 (quoting Newton v. Diamond, 204 F. Supp. 2d 1244, 1257 (C.D. Cal. 2002) (citation omitted)); *see infra* text accompanying note 24.

59. *Id.*

60. *Id.* at 840 (quoting Mathews Conveyor Co. v. Palmerbee Co., 135 F.2d 73, 85 (6th Cir. 1943)).

61. *Id.* at 842.

62. *Id.*

63. *Id.*

64. *Id.*

musicians."[65] While this last sentence might seem curious, given the court's conclusion regarding the dissimilarities in mood and tone, it should be understood as the court's conception of a society that accepts the free exchange of ideas. Accordingly, when, as in this case, themes and ideas are not borrowed but rather used as raw materials to create a wholly dissimilar, transformative work, punishing that activity would not serve the purposes of copyright law.

B. Bridgeport II*: The Decision in the Sixth Circuit*

On appeal, Westbound argued that the district court erred because a substantial similarity or *de minimis* inquiry should not be undertaken at all when the defendant does not dispute that it digitally sampled a copyrighted sound recording.[66] The Sixth Circuit agreed, reversed the district court's decision, and announced its "new rule" that the *de minimis*/substantial similarity analysis only applies when the musical composition, not the sound recording, is allegedly infringed.[67] The court held that digitally sampling from a protected sound recording without authorization is *per se* copyright infringement.[68] The court justified this result mainly on what it called a "literal reading" of Section 114 of the Copyright Act.[69] The Sixth Circuit reasoned that because the owner of a sound recording copyright possesses the exclusive right to create derivative works which "rearrange[], remix[], or otherwise alter[] in sequence or quality"[70] the original recording, "a sound recording owner has the exclusive right to 'sample' his own recording."[71] The court accepted the statutory interpretation that unless a new work consists "entirely" of an independent fixation of other sounds the sound recording copyright is infringed.[72]

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65. *Id.*

66. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 798 (6th Cir. 2005).

67. *Id.* (acknowledging that had the Sixth Circuit followed the district court's analytical framework, it would have agreed with the district court's result).

68. *Id.* at 798-799.

69. *Id.* at 805; *see* 17 U.S.C. § 114(b) ("The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 [the right to prepare derivative works based on the copyrighted work] 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.").

70. *Bridgeport II*, 410 F.3d at 799 (quoting 17 U.S.C. § 114(b)).

71. *Id.* at 801.

72. *Id.* at 804 n.18.

The court then articulated what it saw as the advantages of its bright-line approach.[73] Echoing *Grand Upright*, the Sixth Circuit announced: "To begin with, there is ease of enforcement [with this interpretation]. Get a license or do not sample. We do not see this as stifling creativity in any significant way."[74] It explained that an artist is still free to re-create in a studio the sound of any sample he would otherwise copy.[75] This is a curious statement given the fact that the court itself acknowledged that, in such a case, the musical composition would still have to be licensed.[76] In this regard, it seems as if nothing has changed–the artist can either license the musical composition, or take his chances that his re-creation will not be held to infringe under a substantial similarity analysis, just as before.

The court then expressed confidence that the market will dictate license prices, keeping the practice affordable, because no one will pay a license fee greater than what it would cost to duplicate the sample in a new recording.[77] This statement reveals the Sixth Circuit's limited understanding of the value of sampling: sampling is not used just to save production costs. Rather, a sample may contain a unique sound, which would otherwise be impossible to recreate.[78]

Finally, the court focused on intentionality or willfulness, saying that "sampling is never accidental . . . When you sample a sound recording you know you are taking another's work product."[79] The court immediately followed this sentence with a footnote citing the "Thou shalt not steal" language from *Grand Upright*.[80] The Sixth Circuit characterized the taking from a sound recording involved in digital sampling as physical rather than intellectual.[81] This distinction seems to be one of the court's justifications for treating sound recordings and musical compositions differently, but it does not really make sense. If digital sampling is considered a physical taking from the sound recording, then why is it not also one from the musical composition (which the sound recording contains)? Both copyrights require that the work be fixed in a tangible medium; a musical score

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73. *Id.* at 801.
74. *Id.*
75. *Id.*
76. *Id.* at 800 n.8.
77. *Id.* at 801.
78. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 272 (1996) (citing Steven Dupler, *Digital Sampling: Is it Theft? Technology Raises Copyright Question*, BILLBOARD, Aug. 2, 1986, at 74).
79. *Bridgeport II*, 410 F.3d at 801.
80. *Id.* at 801 n.12 (citation omitted).
81. *Id.* at 802.

on paper is certainly no less tangible than a compact disc.[82] At best, the court's distinction between taking from a sound recording and taking from the musical composition is unconvincing. At worst, it seems to run contrary to the Supreme Court's thoughts on this analogy:

> It is less clear, however, that the taking that occurs when an infringer arrogates the use of another's protected work comfortably fits the terms associated with physical removal employed by Section 2314 [of the National Stolen Property Act]. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially like infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud.[83]

Had the Sixth Circuit recognized that it should have taken its guidance from the Congressional Report on Section 114 of the Copyright Act, rather than from the Bible, the result would have been different. According to the Report:

> Subsection (b) of [S]ection 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. . . .[84]

As is clear from this Report, Congress intended that the substantiality requirement apply to the infringement analysis of sound recordings; thus, the Sixth Circuit's contrary conclusion is unjustifiable. Looking to the Report would have helped the court resolve what it should have seen as its own contradiction: "We have taken a 'literal reading' approach. The legislative history is of little help because digital sampling wasn't being done in 1971."[85] While it is generally true that sampling was not being done in 1971, it does not follow that a literal approach would correctly resolve the issue. The

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82. 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, 544 (2006).

83. Dowling v. United States, 473 U.S. 207, 217-18 (1985) (finding that the National Stolen Property Act provision that imposed criminal penalties for interstate transportation of stolen property did not include the interstate transportation of unauthorized copies of unreleased sound recordings because they were not "stolen, converted or taken by fraud" except in the sense that they were manufactured and distributed without consent).

84. H.R. REP. NO. 94-1476, at 106 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5721.

85. *Bridgeport II*, 410 F.3d at 805.

legislative history is of great help and it should have been used by the Sixth Circuit in *Bridgeport II*.

IV. CONCLUSION

Literally, of course, the Sixth Circuit's *per se* rule, as expressed in *Bridgeport Music v. Dimension Films*, does not so much weaken the protection for musical compositions as it strengthens the protection for sound recordings. The decision that sound recordings deserve more protection, however, can be equated with a normative judgment that musical compositions have less value than sound recordings. Accordingly, it is easily imagined that while the standards for determining infringement of a musical composition do not literally change, courts will conduct the inquiry in a far less meaningful way and it will become more difficult to prove infringement of the musical composition. This is no answer for unlicensed digital sampling. Instead of changing the rule, the Sixth Circuit should have affirmed the decision of the district court and dismissed the plaintiff's infringement claim.[86]

86. *Id.* at 803.