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Cover Page Footnote

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TAKING NEW STEPS AGAINST DIGITAL SAMPLING: THE SIXTH CIRCUIT LAYS DOWN THE LAW ON DIGITAL SAMPLING, BUT WILL IT REALLY IMPROVE INDUSTRY PRACTICES?

Kelly Randall[*]

I. In Search of an Infringement Rule

In *Bridgeport Music, Inc. v. Dimension Films*,[1] the Sixth Circuit tackled an issue that has been plaguing the music industry for nearly two decades. Digital sampling is a staple of the rap and hip-hop creative process, but there is very little precedent on or clarity about how to determine if sampling infringes on a sound recording copyright. In *Bridgeport I*, the defendant, No Limit Films, released the film *I Got the Hook Up* (*Hook Up*) and included the song "100 Miles and Runnin'" ("100 Miles") on the film soundtrack.[2] As with many typical rap songs, "100 Miles" sampled from another song. The plaintiff, Westbound Records, Inc. ("Westbound"), claimed co-ownership of the sound recording copyright to the sampled song, "Get Off Your Ass and Jam" ("Get Off"), by George Clinton, Jr. and the Funkadelics.[3] Although No Limit Films obtained an oral license from the co-owners of "100 Miles" to use the song in the film soundtrack,[4] Westbound claimed that "100

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[1] 230 F. Supp. 2d 830 (M.D. Tenn. 2002) [hereinafter *Bridgeport I*].

[2] *Id.* at 833.

[3] Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004) [hereinafter *Bridgeport II*].

[4] *Bridgeport I*, 230 F. Supp. 2d at 833.

Miles" contained an unauthorized sampling of "Get Off."[5]

The process to determine whether digital sampling amounts to copyright infringement is obscured by many factors. Since many sampling cases are settled out-of-court,[6] the scarcity of case law does not provide a definitive road map for making this determination. While the courts are still in the evolutionary stages of creating a standard of analysis for infringement created by sampling,[7] the lack of clear guidelines or rules further complicates the process. In light of an increase in litigation regarding digital sampling and copyright infringement, the Sixth Circuit addressed the need to clarify "what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings."[8] In *Bridgeport II*, the Sixth Circuit reversed the district court's grant of summary judgment to No Limit Films and established a new bright light rule for defining sound recording copyright infringement.[9] The court held that when someone digitally samples, it is a physical taking of another's work and no further analysis, such as de minimis or substantial similarity test, is required.[10]

The purpose of this case synopsis is to demonstrate *Bridgeport*'s departure from the traditional methods of evaluating copyright infringement claims, as well as its potential effect on the music industry and the courts that review those cases. While this case addressed other issues on appeal, this synopsis will focus primarily on Westbound's claim against No Limit Films and the court's establishment of a new bright line rule. Moreover, this synopsis will not include the technical details of digital

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[5] *Id.* at 838.

[6] 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, 124 (2003).

[7] *Id.*

[8] *Bridgeport II*, 383 F.3d at 397.

[9] *Id.* at 395.

[10] *Id.* at 395, 399.

sampling, as they are discussed in an abundance of scholarly articles written on the topic.[11] While this decision emphasizes the need for the new bright line rule and "ease of enforcement,"[12] it represents a broad departure from the traditional model of determining whether digital sampling amounts to copyright infringement. Furthermore, such a departure may not result in the outcome that the court anticipated. Rather, this decision may create a greater divide between the analyses utilized by the Sixth Circuit and other circuit courts of appeals for copyright infringement cases.

II. Development of Copyright Infringement Analyses

A. Groundwork for Analyzing Infringement

Although *Baxter v. MCA*[13] involved only a musical composition copyright infringement, it provides a genesis for the analyses used to determine copyright infringement. In that case, the plaintiff was the sole copyright owner of the musical composition "Joy,"[14] which he claimed composer John Williams copied for use in the "Theme from E.T."[15] After the district court found that the two works were not substantially similar,[16] the Ninth Circuit laid the groundwork for analyzing a copyright infringement claim. A claimant must prove (1) copyright ownership, and (2) that the defendant copied a "protectible expression."[17] To prove copying, a plaintiff may use circumstantial evidence that (a) the defendant had access to the original

[11] *Id.* at 401.
[12] *Id.* at 398.
[13] 812 F.2d 421 (9th Cir. 1987).
[14] *Id.* at 422.
[15] *Id.* at 423.
[16] *Id.*
[17] *Id.*

work before his work was created, and (b) "substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work."[18] Furthermore, a plaintiff may also show a "'striking similarity' between the works" to infer copying, where there is no evidence of access.[19]

In reviewing the case, the *Baxter* court applied an "intrinsic" test of substantial similarity by relying on the reaction of an ordinary lay person hearing the works.[20] Although the court used this analysis technique to determine that the two works should be heard by the jury,[21] it rejected the defendant's argument that a similarity as minimal as a six-note progression is not copyrightable.[22] In fact, the court highlighted the lack of a bright line rule regarding what amount of copying constitutes infringement.[23] Rather than opt to solve the problem by establishing a rule, the Ninth Circuit left that determination to the jury,[24] preferring to determine infringement as a question of fact rather than law.

B. Simplifying the Analysis for Unauthorized Use

Grand Upright Music Ltd. v. Warner Brothers Records, Inc.[25] is one of the earliest sampling cases involving unauthorized use. The defendant, artist Biz Markie, sought the clearance to use the plaintiff's work, "Alone Again (Naturally)," in his composition, "Alone

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[18] *Id.*
[19] *Id.*
[20] *Id.* at 424.
[21] *Id.* at 425.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 780 F. Supp. 182 (S.D.N.Y. 1991).

Again."[26] However, his record label released the album including "Alone Again" before the defendant could obtain the necessary clearances.[27] The court used the defendant's own actions in attempting to obtain a license, then subsequently releasing an album with a song that included an unlicensed sample, to prove that the defendant knew he was violating the plaintiff's rights as a copyright holder.[28] Essentially, the court used the defendant's own knowledge of unauthorized sampling to prove infringement, thus simplifying the analysis to a process similar to the later developed *Bridgeport* rule.

C. Defining Multiple Analyses for More Complex Infringement

Two years later, a district court in nearby New Jersey decided a more complicated sampling case using a less clear-cut approach.[29] In *Jarvis v. A&M Records*, the defendant used sampled portions of the plaintiff's composition "The Music's Got Me" in his composition "Get Dumb! (Free Your Body)."[30] The court established a three step process to prove copyright infringement, in which the plaintiff must prove that (1) he is a valid copyright owner; (2) the "defendant copied a protectible expression"; and (3) the "copying is substantial enough to constitute improper appropriation of plaintiff's work."[31] Similar to the *Baxter* court's analysis, the *Jarvis* court found that without the defendant's admission of unlicensed sampling, copying can be inferred if the defendant had access to the original work and the defendant's work is

[26] *Id.* at 184.
[27] *Id.* at 185.
[28] *Id.*
[29] Jarvis v. A&M Records, 827 F. Supp. 282 (D.N.J. 1993).
[30] *Id.* at 286.
[31] *Id.* at 288.

substantially similar to the plaintiff's.[32]

In *Jarvis*, however, the defendant admitted to unauthorized use of the sample,[33] and the court moved to the third step in its analysis. The court analogized digital sampling to "taping the original composition and reusing it in another context."[34] This analogy allowed the court to apply Professor Nimmer's doctrine of "fragmented literal similarity," where "literal, verbatim similarity" exists between the two works.[35] Digital sampling by definition is a flawless example of "fragmented literal similarity." To this end, the court further explained that "fragmented literal similarity" infringement may decrease the value of the original work even when only a small, but qualitatively significant portion of the work was copied.[36] While the court found that both quantitatively and qualitatively significant portions of a work can be protectible expressions, it ultimately examined the infringing work's effect on the original work's value to determine unlawful appropriation.[37] On the other hand, the court noted some material may not be "sufficiently original and/or novel" and, thus, is non-copyrightable,[38] but a "sufficiently distinctive" work is copyrightable.[39] *Jarvis* illuminated four of the main analyses for determining copyright infringement: (1) substantial similarity, (2) fragmented literal similarity, (3) quantitative/qualitative, and (4) originality.

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[32] *Id.* at 289.
[33] *Id.*
[34] *Id.* at 286.
[35] *Id.* at 289.
[36] *Id.* at 291.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 292.

D. Compacting the Analyses, But Infringement Still Remains a Jury Question

Nearly a decade later, in *Williams v. Broadus*,[40] the court evaluated and compacted several analyses to determine if sampling is unlawful.[41] Plaintiff Marlon Williams ("Marley Marl") sampled a portion of Otis Redding's song "Hard to Handle" for his song "The Symphony" without obtaining the proper permission from the copyright owner.[42] Ten years after the release of Williams' album, the defendant, Calvin Broadus ("Snoop Dogg") sampled some lyrics and music from "The Symphony" for his own song, "Ghetto Symphony."[43] The defendant argued that due to Williams' own unauthorized sampling, the plaintiff did not have a valid copyright, and therefore, could not meet the first step in a copyright infringement analysis.[44] While the Copyright Act does not protect a derivative work that has unlawfully used other material,[45] a "work is not derivative simply because it borrows from a pre-existing work."[46] Rather, a work is derivative if it infringes on the original copyright holder's right to create a derivative work himself.[47] To establish that a derivative work exists, the infringer must have copied the work and done so to the level of unlawful appropriation.[48] Once again, the substantial similarity test is used to prove unlawful appropriation[49] by relying upon

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[40] No. 99 Civ. 10957 MBM, 2001 WL 984714, at *1 (S.D.N.Y., Aug. 24, 2001).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] 17 U.S.C. § 103(a) (1976).
[46] *Williams*, 2001 WL 984714, at *2.
[47] *Id.*
[48] *Id.*
[49] *Id.* at *3.

the ordinary lay listener's response to the two works.[50]

The court further explained that this case is an example of "fragmented literal similarity,"[51] and offered the de minimis doctrine that some literal copying may be so quantitatively or qualitatively insignificant that it does not amount to infringement.[52] The court acknowledged that its de minimis substantial similarity analysis depends on the significance of the copied material to the original work.[53] After compressing several analyses, the court found that a material issue of fact remained as to whether the defendant's sample constituted a significant portion of the original work,[54] thus continuing to follow the *Baxter* precedent that infringement is a question of fact and not of law.

E. Filtering Out Sound Recording and Musical Composition Infringements

1. The District Court's Approach in *Newton I*

In *Newton v. Diamond*,[55] the court distinguished between musical composition and sound recording copyright infringement. The plaintiff was the sole owner of the musical composition "Choir,"[56] but did not own the sound recording copyright after he had licensed it to ECM Records.[57] The defendants, the Beastie Boys, obtained a license to sample the sound recording from ECM and used

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at *4.
[54] *Id.*
[55] Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) [hereinafter *Newton I*].
[56] *Id.* at 1246.
[57] *Id.*

a six-second long sequence of three notes played over one sustained note in their song "Pass the Mic."[58] Since the plaintiff did not have a sound recording copyright infringement claim, the court first used a process to filter out the unique characteristics of the sound recording from the musical composition.[59]

The court concluded that a musical composition copyright "protects only the sound that would invariably result from" playing the written musical composition,[60] not necessarily the actual sounds performed. While the plaintiff's argument focused on this specific performance technique, the court applied the following test to filter out the performance from the composition by asking (1) what is "unique" about the plaintiff's performance,[61] and (2) whether the defendant's own creation of a similar three-note sequence would infringe upon the musical composition copyright.[62] Next, the court employed the originality analysis, explaining that "not every element of a song is per se protected" and that copyright extends only to the "original and non-trivial" elements of a work.[63] The court countered the plaintiff's focus on the originality of the three-note sequence with prior case law. Similar cases involving less than six notes were successfully protected only where the notes were "qualitatively distinctive" when accompanied by lyrics, went to the "heart of the composition," were repeated frequently within the lyrics, and were analyzed in both the sound recording and the written composition.[64] After using this filtering process, the court found that any originality in the six-second

[58] *Id.*
[59] *Id.* at 1249.
[60] *Id.* at 1251.
[61] *Id.* at 1252.
[62] *Id.*
[63] *Id.* at 1253.
[64] *Id.* at 1254.

sample comes from the sound recording,[65] and further held that a small, common three-note sequence was not protected by copyright.[66]

Lastly, the court employed the de minimis analysis. While the court acknowledged that the three-note sequence is not protected by copyright, it contended that the defendant's use of the sample was nonetheless de minimis.[67] Since a de minimis sample is not substantially similar enough to be recognizable by the average audience,[68] the court adopted a quantitative/qualitative approach by asking whether the defendant's use of quantitative or qualitative elements of the original work "rises to the level of unlawful appropriation."[69] While a quantitative analysis emphasizes the amount of material copied,[70] the qualitative analysis focuses on the significance of the copied material to the original work.[71] Ultimately, the court noted that the qualitative analysis depends on whether someone might recognize the source of the material in question when performed outside the context of the original work.[72] Although a de minimis analysis was not necessary with this particular sample, the court's elaboration of the analysis began to solve the problems associated with the lack of useful guidelines to determine copyright infringement by digital sampling.

2. The Court of Appeals Refines the Process in *Newton II*

On appeal, the Ninth Circuit affirmed the district

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[65] *Id.* at 1256.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1256-57.
[69] *Id.* at 1257.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1258.

court's holding in *Newton I* that the defendant's use of the sample was de minimis.[73] However, *Newton II* approached the de minimis analysis in a different manner. Here, the Ninth Circuit, like the trial court, began with a process to "filter out" the elements associated with the sound recording to address only the elements infringing upon the musical composition.[74] The court then incorporated the substantial similarity, "fragmented literal similarity," and the quantitative/qualitative analyses to establish that "the substantiality of the similarity is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."[75] The court determined that since the three-note sequence appeared only once in "Choir" and was not any more significant than other sections of the work, the sampled portion was "neither quantitatively nor qualitatively significant."[76]

Therefore, the *Newton II* court concluded that the works were not substantially similar and the sample was de minimis because the ordinary listener would not "discern Newton's hand as a composer apart from his talent as a performer" in the Beastie Boys' sample.[77] While the dissenting judge acknowledged the analyses presented by the majority were correct, she explained that a reasonable jury could find substantial similarity in the works, and disagreed with the grant of summary judgment for the defendant.[78]

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[73] Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003) [hereinafter *Newton II*].
[74] *Id.* at 595.
[75] *Id.* at 596.
[76] *Id.* at 597.
[77] *Id.* at 598.
[78] *Id.*

F. Summary

Steadily, courts have established a framework for determining what constitutes copyright infringement in digital sampling cases. Borrowing from other infringement analyses, courts have many options to evaluate digital sampling's effect on copyright, while generally resolving the issue as a question of fact. Such painstaking efforts to set forth precedent should not be taken lightly. Relying more on law review articles than case law, however, the Sixth Circuit chose to depart from this precedent rather than add to it.

III. *Bridgeport*'s Procedural History

A. The District Court Takes the Anticipated Approach and Follows Precedent in *Bridgeport I*

In *Bridgeport I*, the district court incorporated all of the analyses, relying heavily upon the substantial similarity and quantitative/qualitative analyses to find that the defendant's use of the sample was de minimis and thus not actionable. The court first focused on the originality of the sample, concluding that a jury could find that the arpeggiated chord from "Get Off" was sufficiently "original and creative" and therefore a protectible expression.[79] Next, the court pointed out that the de minimis analysis balances the interests of the copyright holders against the potentially "stifling effect" that strict enforcement of copyright laws may have on the artistic expression of new works.[80] In addition, the court highlighted that the analysis is complicated by the scarcity of case law on digital sampling and the "lack of a clear road

[79] *Bridgeport I*, 230 F. Supp. 2d at 839.
[80] *Id.* at 840.

map for de minimis analyses."[81]

After finding that the de minimis analysis was a derivative of the substantial similarity test,[82] the court explained that applying either the quantitative/qualitative or the "fragmented literal similarity" approaches used by other courts would also show that this particular instance of sampling "does not rise to the level of legally cognizable appropriation."[83] Therefore, the *Bridgeport I* court found that the sampled material was a "mere fraction" of the plaintiff's original work and therefore quantitatively insignificant.[84] While reviewing the qualitative significance of the sample, the court found that the mood, tone, and purpose were not substantially similar enough that an ordinary lay listener would recognize the appropriation.[85] In a final note, the court emphasized that copyright law's purpose is to "deter wholesale plagiarism," while striking a balance "between protecting an artist's interests, and depriving other artists of the building blocks of future works."[86] Therefore, the court attempted to weigh those factors when dismissing the plaintiff's claims after finding a lack of substantial similarity and that the sampled material was de minimis. As expected, the district court respected the precedent, evaluated the case under every analysis available from case law, and found that the issue was a question of fact.[87]

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[81] *Id.*
[82] *Id.* at 841.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 842.
[86] *Id.*
[87] Following the Sixth Circuit's decision, the court granted a rehearing based on the defendant's petition and an amicus brief filed by the Recording Industry Association of America in support of that petition, which resulted in a few changes to section II of the decision. *See* Bridgeport Music Inc. v. Dimension Films, 401 F.3d 647 (6th Cir. 2004) [hereinafter *Bridgeport Rehearing*]. Although this case synopsis focuses primarily on section II of the decision, the amendments either

IV. The Sixth Circuit Makes Its Own Rules in *Bridgeport II*

In *Bridgeport II*,[88] the Sixth Circuit took a less analytical approach to the issue of whether digital sampling constitutes copyright infringement. The court created a new bright line rule to address the district court's concern with the scarcity of case law and general lack of clear guidelines for the de minimis analysis.[89] However, the Sixth Circuit departed from the district court's decision and accepted the plaintiff's argument that a de minimis, or substantial similarity, analysis was not necessary in cases where the defendant concedes digital sampling.[90] The court explained that by adopting this bright line rule, both the music industry and the courts benefit from the newly found clarity to determine whether digital sampling amounts to copyright infringement.[91]

In developing the rule, the court first called attention to the statutory language of the Copyright Act,[92] specifically that the sound recording copyright owner has the exclusive right to prepare derivative works of the copyrighted material, including using fixed sounds from the original recording.[93] The court's interpretation of section 114(b) allows a non-copyright holder to simulate or imitate the sounds in a recording, but prohibits making an actual copy of the recording,[94] thus protecting the copyrighted

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clarify the court's language or include additional footnote material that has generally little effect on this synopsis.

[88] *Bridgeport II*, 383 F.3d at 390.

[89] *Bridgeport Rehearing*, 401 F.3d at 840.

[90] *Bridgeport II*, 383 F.3d at 395.

[91] *Id.* at 397.

[92] *Id.* at 399 (citing 17 U.S.C. §§ 106, 114).

[93] *See* 17 U.S.C. §§ 106, 114(a)-(b) (1976).

[94] *Bridgeport II*, 383 F.3d at 398.

work without stifling the creativity of others.[95] Since a sampling license fee could not be higher than either the cost to reproduce the sounds by the non-copyright holder or the cost to litigate the issue, the court explained that the market would determine the fee.[96]

In addition, the court pointed out that "sampling is never accidental" and that the sampler knows that the process of sampling is "taking another's work product."[97] Further, the court emphasized the value of the sample,[98] and interpreted the statute as not only prohibiting the sampling of the whole work, but also smaller portions of the whole.[99] Although a sample is only a portion of the whole work, that portion still has value since the sampler chose that portion to either reduce expenses, add value to the new recording, or both.[100]

In contrast, the court explained that following a de minimis or substantial similarity analysis is not as economical as adopting this new bright line rule.[101] In the interest of the many digital sampling cases pending before the courts, the new rule would eliminate additional analyses and allow the courts to decide the cases quickly, efficiently, and with little variance or error.[102] The *Bridgeport II* court claimed to be less concerned with the rule's judicial economy and more interested in the benefits to the music industry by making it cheaper for an artist to license a work than risk the cost of litigation.[103] Yet, with more than 470 similar cases pending from the original litigation, this bright line rule approach seems more self-serving for the

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[95] *Id.*
[96] *Id.* at 398-99.
[97] *Id.* at 399.
[98] *Id.*
[99] *Id.* at 398.
[100] *Id.* at 399.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 399-400.

court than beneficial to the music industry.

Recognizing that it was setting forth a new rule, the court attempted to justify establishing its own precedent, as well as its sharp departure from the traditional analysis-based approach followed by earlier decisions. First, rather than relying upon judicial precedent, the court followed the statutory interpretation offered by numerous law review articles addressing the issue of digital sampling.[104] Such an unorthodox approach will likely be criticized and followed with caution. Second, the court reasoned that a licensing requirement for digital sampling will in no way stifle creativity, since several artists and companies already choose to properly license the sampled material in their works.[105] Third, the court noted that the responsibility of working out guidelines for proper digital sampling licensing rests with the record industry and not the courts.[106] Fourth, the court pointed out that this new rule is intended to apply only to cases arising after the *Bridgeport II* decision and, thus, should not affect any pending or already litigated cases.[107] Lastly, while the court took a "literal reading approach" to the legislation that was passed before digital sampling existed, it left any responsibility for clarifying or updating the law to Congress, particularly noting that the music industry may prompt such action on its own.[108]

In the end, the Sixth Circuit made digital sampling a question of law when the defendant admits to the unauthorized sampling. Although, a taking without permission is infringement, the court disposed of the need for a jury, and thus, presented digital sampling as a strict liability offense. As a result, any flexibility in the Copyright Act and case law that encouraged artistic

[104] *Id.* at 400.
[105] *Id.* at 401.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 401-02.

expression has been quashed. With strict liability looming, digital samplers are faced with a choice to license their sampled material, no matter how insignificant, or face the consequences.

V. Is a New Bright Line Rule Really What The Music Industry Needs?

While the development of this new bright line rule may appear to provide much needed guidance for assessing how digital sampling infringes upon copyrighted works, the rule may not have the desired effects. Although the court appears to present the rap and hip-hop industry with the "license or else" ultimatum, strict compliance by that industry is unlikely. In fact, it might encourage less obedient behavior and less-than-honest practices, particularly among the newer, budding artists. Rising talent in the music industry rarely is represented by counsel or well-versed in copyright law. In hopes of one day "making it" in the industry, up-and-coming artists frequently depend on a grassroots following, creating and distributing demo tapes, and performing in public as often as possible. This approach can lead to the artist's popularity and, in turn, an increased demand for that artist's work. As money begins to exchange hands for the artist's recordings, whether independently as demo tapes and self-produced recordings or through a professional record company, any digital sampling in the work has either been long-forgotten or cannot be removed without significantly altering the work and potentially lessening the demand. Despite the court's position that many artists and companies already choose to properly license their digital samples, those artists and companies the court identified are already well-established in the industry, represented by counsel, and therefore can no longer operate below the radar. Unfortunately, the court failed to account for the up-and-comer, the grassroots artist, and the hobbyist, who may all one day become established

artists.

As word of this decision spreads through the industry, the potential for artists to become less forthright about their use of digital samples and more creative in altering the samples beyond any recognition will likely reach a higher level than ever before. Although the court offered the suggestion that artists are free to recreate the sounds in a sound recording themselves by imitating or simulating the sounds, it fails to recognize that a creative staple of this genre often involves the use and creative manipulation of other sound recordings. Artists and producers are unlikely to change their creative processes for the sake of avoiding the hassle or expense of licensing other works. Just as a slight modification in another area of strict liability—such as enforcing the speed limit—is not likely to change most drivers' habits on the highway, this bright line rule will have little effect on the habits of the digital sampling community.

After several years of developing and employing analyses for determining copyright infringement, other courts may be hesitant to adopt the Sixth Circuit's new rule. The response from the Second, Third, and Ninth Circuits could determine the authority of this new rule and whether they are likely to change their own precedent on this issue. Especially notable would be the Ninth Circuit's reaction to this decision after its own de minimis analysis in *Newton II* just ten months before *Bridgeport II*. In contrast, the Eleventh Circuit could emerge as the most willing to adopt this new rule considering the burgeoning rap and hip-hop industry in the Atlanta area and an even greater scarcity of that circuit's own precedent in copyright infringement cases. On the other hand, the increased influence of the genre's artists and companies in that circuit could persuade the court to adopt a more sampling-friendly approach. However, with a surge of copyright holders filing infringement suits, courts may start adopting the Sixth Circuit's rule, or a variation thereof, in an effort to

insure their own judicial economy.

VI. Conclusion

Only time will tell whether *Bridgeport*'s new bright line rule will mean a whole new strict liability approach to whether digital sampling amounts to copyright infringement. While rejecting several years of case law that allowed some sampling within confined circumstances, the Sixth Circuit's decision prohibits any unlicensed digital sampling. Amid criticism by some artists and companies, the decision may have an effect on the industry's behavior, but perhaps not the exact outcome that the court envisioned.