# Sound Recordings: "Get a License or Do Not Sample"*



## I. INTRODUCTION

The sound track from the movie *I Got the Hook Up* (*Hook Up*) contains a song titled *100 Miles and Runnin'* (*100 Miles*).[1] Segments of this song were created by using a musical snippet from another song.[2] This snippet is a three-note guitar riff from George Clinton and the Funkadelics' sound recording of the song *Get Off Your Ass and Jam* (*Get Off*).[3] In *100 Miles*, the clip is digitally manipulated by lowering the pitch and by extending it to sixteen beats through repeating or "looping" it.[4] The snippet was played five times in *100 Miles*.[5] The music industry refers to this type of borrowing as "sampling."[6]

Bridgeport Music, Inc. (Bridgeport) saw this type of appropriation as a cause of action.[7] It filed approximately 500 similar causes of action against nearly 800 defendants in May 2001.[8] Two months later, the United States District Court for the Middle District of Tennessee severed the complaint into 476 separate cases.[9]

As one of the severed cases, the noted case was based on the sampling of the song *Get Off*.[10] The musical composition copyright in *Get Off* is owned by Bridgeport.[11] Westbound Records, Inc. (Westbound)

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* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).

1. *Id.* at 393.
2. *See id.*
3. *See id.* at 393-94.
4. *See id.* at 394.
5. *See id.* ("[T]his sample appears in the sound recording '100 Miles' in five places; specifically, at 0:49, 1:52, 2:29, 3:20 and 3:46. By the district court's estimation, each looped segment lasted approximately 7 seconds.").
6. *See id.* "Sampling entails the incorporation of short segments of prior sound recordings into new recordings." Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003).
7. *See Bridgeport*, 383 F.3d at 393.
8. *Id.*
9. *Id.*
10. *See id.*
11. *Id.*

owns the copyright in the sound recording.[12] Both companies, joined by Southfield Music, Inc. (Southfield) and Nine Records, Inc. (Nine Records), filed suit against No Limit Films (No Limit), the producer of the *Hook Up* movie sound track, for copyright infringement.[13] No Limit's petition for summary judgment was granted.[14] The Middle District of Tennessee dismissed Bridgeport's claim because it had granted a license in the musical composition to the defendant.[15] The court also dismissed Westbound's claim because it determined the sampling had not reached a legally recognized level, and was therefore de minimis.[16] On appeal, the district court's refusal to grant Bridgeport leave to file an amended complaint and its postjudgment decision to award attorney fees to No Limit were affirmed.[17] However, its summary judgment decision against Westbound regarding the sampling was overturned by a new bright-line rule.[18] The United States Court of Appeals for the Sixth Circuit *held* that any unlicensed digital sampling of a copyrighted sound recording constitutes infringement. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004).

## II. BACKGROUND

The use of sampling began in Jamaica in the 1960s.[19] Analog sampling spread to the United States in the following decade as artists "scratched" records and "cut" back and forth between records to create new songs.[20] Digital sampling sprang up in the 1980s, allowing artists to assert greater control over a sample's multiple facets, including speed, pitch, and whether the recording played forward or backward.[21] Increased command over previously recorded samples combined with the money saved by not hiring musicians resulted in the birth of a new musical genre.[22]

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12. *Id.*
13. *See id.*
14. *See id.* at 393-94.
15. *Id.*
16. *See id.* at 394-95.
17. *See id.* at 404, 406.
18. *See id.* at 398.
19. Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003) (citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 U.C.L.A. ENT. L. REV. 271, 277 (1996)).
20. *See id.* (citing Szymanski, *supra* note 19, at 277).
21. *See id.* (citing Szymanski, *supra* note 19, at 277).
22. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1668 (1999).

Digital sampling litigation began to surface the next decade, in the early 1990s. The first decision to address digital sampling was *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*[23] In this case, a selection from Raymond "Gilbert" O'Sullivan's sound recording of the song *Alone Again (Naturally)* was sampled by rap artist Biz Markie.[24] The *Grand Upright* opinion begins with a daunting quote from Exodus 20:15, "[t]hou shalt not steal," yet follows with negligible insight into the legal consequences of sampling.[25] Nevertheless, the case "marked the '[e]nd of the days of causal sampling' and the beginning of widespread licensing of samples."[26] Not surprisingly, many musicians failed to obtain permission to sample the work of others, so the litigation continued.

In digital sampling copyright infringement cases, the courts must differentiate between two distinct copyrights: "the copyright in the underlying musical work and the copyright in the sound recording."[27] Congress specifically distinguished the two in the Copyright Act. A musical work is the underlying composition, including music and accompanying words where applicable.[28] Copyrights to a musical work are usually held by either a songwriter or a music publisher. A sound recording is a recorded performance of the underlying composition.[29] Copyrights to a sound recording are usually held by a performer or a recording company. Digital sampling will infringe upon a copyrighted musical work if the sample is substantially similar to the underlying composition and the amount sampled reaches a certain threshold.[30] However, "[b]ecause a sample is always taken directly from a sound recording, it will always technically infringe the sound recording copyright as long as the sampled recording is copyrighted."[31]

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23. 780 F. Supp. 182 (S.D.N.Y. 1991).

24. *Id.* at 183.

25. *Id.* The court granted a preliminary injunction to the plaintiff. After the decision, the parties arranged an out of court settlement. *See* Abramson, *supra* note 22, at 1670.

26. Abramson, *supra* note 22, at 1673 (citing DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 296 (1997)).

27. A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 141 (1993) (citing 17 U.S.C. §§ 101, 102(2) (1988)).

28. *See* 17 U.S.C. § 102(a)(2).

29. "'Sound recordings' are works that result from the fixation of a series of musical spoken or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.* § 101.

30. *See* Abramson, *supra* note 22, at 1670.

31. *Id.* (noting that "[s]ongs recorded before February 15, 1972 are not protected by a sound recording copyright" (citing 17 U.S.C. § 301(c) (1994))).

Consequently, the result of a digital sampling case depends on the type of copyright infringement involved.[32] Following the *Grand Upright* decision, courts consistently heard cases involving the sampling of copyrighted musical compositions, yet similar infringement claims based on copyrighted sound recordings were not raised.[33]

Infringement cases involving the underlying musical work have typically turned on whether the sampled material was copyrightable.[34] Sometimes samples are permissible under the fair use doctrine.[35] This doctrine permits the use of an underlying copyrighted work in limited circumstances, including "purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research."[36] When applying this doctrine, courts weigh the plaintiff's allegations in light of a variety of factors, including: the infringer's purpose for the use, the nature and character of the use, the substantiality of the portion used, and the potential impact on the market of the copyrighted work.[37] At other times, the samples are permissible under the principle of *de minimis non curat lex* ("the law cares not for trifles").[38] This means the copying is so trivial it fails to meet the substantial similarity requirement for copyright infringement.[39] In addition, courts commonly apply the "ordinary observer" test for substantial similarity. "[P]ursuant to this test, two works are substantially similar where 'the ordinary [listener], unless he sets out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same.'"[40] Courts also look for whether the sampled song is both qualitatively similar (where the sample captures the heart of the song, no matter how small the sample may be) and quantitatively similar (where a significant portion of the song is sampled) to the sampled work.[41] If courts find the fair use

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32. *See* Johnson, *supra* note 27, at 141.

33. *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991); Jarvis v. A & M Records, 827 F. Supp. 282, 287-92 (D.N.J. 1993); Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1052-55 (S.D.N.Y. 2001); Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003); Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 396 n.4 (6th Cir. 2004).

34. *See* Johnson, *supra* note 27, at 141.

35. *See* 17 U.S.C. § 107 (1988). This Note will follow the court's practice of citing to the 1988 version of the United States Code unless otherwise noted.

36. *Id.*

37. *Id.*

38. Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002).

39. *See id.*

40. Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1053 (S.D.N.Y. 2001) (quoting Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992)).

41. *See Bridgeport*, 230 F. Supp. 2d at 841.

doctrine and the de minimis defense are not applicable, the court is likely to find copyright infringement of the underlying musical work.[42]

Sound recording copyright holders, on the other hand, typically have not pursued their rights through litigation. The fact remains that modern technology makes sound recordings simple to reproduce. Recognizing this, Congress sought to secure the rights of sound recording copyright holders by giving them the exclusive right "to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording."[43] Prior to the noted case, the meaning of these rights had not been litigated in court.[44]

## III. THE COURT'S DECISION

In the noted case, the Sixth Circuit defined protection granted to sound recordings. In so doing, it eliminated the de minimis defense for sound recordings upon which the district court's decision granting summary judgment was based.[45] The court determined that all sound recording sampling claims are actionable.[46] The right to sample sound recordings springs entirely from the copyright owner.[47] The court also affirmed the district court's decision to deny Bridgeport leave to amend its complaint[48] and its postjudgment grant of attorney fees to No Limit Films.[49]

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42. *See, e.g.*, Baxter v. MCA, Inc., 812 F.2d 421, 424-25 (9th Cir. 1987) (overturning the district court's grant of summary judgment to the defendants because genuine issues of material fact existed as to the availability of the de minimis defense).

43. 17 U.S.C. § 114(b) (1988).

44. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 396 n.4, 401 n.13 (6th Cir. 2004).

45. *Id.* at 393.

46. *See id.* at 398.

47. *See id.*

48. Bridgeport sought to file another copyright infringement claim based on a different song on the *Hook Up* sound track. *See id.* at 402. The court determined that the movie itself should have alerted Bridgeport to the possibility of this additional claim. *See id.* at 402-03. When Bridgeport finally made a motion to amend its complaint on the eve of the close of discovery, it was not timely. *See id.* at 403-04. The district court's decision to deny Bridgeport leave to file a second amended complaint was reviewed for abuse of discretion and affirmed on appeal. *See id.* at 402, 404. The Sixth Circuit determined that to allow the second amended complaint to be filed would unduly delay the trial and prejudice the defense. *See id.* at 403; *see also* Wade v. Knoxville Utils. Bd., 259 F.3d 452, 459 (6th Cir. 2001) (regarding denial of motion to amend reviewed for abuse of discretion); Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999) (regarding motions to amend sought in a late stage of litigation); Head v. Jellico Hous. Auth., 870 F.2d 1117, 1123 (6th Cir. 1989) (regarding factors affecting decision to deny a motion to amend).

49. *See Bridgeport*, 383 F.3d at 406. The decision of the lower court was reviewed for abuse of discretion. *See id.* at 404; *see also* Adock-Ladd v. Sec'y of Treasury, 227 F.3d 343, 349

The district court, noting that the sound recording had been sampled, concluded that the sampling was de minimis and dismissed the infringement allegations on summary judgment.[50] Reviewing the court's decision de novo on appeal, the Sixth Circuit broke with the line of reasoning supporting the lower court's decision.[51] The Sixth Circuit interpreted 17 U.S.C. § 114(b)[52] to mean that "a sound recording owner has the exclusive right to 'sample' his own recording."[53] The court simply stated the main issue in the noted case: "If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole. Our answer to that question is in the negative."[54] This eliminates the possibility of a de minimis defense—any unlicensed taking violates the

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(6th Cir. 2000) (regarding reviewing award of attorney fees for abuse of discretion). Pursuant to 17 U.S.C. § 505, the prevailing party in a copyright infringement suit may be awarded a reasonable amount of attorney fees in light of certain considerations.

> Those considerations include: the primary objective of the Copyright Act to "encourage the production of original literary, artistic, and musical expression for the good of the public"; the fact that defendants as well as plaintiffs may hold copyrights and run the "gamut" from large corporations to "starving artists"; the need to encourage "defendants who seek to advance a variety of meritorious copyright defenses . . . to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement"; and the fact that "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright."

*Bridgeport*, 383 F.3d at 404 n.18 (citing Fogerty v. Fantasy, Inc., 510 U.S. 517, 524, 527 (1994)). The purpose of the award in the noted case was for compensation and deterrence. *See id.* at 406. The Sixth Circuit determined that an award of $41,813.30, half of No Limit's fees, was reasonable since this amount was exacerbated by the plaintiffs' behavior. *See id.* at 405-06. The plaintiffs' complaint, although lengthy, overlooked several case-breaking components. *See id.* at 406. The defendant's sampling of the musical composition *Get Off* was pursuant to licenses extended by Bridgeport. *See id.* at 405. Consequently, Bridgeport did not have a valid cause of action against No Limit, yet asserted the claim anyway. *See id.* Moreover, Nine Records and Southfield had no copyright interest in the sampled song, thus should not have been party to the litigation. *See id.* As affirmed on appeal, Nine Records and Southfield are liable for ten percent of the award; Bridgeport is liable for the remaining ninety percent. *See id.* at 404, 406. Westbound was not liable for any of the awarded fees because it was determined that its allegations were legally sound and not frivolous. *See id.* at 404. Since the noted case is one of the hundreds severed from Bridgeport's original massive complaint, the court hoped to promote attentive litigation of similar suits. *See id.* at 406.

50. *See Bridgeport*, 383 F.3d at 393.

51. *See id.* at 395; *see also* Smith v. Ameritech, 129 F.3d 857, 863 (6th Cir. 1997) (regarding de novo review).

52. "The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." 17 U.S.C. § 114(b) (1988).

53. *Bridgeport*, 383 F.3d at 398.

54. *Id.*

sound recording copyright owner's rights.[55] It also eliminates any defense based on substantial similarity—the court held that whether the taking is audibly recognizable is of no consequence.[56] The court provided several justifications for its decision.[57]

First, the court noted that a bright-line rule will simplify enforcement without hindering creativity.[58] Musicians are free to recreate similar-sounding work on their own without falling subject to sound recording copyright regulations.[59] The market will keep licensing fees reasonable because artists will be unwilling to pay more for a license than it would cost them to duplicate the sound in a new recording of their own.[60] Additionally, sampling cannot occur by mistake; those who sample intentionally pirate someone else's property.[61]

The court went on to address ordinary practices in the music industry.[62] Presently, licensing is a routine exercise among musicians.[63] The requirements set forth by the Sixth Circuit are far from foreign to those in the industry.[64] The court expressed confidence in the record industry's ability to adapt to stricter licensing requirements.[65]

Finally, the court noted that, although there was a lack of judicial precedent, its decision was well-founded.[66] The court believed its decision was prescribed by a literal reading of the pertinent statute.[67] Throughout the opinion, the court acknowledged and cited several law review articles and text writers that directly supported its interpretation.[68] It maintained that the lack of judicial ruling in the area of sound

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55. *Id.*
56. *See id.* at 399.
57. *See id.* at 398-99.
58. *See id.* at 398.
59. *See id.*
60. *See id.* at 398-99.
61. *Id.* at 399.
62. *See id.* at 400-01.
63. *Id.*
64. *See id.*
65. *See id.* at 401.
66. *See id.* at 400.
67. *See id.* at 399, 401-02.
68. *See, e.g.*, Abramson, *supra* note 22, at 1668; Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 896 (1992); Johnson, *supra* note 27, at 141; Susan J. Latham, Newton v. Diamond*: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003); David Sanjek, *"Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 621 (1992); Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 HIGH TECH. L.J. 179, 179 n.9 (2002); *see also* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486-87 (3d ed. 2002); BRADLEY C. ROSEN, ESQ., 22 CAUSES OF ACTION § 12 (2d ed. 2003).

recordings is dictated by the prevalence of sampling where "today's sampler is tomorrow's samplee" as well as by the high costs and uncertain outcomes litigation would impose.[69] According to the court, if Congress's intent was for an alternative interpretation of the Copyright Act, then it is up to the legislators of this country to make the appropriate clarifications.[70]

## IV. ANALYSIS

Many in the music industry are concerned about the effect of the Sixth Circuit's decision in the noted case. One concern is over retroactive liability.[71] In its opinion, the court stated that its decision "should not play any role in the assessment of concepts such as 'willful' or 'intentional' in cases that are currently before the courts or had their genesis before this decision was announced."[72] However, it did not speak to those who have already sampled from a sound recording believing their actions to be de minimis. In the area of musical works copyrights, the de minimis defense is still available. However, in the Sixth Circuit, such actions would now automatically constitute a sound recording copyright violation.

Another worry is that the Sixth Circuit's decision is too extreme.[73] If a sample is digitally altered to the point that the underlying work is no longer recognizable, the samplee is arguably not injured.[74] While this may be true, the difficulty with allowing de minimis sampling lies elsewhere. The problem is the unjust enrichment of the sampler who profits from the use of the previously recorded work. To make a sound recording, one must rent studio time, hire musicians, and pay a producer to create the sound recording. When sampling is used, the sampler forgoes all of these costs. If the sample was of no value to the sampler, he would not choose to use it. If it is so valuable to the sampler that he wants to use it, he should pay to obtain a license. The Sixth Circuit's new rule thus seeks to compensate the samplee.

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69. *Bridgeport*, 383 F.3d at 401.

70. *See id.* at 401-02.

71. *See* Gary Young, *6th Circuit Clamps Down on 'Sampling'*, LAW.COM, *at* http://www.law.com/jsp/article.jsp?id=1096473910640 (Sept. 30, 2004).

72. *Bridgeport*, 383 F.3d at 401.

73. *See* John Gerome, *Court Says Any Sampling May Violate Copyright Law*, USA TODAY, Sept. 8, 2004, *available at* http://www.usatoday.com/tech/news/techpolicy/2004-09-08-sampling-ruling_x.htm.

74. *See id.*

Unfortunately for some musicians, the price of a license will be more than they are able to pay.[75] The parties truly hurt by this decision are creative artists who have not yet made enough money to purchase licenses. Those who can afford to buy licenses can also likely afford to forgo legal repercussions by reproducing the sound on their own. Some in the music industry argue rap and hip hop music by definition are created from sampled sounds, and this ruling will effectively stifle an entire genre of music.[76]

In light of these fears, *Campbell v. Acuff-Rose* is a clear reminder that the Supreme Court has not always agreed with the Sixth Circuit's interpretation of copyright law.[77] In the noted case, the Sixth Circuit arguably did not strike the appropriate balance between protecting copyrights and promoting music's development. The noted case was one of several hundred severed cases filed by Bridgeport sitting on the Sixth Circuit's docket. The court's bright-line rule seems an easy solution to quickly downsizing an overcrowded schedule. Unfortunately, the problems underlying digital sampling cannot so swiftly be solved. Pirating someone else's work may not seem right, but how much a pirate steals undeniably comes in multiple degrees. Fair use and de minimis use acknowledge that sometimes portions of another's work may be used without legal repercussions. These defenses are available in other areas of copyright litigation because courts have recognized their role in promoting the development of useful arts. The art of music is no exception.

In reality, those wanting to sample music probably will continue to do so, with or without a license. As in many areas of life, even when people know the consequences of a certain action, many still are willing to take the risk of getting caught. To avoid identification, artists will have to think of more creative ways to finagle a sound recording sample to forgo detection by those holding its copyright.[78] Arguably they are still profiting from the underlying sound recording. Yet at the same time, in order to create a new sound so different as to avoid discovery, a considerable amount of work must go into the modification of the sample. This work may be both time consuming and costly. By so

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75. *See* Richard Stim, *Getting Permission for Sampling Others' Work*, NOLO.COM, *at* http://www.nolo.com/lawcenter/ency/article.cfm/ObjectID/D788BAEE-8E99-4825-B0B97B2D132AF98F/catID/E99ADB31-C4B6-4645-87DEC821D1D5548C (Jan. 8, 2005).

76. *See* Young, *supra* note 71; *see also* Chris Reynolds, *Sampling the Future*, TECHNICIANONLINE.COM, *at* http://www.technicianonline.com/story.php?id=010041 (Sept. 16, 2004).

77. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (citations omitted).

78. *See* Reynolds, *supra* note 76.

doing, perhaps the sampler has created an original piece of music that should not be subjected to infringement claims by other copyright holders; he has created a musical work that possibly deserves copyright protection of its own.

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