Bridge Over Bridgeport: An Incremental Change in Case Law of Sampling

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The purpose of the Copyright & Fair Use column is to keep readers informed on copyright as it affects the preservation and availability of historic recordings. We welcome your questions regarding copyright, and will endeavor to address them in these pages. (We cannot, however, offer private legal advice.) Comments and short articles describing your own experiences with copyright are also welcome. Please send submissions to Tim Brooks, Chair, ARSC Copyright & Fair Use Committee at tim@timbrooks.net. Opinions given here are those of the contributors. For general information visit the Committee’s web page at www.arsc-audio.org and the site maintained by the Historical Recording Coalition for Access and Preservation, of which ARSC is a member (www.recordingcopyright.org).

There was a sudden upsurge in action on copyright in the US Congress in early 2018, but as of this writing the outcome is still undetermined. ARSC is deeply involved in advocating for the needs of libraries, archives and scholars of recorded sound in the negotiations surrounding this legislation, and you will no doubt hear more about this, perhaps even before this issue reaches you. In the meantime Committee member Eric Harbeson has prepared a valuable review of recent developments in case law affecting one of the most contentious areas of copyright involving recordings, that of sampling.

Bridge over Bridgeport: An Incremental Change in the Case Law of Sampling

By Eric Harbeson

The law and ethics of sampling in sound recordings is a contentious subject, and though the practice is widespread, the case law has mostly been unkind to sampling as a creative activity. Proposals to free remix art from its legal uncertainty have included an increased reliance on fair use, proposals to create a compulsory license for sound recording fragments, and even to create a safe window for sampling uses. Congress is currently mulling several copyright bills relating to music and sound recordings, but none attempts to address creation of derivative works through sampling. But though there has been no legislative progress in promoting remix art, the courts have been making slow, even glacial, but still significant progress. In particular, the de minimis doctrine, long a staple of copyright litigation, has for many years been strangely absent
sampling is one area where the conundrum posed by sound recordings presents itself in copyright law. for every other form of copyrightable work, the scope of the exclusive rights provided by the copyright act is a mostly straightforward matter of interpreting the suite of rights provided for in sec. 106—the exclusive rights to reproduction, creation of derivative works, distribution, public display, and public performance. the exclusive rights in sound recordings, unlike many other classes of works, are subject to three clarifying paragraphs. the first restates the sound recordings exception to sec. 106—that the exclusive right in public performance is strictly limited to performances through digital transmissions—and the third makes explicit the fact that public performances of the underlying works on sound recordings are nonetheless the exclusive right of their respective rights holders when a sound recording is performed publicly.

the second paragraph is most interesting from the point of view of the sampling debate, and is the one that has framed most of the discussion in the courts until very recently. sec. 114(b) specifies what, exactly, congress was protecting when they added copyright protection to sound recordings. specifically, congress was protecting the sounds on the sound recordings. this is because, when congress first created copyright protection for sound recordings in 1971, they were primarily motivated by “protecting against unauthorized duplication and piracy” of recordings. in the 1971 sound recordings act, congress limited the new protection to the elements of piracy—the making and distributing of actual duplications of a recording. imitations made from an “independent fixation of other sounds,” no matter how similar those sounds may be to the original, were not infringing under the new law. this is different from other copyrightable works where substantial similarity to the original—not an exact copy—is all that is needed in order to show infringement. this wording found its way into sec. 114(b) when the copyright act was revised in 1976.

in addition to limiting the exclusive right to reproduction, the 1976 copyright act added a similar limitation to the exclusive right to create derivative works. the new sec. 114(b) specified that a sound recording copyright holder’s exclusive rights to make derivative works is “limited to the right to prepare a derivative work in which the actual sounds...are rearranged, remixed, or otherwise altered in sequence or quality.” the act also kept language providing that the copyright holder’s exclusive rights are limited to the actual sounds and not imitations as described above, but added a single word: “the exclusive rights of the owner of copyright in a sound recording...do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds...” the new word—“entirely”—proved crucial in informing the ruling that served as the basis for most of the courts’ rulings where sampling is concerned.

though sampling as a practice had been common for many years, courts have been slow to understand remix and sampling as legitimate tools of a musical artist. two early cases from 1991 are illustrative: for their album three feet high and rising, the hip
hop artist De La Soul was sued by the Turtles for sampling a few seconds of their work, “You Showed Me,” and settled out of court for a reported $1.7 million. Not long after De La Soul came what appears to be the first ruling on a sampling case, Grand Upright Music v. Warner Brothers. For his use of a 10 second sample from Gilbert O’Sullivan’s “ Alone Again, Naturally,” the federal trial judge, in a widely criticized opinion, not only found rapper Biz Markie guilty of copyright infringement (invoking the seventh commandment, for added effect), but found that Biz Markie’s attempt to secure a license demonstrated willful infringement, and even referred the case to the US Attorney for criminal prosecution.

The farthest-reaching sampling decision came more than a decade later. Bridgeport Music v. Dimension turned on the doctrine of de minimis non curat lex—the law does not concern itself with trifles. In order to be infringing a plaintiff must show that there is “substantial similarity” between her work and the allegedly infringing work. In a de minimis defense, the defendant argues that the amount used is sufficiently trivial, and so the taking does not rise to the level of substantial similarity and is therefore not infringing. In Bridgeport, the hip hop group N.W.A. sampled and looped a three-note, two-second arpeggiation from Funkadelic’s “Get Off Your Ass And Jam.” In the trial hearing, the District Court judge applied two different tests for de minimis use, one that had been applied earlier that year by a California court, and one proposed by a leading copyright treatise, and determined that the use was sufficiently trivial as to avoid infringement, due to the very small amount used, and the manner in which it was applied which rendered the sample virtually unrecognizable in the new work.

On appeal, however, the Sixth Circuit Court of Appeals reversed, rejecting any possibility of a de minimis defense as applied to sound recordings. The court held that any amount of copying of sounds, no matter how small, may constitute infringement. Citing the language in both the Sound Recordings Act and the new Section 114(b), the Court reasoned when they specifically added the word, “entirely” into Sec. 114(b), Congress made the deliberate choice not to extend the limitation to works that include a partial inclusion of copyrighted sounds. Combined with the earlier provision that the exclusive right includes the right to “rearrange, remix, [and] otherwise alter” the sounds, the court concluded that “a sound recording owner has the exclusive right to sample his own recording.”

The Sixth Circuit’s Bridgeport ruling, though heavily criticized, has remained the principal governing case on sampling issues. Though some courts in other circuits have declined to follow the ruling, the opinion has largely been the law of the land. This is not to say that the law went unchallenged. To the contrary, sampling, including unlicensed sampling, has of course continued despite the ruling. A notable example is Gregg Gillis, AKA Girl Talk, whose sampled compositions are famously unlicensed, and who has been an outspoken proponent of understanding sampling and remixing as transformative art forms in their own right.

And indeed, the question that remains unanswered in the courts is the extent that sampling of sound recordings might constitute a fair use. The closest answer to the question was 2 Live Crew’s successful defense of their sampling use of Roy Orbison’s “Oh Pretty Woman” as a fair use. However, the Supreme Court’s ruling in that case relied heavily on the parodic nature of the band’s use, apparently leaving open the question of sampling as a per se form of transformative use that might be fair. The Bridgeport
ruling did not address the question, other than inviting the lower court to reconsider a fair use defense if raised on remand, though the court’s admonishment to “get a license or don’t sample”\(^\text{12}\) certainly did little to encourage the argument.

*Bridgeport*’s supremacy in sampling litigation has been largely unchallenged until recently. However, two cases from the last two years have successfully brought the subject back to the courts as a source of controversy. Though the facts in the cases concern very minimal copying, the effect of the principles in these new cases has potential to significantly reframe and breathe new life into remix art and its place in our legal system.

**Crossing Bridgeport: VMG Salsoul v. Madonna Louise Ciccone**

The first significant break from *Bridgeport* concerns the Madonna song “Vogue.” The song premiered in 1990 and was a multi-platinum hit for Madonna, with more than two million RIAA-certified single sales, and another two million sales on its debut album, “I’m Breathless.” VMG Salsoul accused the song’s producer, Step Pettibone, of allegedly incorporating a very short—less than quarter of a second—sample from a previous track he recorded, the Salsoul Orchestra’s “Love Break.”\(^\text{13}\)

The sample amounted to no more than one chord played by the horn section of the orchestra, but that was enough for Salsoul to bring an action against Madonna, et al. The orchestra sued for infringement both of the musical work and the sound recording. Madonna argued, without admitting to the copying, that even if the copying did occur the taking was *de minimis*, and therefore not infringing.

The court had no trouble finding that a single chord in a musical work is not sufficient for infringement. The district court in *Bridgeport* considered two tests for *de minimis* use. The first, called comprehensive nonliteral similarity (what the court in *Bridgeport* referred to as the “quantitative/qualitative” test), asks the court to consider the amount used and also whether a reasonable jury could conclude that an average audience would recognize the appropriation.”\(^\text{14}\) Drawing on an earlier case of “sampling” of a musical work in the Ninth Circuit,\(^\text{15}\) which had employed the qualitative/quantitative test, the court found that no reasonable jury would answer in the affirmative, and upheld the trial court’s finding that there was no infringement of the musical work.

The most important element of the ruling came when the court considered the *de minimis* copying argument with respect to the sound recording. The court rejected the *Bridgeport* court’s interpretation of Sec. 114(b), and reasoned that the relevant statute “imposes an express limitation on the rights of the copyright holder...[t]here is no indication that Congress intended, through Sec. 114(b) to expand the rights of a copyright holder to a sound recording” and that “Congress clearly understood that the *de minimis* exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works.”\(^\text{16}\)

The court declined to consider the other *de minimis* use test discussed in *Bridgeport*, the “fragmented literal similarity” test. Here the question is whether a work is substantially similar through copying of “literal elements scattered throughout the
work.” Because, in *Salsoul*, the allegedly copied elements appeared heavily modified in “Vogue,” there was no literal similarity to consider. However, the language in the court’s holding that the *de minimis* doctrine applies equally to sound recordings is broad enough as to include application in literal sampling cases.

The amount sampled in this case was exceedingly short, even by comparison to other *de minimis* holdings, but the implications of this ruling nonetheless have the potential to be highly significant. The court noted that numerous other district courts had declined to apply the Bridgeport ruling, but by explicitly parting with the Sixth Circuit, the court for the first time created an explicit circuit split. The ruling may supply persuasive precedent for other districts and circuit courts, and may speed up a Supreme Court hearing of the issue.

**Fair Sampling**

Though the *de minimis* defense appears to be in the process of being restored by the courts, the doctrine is very limited by definition. Any sampling beyond the most trivial of amounts, whether literally or in a disguised form, lies beyond the reach of both *Bridgeport* and *Salsoul*.

Courts have addressed the notion of sampling from *musical works*, most recently, a judge in the Southern District of New York, in *Estate of James Oscar Smith v. Cash Money Records*, found that the rap artist Drake’s sampling Jimmy Smith’s 1982 eponymous track, “Jimmy Smith Rap,” was a fair use. The court determined that Drake’s appropriation of words and music were transformative and sufficiently limited, and that the impact on the market for Jimmy Smith Rap was minimal. The case received considerable attention when it was released as a significant milestone for sampling, and as of this writing had not been appealed. Nonetheless, the ruling is unlikely to have significant impact. In part, this is because the ruling was not published. More importantly, the judge’s analysis relied heavily on the nature of what Drake was trying to convey in his use of the sample. Though the Second Circuit, in *Cariou v. Prince*, held that the artist need not have a specific message to convey in order for a use to be transformative, the judge nonetheless relied on the intent of Drake’s message, and in doing so the fair use application more closely resembled the parody analysis in *Campbell v. Acuff Rose Music*.

One recent point of interest in fair use and sampling is the case against the singer, Beyoncé. In the video for her song, “Formation,” Beyoncé incorporated ten seconds of audio from two online videos created by Anthony Barré, who died in 2010. Barré’s estate sued for infringement, and the case settled on February 5, 2018, with the court refusing to grant Beyoncé’s claim of fair use. But before the case settled, an opinion in the Eastern District of Louisiana explicitly rejected the Barré estate’s claim that Beyoncé’s fair use defense was barred by the Bridgeport ruling. The judge correctly observed that Bridgeport left an open (even if also discouraging) door for a fair use defense in sampling a sound recording.

With *Salsoul*, the chilling of *Bridgeport* has effectively, and finally, been halted. We are still waiting for a major ruling in applying fair use to sampling, but the courts’ work to this point has been very promising.
Endnotes


2. 17 USC 102(a) provides this non-exhaustive list of eight classes of works that are within the scope of copyright: “literary works; musical (including any accompanying words); dramatic works (including any accompanying music); pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.”

3. 17 USC 114(a)–(c)


12. Ibid.

13. VMG Salsoul v. Madonna Louise Ciccone. 824 F.3d 871 (9th Cir., 2016)


16. VMG Salsoul. 824 F.3d 871,


19. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013)