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Hold Up: Digital Sampling, Copyright, Infringement, and Artist Credit Through the Lens of Beyonce's "Lemonade"

Spenser Clark
University of Georgia School of Law

HOLD UP: DIGITAL SAMPLING, COPYRIGHT INFRINGEMENT, AND ARTIST CREDIT THROUGH THE LENS OF BEYONCÉ'S *LEMONADE*

*Spenser Clark**

*Spenser Clark is a 2019 JD Candidate at the University of Georgia School of Law.

I. INTRODUCTION

It takes a village to raise a child.[1] This old African proverb has spanned the length of history but was made prominent by First Lady Hillary Rodham Clinton in her 1996 book, *It Takes a Village: And Other Lessons Children Teach Us*. The meaning is generally understood. A child has a better chance of becoming a healthy adult who contributes to society if the community is involved with their upbringing. This saying also accurately describes digital sampling[2] and modern musical creation. Today's music would not be possible if not for the artists who came before laying the groundwork. Modern artists build songs by taking elements from other songs to reach their desired musical outcome. In order to make today's music, artists combine their novel, original artistry and thoughts with snippets from the music of yesterday to produce a new, innovative work. Tomorrow's artists will then use today's music as an addition to their original works and so on. Some of the most popular music in modern times contains examples of digital sampling. One of the most prominent examples of digital sampling and the benefits it can provide to artists is *Lemonade*,[3] a 2016 album by world famous singer-songwriter Beyoncé Knowles, commonly known by only her first name.

Lemonade is the sixth studio album written and produced by Beyoncé. Knowles, who hit the national stage as a member of the female group Destiny's Child, kept the production of her latest album completely silent until February 6, 2016, when she released the first single off of the album, *Formation*. Knowles premiered the song the next day during the Pepsi Super Bowl 50 Halftime Show held in Santa Clara, California. Her performance was met with both acclaim and criticism, because her performance of the song contained strong references to the Black Panther movement[4] and black empowerment.[5] The performance demonstrates the overall themes of the album: heartbreak, redemption, and standing up for oneself. These themes are tied to the ideas central to the black

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[1] HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1996).

[2] *Sampling,* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining digital sampling as the process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording).

[3] BEYONCÉ KNOWLES, LEMONADE (Parkwood Entertainment & Columbia Records 2016).

[4] *Black Panthers,* History (Aug. 21, 2018), https://www.history.com/topics/civil-rights-movement/black-panthers. (The Black Panther movement was a period from 1966 to 1982 where the organization's main aim was to arm its citizens, primarily African American, to monitor the behaviors of police officers).

[5] Caroline Framke, *Beyoncé didn't just steal the Super Bowl halftime show. She made it a political act*, Vox (Feb 7, 2016), https://www.vox.com/2016/2/7/10934576/beyonce-super-bowl-halftime-2016-coldplay

Panther movement's demand that America protect and represent all people. The full album was released to listeners through Tidal, an online streaming service co-owned by Knowles, on April 23, 2016, with the public release to follow on April 25th. The album debuted at number one on the US Billboard 200 chart by selling over 653,000 copies in the first week of its release.[6] Sales remained steady throughout the year due in part to the Formation World Tour that Knowles embarked on in April 2016. The album sold 2.5 million albums in 2016, making it the highest selling album of the year, right ahead of Adele's *25* and Drake's *Views*.[7]

Lemonade is a Rhythm and Blues album, commonly referred to as R&B, containing twelve songs with musical influences from other genres such as pop, reggae, blues, rock, hip-hop, soul, funk, Americana, country, gospel, electronic, and trap music.[8] This fusion of musical styles usually contains different techniques of digital sampling.

Digital sampling refers to the technique of taking an already existing or recorded passage of music and adding it to a new recording.[9] Digital samples can be as short as a three-note melody to as extensive as a minute-long portion of a popular song.[10] One of the critiques of Beyoncé's album is the amount of digital sampling present throughout. While only five of the album's twelve songs utilize digital sampling, the amount of digital sampling in each song is unusually high.[11]

For example, in her song *Hold Up* there are many different versions of digital sampling that occur. The first is the lifting of the lyrics from the song *Maps* by The Yeah Yeah Yeahs where Beyoncé quotes the lyric "they don't love you like I love you" multiple times throughout the chorus.[12] *Maps* is a popular song often used in sampling as prominent artists such as TLC, Black Eyed Peas, and numerous others.[13] Digital samples do not have to be 100% identical to be considered "sampling," meaning that the sample does not have to mimic the original lifted portion of the song; they can be modified to fit the new song. For

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[6] Keith Caulfield, *Beyoncé Earns Sixth No. 1 Album on Billboard 200 Chart with 'Lemonade'*, (May 1, 2016), http://www.billboard.com/articles/columns/chart-beat/7350372/beyonce-earns-sixth-no-1-album-on-billboard-200-chart-with-lemonade.

[7] GLOBAL MUSIC REPORT 2017: ANNUAL STATE OF THE INDUSTRY 9, http://www.ifpi.org/downloads/GMR2017.pdf (last visited Sept. 27, 2017).

[8] Jillian Mapes, *Beyoncé Lemonade*, PITCHFORK, (APR. 26, 2016) https://pitchfork.com/reviews/albums/21867-lemonade/.

[9] *Digital Sampling Law and Legal Definition,* US LEGAL, https://definitions.uslegal.com/d/digital-sampling (last visited Nov. 1, 2017).

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

[11] Steven J. Horowitz, *Breaking Down Beyoncé's Lemonade Samples* (Apr. 25, 2016), https://pitchfork.com/thepitch/1116-breaking-down-beyonces-lemonade-samples

[12] Beyonce Knowles, Hold Up, on Lemonade (Parkwood Entertainment & Columbia Records 2016) (using lyrics from YEAH YEAH YEAHS, *Maps,* on FEVER TO TELL (Interscope Records 2003)).

[13] Horowitz, *supra* note 11.

example, Beyoncé modified a sample based on a tweet by Ezra Koenig,[14] a prominent singer/songwriter, who added the words "hold up" to the Yeah Yeah Yeahs' original lyrics in *Maps.* In *Hold Up,* Knowles also uses lyrical sampling from Soulja Boy's *Turn My Swag On,* particularly the lyrics "I hop up out my bed and get my swag on."[15] The most prominent form of digital sampling on *Hold Up* is from Andy Williams' *Can't Get Used to Losing You.*[16] The instrumental introduction of *Can't Get Used to Losing You*[17] becomes almost the entirety of the background beat/instrumental for *Hold Up.*

Another song on Beyoncé's album that uses digital sampling in large quantities is *Don't Hurt Yourself.* The prominent sample is from *When the Levee Breaks*[18] by Led Zeppelin, which is one of the most digitally sampled songs in history.[19] Artists such as Dr. Dre, Bjork, Beastie Boys, Ice T, and Sophie B. Hawkins have used samples from this track.[20] Although the song was originally written and recorded by Kansas Joe McCoy and Memphis Minnie in 1929, the digital sampling credit is almost always given to the Zeppelin version because the group re-worked the original and their rendition is the one that is most often sampled.[21] A number of the other songs on Beyoncé's album have examples of digital sampling in them, but the main issue is how and whether Knowles gives the original artists credit for their work according to copyright law.

There are numerous ways that artists will acknowledge other artists who contributed to the song/album in some fashion. In the music industry, this is known as giving credit, which is acknowledging everyone who was involved with the album making process.[22] The three most common attributions of credit are producers, songwriters, and mixers/engineers.[23] In the context of sampling,

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[14] Ezra Koenig (@arzE), TWITTER (Oct. 21, 2011, 4:05 PM), https://twitter.com/arzE/status/127520992565272576.

[15] BEYONCE KNOWLES, *Hold Up*, on LEMONADE (Parkwood Entertainment & Columbia Records 2016) (using lyrics from SOULJA BOY, *Turn My Swag On*, on ISOULJABOYTELLEM (Stacks on Deck Entertainment, Collipark Music & Interscope Records 2008)).

[16] Horowitz, *supra* note 11.

[17] BEYONCE KNOWLES, *Hold Up*, on LEMONADE (Parkwood Entertainment & Columbia Records 2016) (using instruments from ANDY WILLIAMS, *Can't Get Used to Losing You*, on DAYS OF WINE AND ROSES AND OTHER TV REQUESTS (Columbia Records 1963)).

[18] LED ZEPPELIN, *When the Levee Breaks,* on LED ZEPPELIN IV (Atlantic Records 1971).

[19] Dave S, *These are the 5 Most Sampled Drum Beats in Hip Hop*, PRODUCE LIKE A PRO (Sept. 17, 2018, 10:53 AM), https://producelikeapro.com/blog/5-most-sampled-drum-beats-in-hip-hop/.

[20] Horowitz, *supra* note 10.

[21] *See id.*

[22] *See* Hugh McIntyre, *The 7 Essential Musical Credits You Need to Keep Track of,* SONICBIDS BLOG (Nov. 4, 2016, 6:00 AM), http://blog.sonicbids.com/musical-credits-what-to-keep-track-of.

[23] *Id.*

these are the individuals who helped to build the song in different ways.[24] Most artists who have their work sampled are given recognition through songwriter's and producer's credit.[25] Songwriter's credit is ensures that artists are being paid royalties for the use of material like lyrics.[26] A Producer's credit is used for the artists who actually created the musical composition for the song.[27]

On *Lemonade,* Knowles primarily utilizes songwriter and producer credits for those from whom she has digitally sampled. Soulja Boy, Ezra Koenig, and The Yeah Yeah Yeahs are all credited on *Hold Up.*[28] Interestingly, however, her decisions on what credit to give to whom do not seem to not have a rhyme or reason. For example, one of her producers, Diplo, was working with Andy Williams' song *Can't Get Used to You,* but Diplo is credited as a producer, and Williams is not.[29] Similarly, Koenig, who is credited for his tweet that was turned into lyrics, is given songwriting credit over someone whose song (Williams) forms the basis of the beat and melody for the song and would seem to garner producer's credit.[30]

This crediting inequity is the crux of the dilemma around sampling — there are no defined rules as to who should receive credit under copyright law. The law and industry have left it up to the individual artist as to who gets credit on their albums and songs. Oftentimes their choices are not based in law, but rather more intangible considerations like the desire to maintain relationships with creators they wish to work with in the future. Andy Williams' song, for example, was released in 1963, and therefore Knowles was probably less concerned with that relationship as she was with other, more relevant artists. The confusion over crediting exists because all artists treat this process differently and the law has not defined who must receive credit when digital sampling is involved.

The primary issue that has not been settled by the courts is what the requirements are for digital sampling credits. In this era of music, artists are expanding their use of digital sampling, so there needs to be a standard for determining who should receive credit. However, in order to understand what requirements should be implemented one must understand what digital sampling is and how the evolution of the music industry has gotten us to this point.

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[24] Shawn Setaro, *The Musicians Behind Your Favorite Songs Are Coming for Their Credit,* (Jul. 30, 2018), https://www.complex.com/music/2018/07/musicians-behind-favorite-songs-coming-for-their-credit/

[25] *Id.*

[26] McIntyre, supra note 22

[27] *Id.*

[28] BEYONCÉ KNOWLES, *Hold Up, on* LEMONADE (Parkwood Entertainment & Columbia Records 2016).

[29] Brittany Spanos, *Ezra Koenig Explains Writing Credit on Beyoncé's 'Lemonade'* (Apr. 25, 2016), http://www.rollingstone.com/music/news/ezra-koenig-explains-writing-credit-on-beyonces-lemonade-20160425.

[30] *Id.*

Part II of this note will discuss the background of digital sampling, the techniques utilized in the process, and provide examples of cases where digital sampling and copyright law is the primary issue before the court. Part III will analyze the current circuit split between the Sixth and Ninth Circuits about what constitutes copyright infringement and which approach is appropriate. Finally, Part IV is a conclusion that evaluates the best way forward to standardize the industry and allow all circuits to utilize the same practice.

II. BACKGROUND

Digital sampling is the recording of an existing sound recording by the use of a computer and then using that copy in a new sound recording.[31] The existing sound recording is usually an old or popular song that an artist wants to recreate. By obtaining the digital recording, producers have a digital code which can be manipulated using a computer synthesizer to change the speed, pitch, and dynamics of the original recording.[32] Producers then add this digital code to their work to form their songs. Digital sampling is used because it is a relatively easy process and also brings a familiar sound to a song which in turn raises the popularity of the song and results in higher sales.[33]

A common misconception is that digital sampling and remixing are the same process. This is not correct. Although this note focuses primarily on digital sampling it is important to understand and recognize the differences between it and remixing. Both concepts have similarities, but the main difference is that the remixing process takes portions of songs and mashes them together to create a new sound while digital sampling involves taking those portions of songs and independently adding something original to the composition.[34] Therefore, remixing can be considered a subcategory of digital sampling. Remixing can be utilized almost to the point of making the original composition unrecognizable, while sampling usually relies on the listener being able to identify the original song.[35] The main difference between the two techniques is that digital sampling utilizes a portion of an existing work as the starting point for a new work, while remixing utilizes existing works as the basis of their new product.[36]

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[31] James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, 80 N.Y. ST. B.J. 23 (2008) (discussing the definition of digital sampling).

[32] RAYMOND J. DOWD, COPYRIGHT LITIGATION HANDBOOK § 2:8 (2d ed. 2016).

[33] Ryan C. Grelecki, *Can Law and Economics Bring the Funk or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 Fla. St. U. L. Rev. 297, 304–05 (2005) (discussing how sampling can make songs more popular).

[34] Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-based Music*, 68 WASH. & LEE L. REV. 811, 812 (2011).

[35] *Id.* at 823.

[36] *Id.*

A BRIEF HISTORY OF SAMPLING

Digital sampling has been readily utilized in the music industry since the mid-1970's. The usage of digital sampling began earlier but because of the expense of the process and logistics, it was not a viable option for many musicians prior to the 1970's.[37] The process began in Jamaica in the early 1960's when disc jockeys used analog sound systems to chant over music and change the lyrics in what would today be called a "rap battle," where artists compete against each other to gain the approval of the crowd.[38] Jamaican engineers created "dubs," an infinite number of versions from the raw components of any recording.[39] In the late 1960's the practice of creating dubs came to the United States, and the practice of digital sampling began shortly afterwards.[40]

The practice began in the hip-hop and R&B genres as these styles allowed for the introduction of different beats and rhythms that other genres could not provide.[41] The introduction of beats from other songs allowed artists to mix their lyrics and melodies with something familiar to the general public. In the "Golden Age" of digital sampling in hip-hop, which was from the late 1980's to early 90's, rappers began to rap over sample-heavy beats and incorporate them into their songs.[42] This period is known as the golden age because musicians were free to utilize digital sampling as they pleased since there was not any regulation of the practice.[43] The expanded use of digital sampling slowed to a halt when copyright questions arose around the practice.[44] Record labels began suing each other for digital sampling, and the courts initially sided with the original copyright holder, thus preserving originality.[45] In *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*,[46] the court held that, although stealing music was rampant in the industry, it was still a violation of copyright law.[47] The court did not accept the reasoning

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[37] Aidan Crilly, *A Brief History of Sampling*, UNIVERSITY OBSERVER (Sept. 29, 2017), http://www.universityobserver.ie/otwo/a-brief-history-of-sampling/

[38] Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings.*, 31 COLUM. J.L. & ARTS 355, 358 (2008) (providing the history of Jamaican sampling).

[39] *Id.*

[40] *Id.*

[41] Computer Magic, *A Brief History of Sampling*, (Aug. 5, 2014), https://www.musicradar.com/tuition/tech/a-brief-history-of-sampling-604868.

[42] Wayne M. Cox, *Rhymin' and Stealin'? The History of Sampling in the Hip-Hop and Dance Music Worlds and How U.S. Copyright Law & Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L.J. 219, 227 (2015) (discussing the background of hip-hop and r&b in sampling).

[43] Ethan Hein, *Biz Markie Gets the Copyright Smackdown*, THE ETHAN HEIN BLOG (Jul. 19, 2009), http://www.ethanhein.com/wp/2009/biz-markie-gets-the-copyright-smackdown/.

[44] *Id.*

[45] *Id.*

[46] 780 F. Supp. 182 (1991).

[47] *Id* at 183.

from the defendants that digital sampling was widespread in the industry and thus they should not be liable.[48] This case presented a major shift in the industry because one of the biggest names in hip-hop at the time, Biz Markie, was being held liable for his usage of unauthorized digital sampling. The unauthorized usage occurred in his song, *Alone Again*, which used samples of the three-word chorus and some instrumentation from Gilbert O'Sullivan's song *Alone Again Naturally*.[49] After this, all of the major labels were on notice that the world of digital sampling was not what it used to be. The court began its opinion with the words "thou shalt not steal," an allusion to the Seventh Commandment,[50] and an indication that the court considered the use of other's music without their express written consent as unacceptable.[51] The court even suggested that criminal prosecution should be sought against the label for violations of 17 U.S.C. § 506(a) and 18 U.S.C. § 2319.[52]

The Copyright Infringement and Remedies statute, 17 U.S.C. § 506(a), provides for prosecution for criminal infringement that is committed for the purposes of commercial advantage or private financial gain, which is exactly what music albums are produced for.[53] The Criminal Infringement of a Copyright Statute, 18 U.S.C. § 2319, sets forth criminal punishment for copyright infringement which provides for fines and prison time up to ten years for illegal usage of music.[54] However, even though the *Upright Music Ltd.* court recommended that the U.S. Attorney's office take action, there has been limited action taken against producers and the case has been cited less than fifteen times since the decision was made in 1991.[55] The ruling did, however, have an impact on the industry as record labels were more conscious on the licensing requirements.[56]

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[48] David Mongillo, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, 9 PITT. J. TECH. L. & POL'Y 3, 5 (2009).

[49] *Id.*

[50] *Exodus* 20:15.

[51] *See Upright Music Ltd.*, 780 F. Supp. at 183.

[52] *See* Mongillo, *supra* note 43, at 5.

[53] 17 U.S.C. § 506(a) (2008).

[54] 18 U.S.C. § 2319 (2008).

[55] Mongillo, *supra* note 46, at 6.

[56] *Id.*

B. INTRODUCING COPYRIGHT LAW

The illegal usage of others' music falls under the intellectual property concept of copyright. The United States has protected intellectual property since well before its founding. Article I Section 8 of the Constitution broadly provides that Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[57] Indeed, even before the Constitution was ratified, twelve of the original thirteen states had copyright laws.[58]

The Constitution provides for the regulation of copyrights. The Patent and Copyright Clause of the Constitution can be found in Article I, Section Eight, Clause Eight. "The Congress shall have power... [t]o promote the Progress of Sscience and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[59] It has been accepted that the language of "useful Arts" by the founders includes music because the main forms of art during this time period were paintings, books, and music.

In order to understand the basis of the copyright law you must first look at the history of the clause. The clause originated with Charles C. Pickney, who was a Constitutional Convention delegate from South Carolina.[60] The process surrounding its origination is unclear because of animosity between states.[61] Most delegates kept their ideas a secret in an effort to prevent them from being stolen by other delegates out of aroused jealousy of authorship or opposition based on antagonism between the states.[62] The purpose of the clause was to protect authors from having their works stolen.[63] However, it was made clear during deliberation that this protection was only supposed to last for a "limited time." Multiple versions of the clause were debated, but all of the versions contained the words "limited time."[64] The purpose of this limitation was to promote originality and creativity by giving limited rights to the material.[65] With the knowledge that their works would be protected, authors could be confident in creating new material without their ideas being stolen. The copyright clause

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[57] U.S. CONST. art. I, § 8, cl. 8.

[58] *.See* Patry, Supra Note 56

[59] U.S. CONST. art. I, § 8, cl. 8.

[60] Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 11 J. PAT. OFF. SOC'Y, Oct. 438 (1929).

[61] *Id.*

[62] *Id.*

[63] *Id.* at 440.

[64] *Id.* at 441.

[65] *Id.*

was passed by a unanimous vote of the convention and placed into the Constitution.[66]

The meaning of the Copyright Clause in the music context was unclear until the introduction of the Copyright Act of 1909.[67] This act provides the definition of what constitutes copyrighted music material. It is "to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced".[68] The act further specifies that "any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor".[69] This is the first instance of Congress requiring credit and compensation for the use of the copyrighted music. The copyright holder was also given the sole right to produce replicas of the original work.[70] With this act, musicians finally had notice as to how far their rights over their material went. This act survived until technology improved and a new copyright act, the 1976 Copyright Act, was necessary to keep up with the times.[71] Importantly however, the 1909 act was the first step to protecting the work of musicians and setting the stage for the debate over digital sampling that has been a major point of contention in the late 20th and early 21st centuries.

Today, copyright law exists in similar form as in the original introduction of The Copyright Act of 1976.[72] This act sought to protect "original works of authorship fixed in any tangible medium of expression [such as] . . . musical works, including any accompanying words . . . and sound recording."[73] Therefore, even from the beginning, Congress had the intent for music to be protected. However, this protection was limited to tangible mediums. The protection only extends to work that has been reduced to writing or another tangible form such as a recording.[74] Ideas, procedures, processes, concepts, principles, and other intangible musical forms were not protected because they had no tangible value.[75]

Four main categories of artists can be considered for copyright protection: the author(s) of the lyrics, the composer(s) of the music and melody, the studio producer(s) or engineer(s) who mixed the music, and the record company.[76]

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66 *Id.* at 443.

67 Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

68 *Id.*

69 *Id.* at 1076.

70 Kerri Eble, *This is a Remix: Remixing Music Copyright to Better Protect Mashup Artists,* 2013 U. III. L. Rev. 661, 669 (2013).

71 *Id.* at 670.

72 17 U.S.C. (1976).

73 17 U.S.C. § 102(a).

74 17 U.S.C. § 101.

75 26 AM. JUR. 3D Proof of Facts § 5 (2018).

76 *See Id.* § 6.

Performance of the song is not protected when it is covered by one of the other four categories. Every owner of these copyrights has the exclusive rights of reproduction for their portion of the original record.[77] Therefore, the majority of the digital sampling that occurred in the 1970s and 1980s was illegal because the artists did not receive permission from the original rights holders or their subsidiaries.

C. FAIR USE DOCTRINE

The fair use doctrine is one way that artists try to skirt copyright law. The Copyright Act of 1976 places limitations on the exclusive rights that copyright holders have. Under the fair use doctrine there is no copyright infringement if the protected material is used in certain permissible ways.[78] The factors considered in a fair use determination include 1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; 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.[79]

The third factor is where the conversation starts around digital sampling. The question is what constitutes the substantiality of the portion. There is no bright-line rule for this meaning; it could constitute 10%, 30%, or 50% of the sampled song. This uncertainty causes confusion in the music industry as to what is acceptable practice. In order to solve this, the courts should attempt to find a bright-line rule that can be easily applied since there is currently a circuit split on the issue. No court has narrowed the usage of a sample to an exact quantifiable amount. The Sixth Circuit has ruled that any usage of copyrighted material is a violation of the Copyright Act[80] while the Ninth Circuit has held that the use of copyrighted material is allowable if the use is *de minimis*.[81] However, because there are varying definitions of *de minimis,* there is not a standard that the industry can follow.

The fair use doctrine preserves the founders' intention to balance the protection of creators with their fear of monopolies and dominated markets. It does so because it prevents the domination of material by a single artist by allowing the public to use copyrighted material without violating the creator's copyright.

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[77] *See Id.* § 7.

[78] 17 U.S.C. § 107

[79] *Id.*

[80] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

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

The Copyright Act provides that the fair use doctrine applies to purposes such as criticism, comment, news reporting, teaching, scholarship, or research.[82] In *Campbell v. Acuff-Rose Music, Inc.*,[83] the holders of a copyright sued a rap group for copyright infringement, but the court found that since the rap group used the song as a parody, it was allowed under the fair use doctrine. The court reasoned that parodies do not violate the fair use doctrine because it serves two distinct markets that have little overlap.[84] The court preserved the intention of the copyright clause because it still promoted creativity. The emphasis is placed on the harm experienced by the copyright holder by the "transformative use" of the property and whether that usage is fair.[85]

There is currently a split in authority between the sixth and ninth circuits on how courts and artists should approach how to utilize sampling in order to satisfy copyright law.

1. The Sixth Circuit

In *Bridgeport*, the plaintiffs claimed that defendants infringed upon their original works by violating music composition and sound recording copyrights for the song "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics.[86] The song "100 Miles" was used in the movie *I Got the Hookup*, produced by the defendants.[87] No Limit Films, another producer of *I Got the Hookup*, had the plaintiff's claim for copyright infringement against them dropped because they had received permission in the form of a Release Agreement.[88] This release granted No Limit Films the rights to the song and therefore express permission to use the music.[89] Plaintiffs did not claim that Dimension Films infringed on their copyright for the entire song.[90] The only part of the song in question was a three-note guitar solo or riff that lasts for approximately four seconds.[91] The plaintiffs produced an expert witness who, after analyzing the song, was able to confirm that the three-cord riff was sampled from plaintiffs' song.[92] Defendants modified the digital sample by looping/repeating it, changing the pitch, and extending it to sixteen beats.[93] This

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[82] Copyright Act of 1976, 17 U.S.C. § 107 (2018).

[83] 510 U.S. 569 (1994).

[84] *Id.* at 571.

[85] *Id.* at 594.

[86] See *Bridgeport Music, Inc.*, 410 F.3d at 796.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

modified digital sample was used throughout the song in five distinct places lasting approximately seven seconds in each location.[94] The plaintiff concluded that this evidence proved that Defendants infringed on their rights to the song.[95]

The defendants countered that the music was not protected because it was not "original" under the meaning of the Constitution and that the digital sample was legally insubstantial and therefore not actionable under copyright law.[96] For the first defense, the court found that the case did not turn on the originality of the chord but on how the chord is used in the new composition.[97] Since there are a limited number of musical notes and potential chords, no works by artists would be considered "original" if they contained any combination of chords. The problem the court had with the defendants' use was that the chord was played in the same arpeggiated sequence, which is when the notes of a chord are played in succession, either ascending or descending, as the original song.[98] This arpeggio was unique to the plaintiff's song and was clearly evident in the defendant's song. Therefore, the court found that originality did exist because of the creative aspect, and thus copyright protection was proper.[99]

Next, the District Court evaluated the digital sampling claim by determining whether there was *de minimis* copying.[100] *De minimis* is a Latin term meaning "pertaining to minimal or trivial things; small, minor, or insignificant; negligible."[101] The *de minimis* test is a "test for determining whether a contributor to a joint work is an author for legal purposes, based on whether the joint effort itself is an original expression that qualifies for copyright protection."[102] The test draws upon both qualitative and quantitative analyses as well as a "'fragmented literal similarity'" approach.[103] Fragmented literal similarity is a situation "in which a smaller fragment of a work has been copied literally, but not the overall theme or concept."[104] The purpose is to identify whether or not the music is recognizable to the average ear.[105] "After listening to the copied segment, the sample, and both songs, the District Court found that no reasonable juror would

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94 *Id.*

95 *Id.*

96 *Id.* at 797.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *de minimis,* DICTIONARY.COM, https://www.dictionary.com/browse/de-minimis?s=t (last visited Sept. 14, 2018).

102 *de minimis test*, BLACK'S LAW DICTIONARY (9th ed. 2009).

103 *See* Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 274-276 (6th Cir. 2009) (describing the process used to determine material that was copyright protected within a jointly created song).

104 *Id.* at 275.

105 *See Bridgeport Music, Inc.* 410 F.3d at 797.

recognize the source of the sample."[106] Using this test and the minimal quantitative and qualitative connection in their view, the court concluded that there was no copyright infringement.[107] The defendants did not dispute the findings of the court that there was a digitally sampled portion used, but took issue with the "fragmented literal similarity" test that was applied.[108]

The court of appeals agreed with the defendant's assessment and reversed the decision of the district court.[109] The *de minimis* test is not to be used when there is not a question of whether digital sampling of copyrighted music occurred.[110] Instead the court of appeals created a bright-line test that can be used when disputes of copyright arise.[111] In order to do this the court first looked to the Code, which provides that "the exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4)."[112] Section 106 provides that the owner of copyright under this title has the exclusive rights to do and authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[113] The court then went through the history of copyright law and concluded that creative works can be imitated or simulated as long as a copy of the sound recording is not made.[114] The court then reached the conclusion that if an artist cannot lift or use a whole song, then it follows that usage of a portion of that song is also illegal.[115]

In order to create its bright-line test, the court of appeals states that copyright owners have the exclusive right to digitally sample their own recording(s).[116] The court's approach to this question about digital sampling is an all-or-nothing approach. Artists must either "get a license or do not sample."[117] If an artist likes a particular riff, that artist is free to recreate that riff in the studio.[118] The

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106 *Id.* at 798.
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.* at 800–02.
112 17 U.S.C. § 114 (2010).
113 17 U.S.C. § 106 (2010).
114 *See Bridgeport Music, Inc.*, 410 F.3d at 800.
115 *Id.*
116 *Id.* at 801.
117 *Id.*
118 *Id.*

counterargument that extending this copyright will drive up licensing costs is negated by artists' second argument that the market will control the license price and keep it in bounds.[119] The reasoning is that, because artists like to sample music from other artists, it would not make sense for prices to be unnecessarily high because those artists would have to pay the higher fees whenever they wanted to sample. The court's final reason is its strongest argument. Digital sampling is never an accidental act.[120] In order to sample, a person must have the intention to take another artist's work product. Knowledge is a distinguishing factor in this inquiry because it stands in contrast to something like simply recreating a melody that gets "stuck in one's head" so to speak. In the sampling context, by contrast, it cannot be a mistake to physically copy another's music. The act of digital sampling is one of physical taking rather than an intellectual one.[121] The physical taking is for the value of the work whether it is a cost saving method or just a way to introduce a new sound into one's work.[122] This test is much easier to apply than a *de minimis* test because there are no "gymnastics" to jump through when evaluating each individual case brought before a court.[123] Finally, the court reasons that this is not a perfect solution, but one that is based upon a textual reading of the statute, and if the music industry has an issue with their strict interpretation they should take it up with their representatives in Congress and not the court.[124] The Sixth Circuit established a bright-line test that any digital sampling without express permission from the copyright holder is a violation of copyright law.[125]

2. The Ninth Circuit

The Ninth Circuit views the same issue quite differently. In *VMG Salsoul, LLC v. Ciccone*[126] the court held that the *de minimis* test was the proper test under copyright law, therefore allowing insignificant portions of music to be digitally sampled without a license from the original copyright holder.[127] *VMG* involved popular singer Madonna Louise Ciccone, commonly known by her first name, Madonna. The dispute was over her song *Vogue* off her album *I'm Breathless*, released in 1990.[128] The plaintiff claimed that the defendants sampled a 0.23

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119 *Id.*

120 *Id.*

121 *Id.* at 802.

122 *Id.*

123 *Id.*

124 *Id.* at 805.

125 *See id.*

126 824 F.3d 871 (2016).

127 *Id.*

128 Vogue (Madonna Song), Wikipedia, https://en.wikipedia.org/wiki/ Vogue_ (Madonna_ song).

second section from *Love Break*, a song that Defendant Pettibone, a producer on *Vogue*, made with plaintiff in the early 1980s.[129] The plaintiff alleged that the defendants digitally sampled from *Love Break* without permission and therefore violated their composition and sound recording copyrights.[130] Plaintiff originally claimed that Defendants digitally sampled a range of material from *Love Break*, such as strings, vocals, congas, "vibraslap", and horns, but only asserted a sole theory of infringement in court.[131] The theory of copyright infringement was based on a "horn hit" that the Defendant digitally sampled.[132] The music theory of this "horn hit" is that it appears in two forms, a "single" horn hit and a "double" horn hit.[133] The single horn hit is comprised of a quarter note chord that is composed of four notes and lasts approximately 0.23 seconds.[134] The double horn hit consist of an eighth-note chord with the same four notes followed by the quarter-note chord.[135] The instruments behind the horn hits were identified by the plaintiff's expert as predominantly trombones and trumpets.[136] In *Love Break* the two horn hits occur fifty times combined in the seven minute, forty-six second song.[137] There was a pattern that the horn hits followed in *Love Break* that were exactly the same as the horn hits in *Vogue*. The single and double horn hits were the exact same composition in both songs.[138] The plaintiff challenged the "radio edit" and "compilation" edits of *Vogue* which had a combined eleven instances of the horn hits throughout the versions of the song.[139] The district court held that defendants were entitled to summary judgment because neither the composition nor sound recording were original and even if the horn hit was original there is no infringement because the usage was *de minimis* or trivial at best.[140]

There was an issue at dispute for the Ninth Circuit because the plaintiff claimed that defendants digitally sampled from *Love Break* while the defendants contended that they did not digitally sample, but by using facts most favorable to the plaintiff, the court found that digital sampling occurred.[141] The court did not find that the mere occurrence of digital sampling indicated copyright

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129 *See VMG Salsoul, LLC*, 824 F.3d at 875.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.* at 875–76.

139 *Id* at 876.

140 *Id.*

141 *Id.* at 877.

infringement.[142] The leading authority relied on by the court was a case decided by the Ninth Circuit in 2004, *Newton v. Diamond*.[143] In that case, the court explained that proof of actual copying alone was not sufficient to establish copyright infringement. For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.[144] The court reasoned that this has been an essential element of copyright law for multiple decades and cited Judge Learned Hand who, in *West Publishing Co. v. Edward Thompson Co.*,[145] stated that "in addition to copying, it must be shown that this has been done to an unfair extent."[146] The court reasoned that this explanation falls in line with the long held *de minimis* concept, and that in order to establish an infringement claim, the plaintiff must show that the copying was greater than *de minimis*.[147]

In order to prove that digital sampling was greater than *de minimis*, the digital sample must be recognizable by the average listener.[148] The court evaluated the written compositions of the two songs and concluded that, while some of the pattern is the same in *Vogue* and *Love Break*, the compositions are not similar enough because the horn hits fall on different beats in the measure and appear in different patterns.[149] Thus, because the average listener could not discern the original sound recording in *Vogue*, it does not exceed the *de minimis* standard. In contrast to *Newton*,[150] where the entire composition was transferred from the original, the sample in *Vogue* does not come close to that level of severity.[151] The court also noted the difference in the single horn hit: the defendants modified the digital sample by transposing the key as well as truncating the note.[152] Additionally, the horn hits are not the only instruments playing at the time in either song, which furthered the court's opinion that the reasonable juror would not be able to recognize the original from the sampling in *Vogue*.[153]

The plaintiff argued that the court should follow the holding by the Sixth Circuit in *Bridgeport*[154] which adopted the bright-line rule that any unauthorized copying, no matter how trivial, constitutes copyright infringement.[155] The Ninth

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142 *Id.*

143 388 F.3d 1189 (2004).

144 *Id.* at 1192–93.

145 169 F. 833, 861 (E.D.N.Y. 1909).

146 *Id.* at 861.

147 *See VMG Salsoul, LLC.*, 824 F.3d at 877.

148 *Id.* at 878.

149 *Id.* at 878–79.

150 Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004).

151 *See VMG Salsoul, LLC.*, 824 F.3d at 879.

152 *Id.* at 880.

153 *Id.* at 879–80.

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

155 *See VMG Salsoul, LLC.*, 824 F.3d at 880.

Circuit disagreed with the Sixth Circuit's ruling and stated that it has been held that there is only infringement if a substantial portion of a given work is copied.[156] The court drew upon copyright laws and treatises going back to the mid-1800's and relies on a 1977 unlawful appropriation and copying rule that established the *de minimis* test.[157] Copyright infringement was designed to protect the financial interests of the copyright holder; however, if the alleged copyright violation is not recognizable then the copier has not benefitted from the use.[158] Outside of the Sixth Circuit's decision in *Bridgeport*, there were no documented instances where courts declined to use the *de minimis* test in copyright infringement cases.[159] In *Newton,* the Ninth Circuit previously held that the *de minimis* rule applies "*throughout the law of copyright*, including cases of music sampling."[160] In support of its position, the court turned to the code.[161] In addition to breaking down the text of the statute, the court evaluated the legislative history relating to the statute.[162] The purpose, according to the legislature, was to limit the rights of copyright owners.[163] The House Report for the revision of the copyright law stated that "infringement takes place whenever all or *any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced."[164] This is evidence that Congress intended for the *de minimis* test to remain and be the standard. The Ninth Circuit vigorously disagreed with the Sixth Circuit's reasoning and held that the Sixth Circuit took that statute out of context and narrowed its meaning in a way that congress did not intend.[165] The statute intended to preserve the expressive aspects of the copyrighted work and not the fruit of the artist's labor.[166] The distinction between intellectual and physical taking has no bearing on what expressive content is according to the Ninth Circuit, and because there was no distinction separating sound recordings from other protected copyright eligible materials established in the statute,[167] the Sixth Circuit's holding in *Bridgeport* was built on air and devoid of logic.[168]

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156 *Id.*

157 *Id.* at 881.

158 *Id.*

159 *Id.*

160 See Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004) (emphasis added/in original).

161 17 U.S.C.A. §114 (2010).

162 See *VMG Salsoul, LLC,* 824 F.3d at 883.

163 *Id.*

164 H.R. Rep. No. 94-1476, at 106 (1976) (emphasis added).

165 See *VMG Salsoul LLC.,* 388 F.3d at 885 (stating that the Sixth Circuit "looked beyond the statutory text").

166 *Id.*

167 17 U.S.C.A. §114 (2010).

168 *VMG Salsoul, LLC,* 824 F.3d at 885.

The Ninth Circuit did not take its decision lightly, cognizant of the fact that it was going to create a troubling circuit split in the area of copyright.[169] This would be troublesome because different areas of the country would interpret the digital sampling law differently, even though the practice of sampling was commonplace throughout the country.[170] There were already a number of courts rejecting the Sixth Circuit's holding, and although they were not court of appeals cases, the trend was to reject the Sixth Circuit's holding.[171] The Ninth Circuit also rejected the Plaintiff's argument that congressional inaction means that Congress approved of the Sixth Circuit's holding.[172] The Supreme Court had previously held that congressional inaction carries "almost no weight" and is not an affirmation of a court's decision.[173] Finally, the Ninth Circuit dismissed the plaintiff's argument that the *Bridgeport* holding is superior as a matter of law.[174] Just because the Sixth Circuit attempted to create a bright-line that would be easy to apply does not make it law. The Ninth Circuit opines that those arguments are better suited for a legislature and not a court.[175] Holding that Plaintiff's argument spoke to "what Congress *could decide*; they do not inform what Congress *actually decided*,"[176] the Ninth Circuit held that the Plaintiff's arguments are insufficient and therefore hold that *de minimis* exception applies to actions alleging copyright infringement dealing with sound recordings and digital sampling.[177]

III. ANALYSIS

There is no consensus on how much of a musical piece can be used legally before the original author's copyright is violated. The Sixth and Ninth Circuits have attempted to answer this question, resulting in a circuit split which in turn causes more of an issue because the law is being unevenly applied throughout the country While *Bridgeport* and *VMG* provided guidance in those circuits respectively, the very fact of the circuit split leaves open the question: How long does a digital sample have to be in order to constitute copyright infringement?

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169 *Id.* at 886.
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.* at 887.
175 *Id.*
176 *Id.* (emphasis added).
177 *Id.*

A. WHICH CIRCUIT IS RIGHT?

Which approach is the correct one as it relates to digital sampling? The answer is not clear, but the Ninth Circuit's analysis is the stronger argument. The Sixth Circuit sought to create a bright-line rule that would establish an easy test for courts to use when analyzing sampling. The problem, however, is that this test is not in line with the intention of the copyright law. While it is true that any form of taking from copyrighted material without permission is copyright infringement, the law has focused on the *de minimis* theory and fair use doctrine when evaluating these claims. Substantial similarity is a required element in order to succeed on a claim of copyright infringement.[178] There have been two different uses of the phrase "substantial similarity" over time. The first use is that it is the threshold to determine the degree of similarity that suffices as indirect proof of copying.[179] The second use is applied after the fact of copying has been established and serves as the threshold for determining the degree of similarity between the disputed uses in order to prove infringement.[180] The second approach is the correct one because it directly analyzes the similarities between the original and new work in the context of determining whether a reasonable juror would be able to identify the digitally sampled portion. This is the better approach because the basis of sampling is dependent on whether the new work can be associated with the original. If the answer is that no reasonable juror can recognize the similarity, then it can be accepted that the usage was *de minimis* and therefore not infringement.

Other circuits have followed the Ninth Circuit's holding and followed its line of reasoning. The Second Circuit also employs the substantial similarity test to determine *de minimis* use. In *Sandoval v. New Line Cinema Corp.*[181] the court concluded that there can be no bright-line rule when it comes to substantial similarity because each claim must be made on a case-by-case basis.[182] This directly cuts against the goal of the Sixth Circuit which tried to create a bright-line rule. The Sixth Circuit ignored the substantial similarity test in their analysis in *Bridgeport*, stating that "even when a small part of a sound recording is sampled, the part taken is something of value."[183] The court only looked to the value gained by producers when they digitally sample instead of the intrinsic elements that are being copied from the copyright holder.[184] But it is hard to determine

178 Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

179 *Id.*

180 *Id.*

181 147 F.3d 215 (2d Cir. 1998).

182 *Id.* at 217.

183 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005).

184 *Id.*

the value of the copyright holder's music if you do not look at how the digital sample has impacted the new song. Has any value been truly added if no one can recognize the original song? Arguably not. While an average listener may not be able to recognize the original, there must be a reason why the artist chose to use the sample in their work, even if that reason is for efficiency in the production process. The digital sample has often been added to the artist's new song in addition to other elements, therefore changing the value of the digitally sampled work. In some sense, therefore, whether they intended to or not the Sixth Circuit was using the *de minimis* test, because they considered even a sliver of a digital sample valuable. The court recognized that the digitally sampled portion is *de minimis* but that it was substantially similar because the producer physically copied the copyrighted sound of another.[185] The court pointed to the "mental, musicological, and technological gymnastics" that would have to be employed to use the *de minimis* or substantial similarity tests.[186] There are no gymnastics involved with either of these tests because they are dependent on what a reasonable person would find representing similarities. There is not a difficult formula, only whether or not a reasonable person could hear a similarity between songs without actively searching for one.

The court stated that a bright-line rule is necessary to help diminish the hundreds of cases that are before courts on the issue of digital sampling,[187] but the backlog of cases should not be a reason to ignore the core of copyright law that has been utilized for decades. The Sixth Circuit said that economy/efficiency of the music industry was the driving point for their decision, not judicial economy.[188] The efficiency that the court refers to is that the artist will know that they cannot sample copyrighted music and will not waste time trying.[189] This explanation does not hold water as a bright-line rule is designed to make it easier for the courts to apply copyright law in a strict interpretation fashion, and therefore, reduce litigation over the issue. The interests of the music industry, besides licensors, are not advanced by this bright-line rule because it changes the landscape of music production. If songwriters and producers want to use a small, insignificant portion of a copyright protected song, they must go through the hoops of acquiring a license, which will add significant costs to an already expensive endeavor. This will not affect the large production and recording studios, but it will be a hindrance on upcoming artists and small level producers who do not have massive resources. This will decrease creativity and artistry, which is exactly what copyright law is intended to prevent. There is an argument that without sampling, artists will have to be more creative, but this is uncertain because artists are inspired and driven by what they know exists in the industry.

185 AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING (4th ed. 2010).

186 *See Bridgeport*, 410 F.3d at 802.

187 *Id.*

188 *Id.*

189 *Id.*

The burden ease on the dockets of courts around the country should not outweigh the creativity that the founders sought to protect when they included Article 1, Section 8, Clause 8 in the Constitution.

B. CAN A NUMERICAL VALUE BE ESTABLISHED?

This begs the question whether a numerical value can be correlated to the *de minimis* standard. Said another way, can this value be quantified in terms of notes/measures or by time requirements? In *Williams v. Broadus*,[190] the usage in question was a two-measure segment of rapper Snoop Dogg's song, *Ghetto Symphony*.[191] The court found that the defendants only copied two of the 54 measures of *The Symphony*[192] by producer Marley Marl.[193] The court applied the *de minimis* standard, but also discussed "fragmented literal similarity."[194] Fragmented literal similarity exists where pre-existing music is copied note for note and placed directly in the new work.[195] Although the notes in *Ghetto Symphony* were copied from an existing song, the court still found that the use did not make up a substantial portion of the song, and therefore, the usage was *de minimis* and protected under copyright law.[196]

To contrast, in *Bridgeport*, the Sixth Circuit did find that a digital sample constituted a substantial portion of the song and thus ruled that it violated copyright law.[197] The issue in the case was the usage of the lyrics "Bow wow wow, yippie yo, yippie yea" from Bridgeport Music's copyright protected song *Atomic Dog*.[198] The lyrics were used by popular R&B and hip-hop group Public Announcement in their song *D.O.G. in Me*.[199] Using the *de minimis* test, the district court and court of appeals found that the usage of the lyrics made the songs substantially similar.[200] The district court took the fragmented literal similarity approach in which they identified just the parts of the songs that were the same to identify their similarity.[201] The defendants wanted an instruction that the two songs be evaluated on their whole, as the songs are distinctly different in their theme, tempo, and style.[202] However, the court of appeals did not assign error

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

191 SNOOP DOGG, *Ghetto Symphony*, *on* NO LIMIT TOP DOGG (No Limits Records 1999).

192 MARLEY MARL, *The Symphony*, *on* IN CONTROL, VOL. 1 (Cold Chillin'/Warner Bros. 1988).

193 *See Williams*, No. 99 Civ. 10957(MBM), 2001 WL 984714, at *3.

194 *Id.*

195 *Id.*

196 *Id.* at *4–5.

197 *See* Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F. 3d 267 (2009).

198 GEORGE CLINTON, *Atomic Dog* (Capitol Records 1982).

199 PUBLIC ANNOUNCEMENT, *D.O.G. in Me*, *on* ALL WORK, NO PLAY (A&M Records 1998).

200 *See Bridgeport*, 585 F.3d at 272.

201 *Id.* at 276.

202 *Id.*

on this lack of instruction because Bridgeport Music's specific claim was over the usage of the lyrics and therefore was not necessary to evaluate the songs as a whole.[203] The conclusion was that there was substantial similarity given the evidence that the copied elements had qualitative importance to the song.[204] The ability for the common layman to recognize the musical similarities of the songs in sampled portion meant that the song failed the *de minimis* test and violated copyright law.[205] The court saw this and held accordingly.[206]

Ultimately, there cannot be a numerical value assigned to determine what constitutes a copyright violation. All the decisions handed down in both circuits did not mention specific numerical values. While it would be easier to have a brightline rule with a hypothetical maximum of thirty seconds of copied material, the decisions in these cases illustrate just how different each individual cases are and the individual evaluation required of each case. Therefore, the *de minimis* test is the proper test because it is the only method that allows for creative freedom while being able to utilize the works of other artists.

C. LEMONADE AND THE LAW

There has already been litigation over Beyoncé Knowles' *Lemonade.* In July 2017, a claim of copyright infringement was brought against Knowles, her recording label, her management company, and other associates who worked on the album. In *Estate of Barré v. Carter*,[207] the estate of Anthony Barré sued Knowles for copyright infringement of his voice from his YouTube videos, *Booking the Hoes from New Wildin*[208] and *A 27-Piece Huh?*[209] The plaintiffs alleged that defendants misappropriated his voice in Knowles' song, "Formation." The infringement in this case involved the use of lyrics from the YouTube videos which were then incorporated to "Formation." The specific lines in question were "Oh yeah baby. I like that," "Bitch I'm back by popular demand," and "What happened at the New Orleans?"[210] The defendants moved for summary judgment on the copyright infringement claim citing the fair use doctrine.[211] The court looked to Sections 106 and 107 of the Copyright Act[212] to evaluate the

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[203] *Id.*

[204] *Id.*

[205] *See VMG Salsoul, LLC.,* 824 F.3d at 878

[206] *Id.* at 887.

[207] 272 F. Supp. 3d 906 (E.D. La. 2017).

[208] Messy Mya, *Booking the Hoes from New Wildin,* YOUTUBE (Aug. 20, 2010), https://www.youtube.com/watch?v=daKqgdcypTE

[209] Messy Mya, *A 27-Piece Huh?*, YOUTUBE (Sep. 4, 2010), https://www.youtube.com/watch?v=zsYOnx2xJuY

[210] Mya, *supra* note 208; Mya, *supra* note 209.

[211] *See Estate of Barré* 272 F. Supp. 3d 906 (E.D. La. 2017).

[212] 17 U.S.C.A. §§ 106, 107 (2010).

defense. The Copyright Act provides a bundle of exclusive rights to the owner of the copyright subject to statutory limitations.[213] One of the limitations is the fair use doctrine. This doctrine can excuse what would otherwise be an infringing use of copyrighted material if used in a reasonable manner.[214] While the court does not render a final verdict on the merits, it does present an evaluation of the factors of the copyrighted material.[215]

When looking at the purpose and character of the use of copyrighted material, the court first determined whether the use is "transformative."[216] The emphasis is not on simply using the sample, but adding something new to the sample that changes the concept or message of the original.[217] Knowles argued that her usage of the copyrighted lyrics added something new because Barré's original recording is just a stream of consciousness, while Knowles used the raw material to add to her artistry and focus on the concepts of "black Southern resilience" and her "cultural heritage."[218] The court did not make a judgment other than to deny the Defendants' Motion to Dismiss, but it did further inquire about the usage and its transformative principles.[219] The Constitution provides for the fair use doctrine to be evaluated as to whether the copyrighted use is for commercial or nonprofit educational purposes.[220] It is clear that the defendants used the lyrics for commercial purposes as evidenced by the selling of the album and the concert tour completed by Mrs. Knowles. The court noted that this could cut against the defendants' fair use argument in future stages of the proceeding.[221]

In order to evaluate the nature of the copyrighted work, courts have analyzed "(1) whether the work is more creative or factual in nature; and (2) whether the work is published or unpublished."[222] In the Knowles case, the original YouTube videos were posted by Barréfive years prior to the defendants' use, which defendants argued was proof that the material was published to the public and therefore eligible for copyright protection.[223] Plaintiffs argued that because this was a creative work, not factual, so it should be afforded more protection.[224] The court agreed with other courts "that creative works are 'closer to the core of intended copyright protection' than are works that are predominantly factual, such as news," and that "a finding of fair use is more likely with respect to factual

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213 *Id.*

214 *See Estate of Barré*, 272 F. Supp. 3d at 929 (E.D. La. 2017).

215 *Id* at 915.

216 *Id.* at 931.

217 *Id.*

218 *Id.* at 932.

219 Id.

220 *Id.* at 933.

221 *Id.*

222 *Id.* at 934.

223 *Id.* at 935

224 *Id.*

works than ... creative works."[225] Although both sides had strong arguments, the court pointed to precedent that the creativeness factor is given more weight than the publication factor.[226] Therefore, it is less likely that defendants will be able to prevail under the fair use doctrine for this element.

The third fair use factor, "the amount and substantiality of the portion used," is evaluated in conjunction with 17 U.S.C. § 107.[227] This factor evaluates the substantive amount of the copyrighted work sampled and how it is used in the new work.[228] Courts use the qualitative/quantitative test when determining proportionality.[229] The key focus of this test is whether the "heart" of the copyrighted work has been sampled and included in the new work.[230] Both parties agree that only ten seconds out of 424 total seconds (7:04 minutes) were sampled from both YouTube videos produced by the plaintiff.[231] Courts have held that even if the actual amount of copyrighted material used by a defendant was "an insubstantial portion," the qualitative portion can still cut against the fair use argument.[232] This is partially where the *de minimis* test is evaluated because the significance of the material is what is important. Even if these three lyrics comprised only ten seconds of the song, if it is the heart of the original material, then it would not pass the *de minimis* test because it was not insignificant to the material. The *Barré* court does not explicitly describe the *de minimis* test but essentially used it when it held that there was enough of a dispute to argue about whether the sampled portions were the heart of the material.[233]

The final fair use factor identified by the court was the effect on the market. This factor asks the court to weigh "the effect of the [secondary] use upon the potential market for the value of the copyrighted work".[234] This factor is about evaluating whether the new work has materially changed the market for the original copyrighted work.[235] Defendants in this case argued that the market was not usurped because there was hardly a market for Barré's work.[236] Since the copyrighted material was published to YouTube, a public video sharing website, Defendants argue that the material was available publicly and had no market or demand.[237] The court distinguished that a market for the material is not required

225 *Id.*
226 *Id.*
227 17 U.S.C. § 107 (2017).
228 *Id.*
229 *See Estate of Barré*, F. Supp. 3d. at 936.
230 *Id.*
231 *Id.*
232 *Id.* at 937.
233 *Id.*
234 *Id.*.
235 *Id.*
236 *Id.* at 938.
237 *Id.*

in order for the fair use doctrine to be violated.[238] Specifically, the court stated that "[s]ection 106 of the Copyright Act provides that a copyright holder has exclusive rights to 'authorize' certain uses of copyrighted material."[239] The Eighth Circuit held in *United Telephone Co. of Missouri v. Johnson Pub. Co., Inc.*[240] that plaintiffs do not have to hold their product out for sale in order to require a license to reproduce it.[241] However, the court here held that defendants did not diminish the marketability of plaintiff's works.[242] A specific factor was that the defendants' uncompensated appropriation did not affect the market or potential market for plaintiffs' product.[243] The Court did not rule in defendants' favor on the Motion for Summary Judgment because there was a dispute as to whether the fair use doctrine was violated by Knowles and her team. As of this writing, the case is awaiting the next steps in litigation. The question that the Court will have to answer in future proceedings is whether or not the digital sampling by the defendants comprises a significant portion of copyrighted material, therefore making it recognizable to the average listener. This *de minimis* test is the vital component when determining if the use of digital sampling is acceptable.

IV. CONCLUSION

Was it required for Beyonce to credit those who she digitally sampled in Lemonade? Yes, but only if her use of sampling exceeded the court's definition of *de minimis*. The Ninth Circuit has the most refined approach by utilizing the *de minimis* test. The bright-line rule established by the Sixth Circuit that any digital sampling of an artist's music without permission is a violation of copyright law does not satisfy the true intent behind copyright law. As discussed earlier, it is not possible to pin down a quantifiable measure to determine when credit must be given. Therefore, the Ninth Circuit approach is the correct way to apply copyright law.

By utilizing the Ninth Circuit approach, artists would be required to give either songwriter, producer, or mixer/engineering credit to those from whom they sampled if their use of the original sample is greater than *de minimis*. The rationale behind this approach is that it would give artists the freedom to utilize older music but still provide protections to the original artists.

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238 *Id.*

239 *Id.*

240 855 F.2d 604 (8th Cir. 1988).

241 *Id.* at 610.

242 *See Estate of Barré*, 272 F.Supp 3d 906 (E.D. La 2017).

243 *Id.* at 939.

The trouble would be, as the Ninth Circuit found, determining whether the use is *de minimis*. The fragmented literal similarity test would be appropriate to use but with a caveat. Under the test, courts must look at the substantial similarity of the two songs.[244] Qualitative and quantitative evaluation is required under the test, but because it is impossible to determine infringement based on a word count or amount of musical measures/beats, the qualitative nature must be the prevailing factor.[245] Therefore, in order to apply this test, the courts would have to evaluate whether the copied portion goes to the "heart of the original composition."[246] This is a difficult standard for courts to apply, but there is an easier solution.

If the sample can be recognized by an average listener as part of the copyright holder's song, then it will meet the fragmented literal similarity test and surpass *de minimis* use. This test already exists, but the burden is placed on the copyright holder to prove that it is a substantial portion of the copyright holder's song.[247] The burden should be shifted to the person who used the sample in their new composition. If courts required artists to prove that the sample is materially different from the original, then there will be fewer uncertainties. The artist who sampled would have to prove that there was originality independently added to the sampled portion or they would be liable for copyright infringement. The result of a test implemented in this manner would be that more credit would be given to the original copyright holder.

When applying this test to Beyoncé and her album *Lemonade,* it is clear that Beyoncé would be responsible for giving credit to those whom she sampled from. The lyrical and musical samples that she used are well-known, as evidenced by the fact that other artists have used the samples before. Largely known artists, such as Beyoncé, can afford to provide credit to prevent copyright infringement claims, and thus the burden should be placed on them. Artists should lean towards giving credit to those they sampled, regardless of whether the use is *de minimis*, in order to protect themselves from copyright infringement suits.

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[244] TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 598 (S.D.N.Y. 2013).

[245] Id. at 599 (citing Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F. 3d 65, 71 (2d Cir. 1999)).

[246] *Id.* (quoting Elsmere Music, Inc. v. Nat'l Broad Co., Inc., 482 F. Supp. 741, 744 (S.D.N.Y. 1980), aff'd. 623 F.2d 252 (2d Cir. 1980)).

[247] *Id.* at 595.

Digital sampling is ingrained in the fabric of the music industry and will continue to be utilized in the future. By proactively protecting themselves by giving credit the industry will be healthier and creativity will continue to flourish. Then if artists bring suits for copyright infringement, Beyoncé and others will be able to demonstrate that appropriate credit was given in court and "tell 'em boy bye."[248]

[248] BEYONCÉ KNOWLES, *Sorry, on* LEMONADE (Parkwood Entertainment & Columbia Records 2016).