Case No. 02-6521

United States Court of Appeals
for the
Sixth Circuit

BRIDGEPORT MUSIC, INC., WESTBOUND RECORDS, INC.,

Plaintiffs-Appellants,

SOUTHFIELD MUSIC INC., NINE RECORDS, INC.,

Plaintiffs,

- v. -

DIMENSION FILMS, MIRAMAX FILM CORP.,

Defendants,

NO LIMIT FILMS LLC,

Defendant-Appellee.

ON PANEL REHEARING FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLEE

Brennan Center for Justice
at NYU School of Law
Marjorie Heins
Aziz Huq
161 Avenue of the Americas, 12th Fl.
New York NY 10013
(212) 998–6730

Electronic Frontier Foundation
Fred von Lohmann
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333

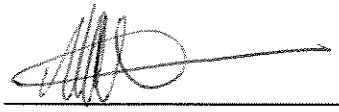
Attorneys for *Amici Curiae*

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit R. 26.1, the Brennan Center for Justice at NYU School of Law and the Electronic Frontier Foundation makes the following disclosure:

1. Are said parties subsidiaries or affiliates of a publicly owned corporation? No

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? No



Aziz Huq

January 20, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI*

The Brennan Center for Justice at NYU School of Law, founded in 1995, unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's Free Expression Policy Project (FEPP) provides research and advocacy on issues of free speech, copyright, and media policy. In this case, FEPP's interest lies in preserving the *de minimis* rule, an important element of copyright law that provides breathing space for artists and is central to processes of new creation.

Electronic Frontier Foundation ("EFF") is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF has over 13,000 dues-paying members and represents the interests of Internet users in court cases and in the broader policy debates surrounding the application of law in the digital age. EFF publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, http://www.eff.org. EFF has handled some of the leading cases considering the proper balance in intellectual property law in the digital age.

SUMMARY OF ARGUMENT

The panel erred in carving out an exception to the *de minimis* rule solely for sound recordings. The legislative history of the Copyright Act, unbroken precedent, the weight of scholarship, the technology of sound

sampling, and fundamental policy considerations underlying the *de minimis* doctrine all support its application to sound recordings. In revising the Copyright Act in 1976, Congress explicitly stated that only "substantial" copying from sound recordings would violate 17 U.S.C. §114(b). Sound recording also cannot be distinguished in meaningful technological terms from other media.

Courts have long recognized the centrality of quotation from earlier works in the creation of new art, particularly music. Borrowing in musical composition and its lineal descendant, sampling, are critical tools in composers' toolkits. The *de minimis* rule is essential because it provides an initial protection for the borrowing that, while at the heart of artistic creation, comprises only a trivial portion of copied work. Although a *de minimis* analysis also can be part of a fair use defense, fair use is not an adequate substitute because it is a much more complex and unpredictable element of copyright law. It also does not serve the other important policy underlying the *de minimis* rule: that the law does not concern itself with trifles.

ARGUMENT

I. THE *DE MINIMIS* RULE APPLIES TO SOUND RECORDINGS

A. The *De Minimis* Rule Is a Longstanding and Essential Component Of All Copyright Law

The *de minimis* rule, part of the doctrine of substantial similarity,[1] has both quantitative and qualitative elements. The qualitative element refers to "a technical violation of the right so trivial that the law will not impose legal consequences." *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997). Judge Leval gives as an example the singing of "Happy Birthday" at a private gathering, or the taping of a *New Yorker* cartoon to a refrigerator door. Pierre N. Leval, *Fair Use Rescued*, 44 U.C.L.A. L. Rev. 1449, 1457-58 (1997). The quantitative component of the *de minimis* rule also acknowledges verbatim copying, but asks how much of it is needed to be actionable in copyright law. *Ringgold*, 126 F.3d at 74-75; 4-13 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* §13.03[A], at 13-33 (2004).

The *de minimis* rule shields a gamut of minor, partial borrowings (and the types of everyday behavior noted by Judge Leval) from copyright

[1] Substantial similarity also concerns itself with how closely a new work resembles an earlier one in the absence of verbatim copying, and in this sense is an outgrowth of the "idea/expression" dichotomy. Nimmer and Nimmer refer to this as "comprehensive nonliteral similarity," and to situations of verbatim but limited copying as "fragmented literal similarity." *See* 4-13 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* §13.03 (2004).

liability. It balances "the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works." *Bridgeport Music. v. Dimension Films,* 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002) (citing *Warner Bros., Inc. v. Am. Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983)). And it protects the judiciary and society generally from turning every insignificant borrowing into, literally, a federal case. The Ninth Circuit recently reaffirmed "the principle that the substantiality requirement applies throughout the law of copyright, including cases of music sampling, even where there is a high degree of similarity." *Newton v. Diamond*, 388 F.3d 1189, 1995 (9th Cir. 2004).

Every court of appeals to consider the *de minimis* rule, including this one, has accepted it as a fundamental part of copyright law.[2] Every court to address the issue in the music sampling context (including sound recordings) has concluded that the *de minimis* rule applies. *See Newton,* 388 F.3d at 1194-95; *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1054 (S.D.N.Y. 2001); *Jarvis v. A&M Records*, 827 F. Supp. 282, 290-91 (D.N.J. 1993) (the relevant question in *de minimis* analysis is whether "the segment in question constituted a substantial portion of the plaintiff's work").

[2] *Amici* will not replicate defendant No Limit Films' brief, which includes citations to these cases.

Applied to sound recordings, the *de minimis* rule should at least exclude from infringement actions the copying of a few notes or chords in which "the ordinary lay observer [cannot] discern or recognize the sampled material." Brett I. Kaplicer, Note, *Rap Music and* De Minimis *Copying: Applying the* Ringgold *and* Sandoval *Approach to Digital Samples*, 18 Cardozo Arts & Ent. L.J. 227, 250-53 (2000); *accord* Charles E. Maier, *A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who Are Sampled*, 5 Vand. Ent. L. & Prac. 100, 101 (2003); Josh Norek, Comment, *"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 U.C.L.A. Ent. L. Rev. 83, 92 (2004).

The Ninth Circuit has adopted this as a threshold. *See Newton*, 388 F.3d at 1193; *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986). The district court here also noted that "[o]ne of the most common tests for substantial similarity is 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" *Bridgeport*, 230 F. Supp. 2d at 840 (quoting *Tuff 'N' Rumble Mgmt. v. Profile Records*, 42 U.S.P.Q.2d 1398, 1402 (S.D.N.Y. 1997)); *see also Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998) (a *de*

minimis copying is one "so trivial 'as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.'" (quoting *Ringgold*, 126 F.3d at 74)). Although recognizability should not foreclose a *de minimis* finding (the familiar opening chords of Beethoven's Fifth Symphony, for example), the fact that a few copied notes or chords are *not recognizable* by the ordinary listener (in litigation, a judge who is presumably not a musical expert) should suffice to eliminate claims of insignificant and unsubstantial copying.

B. Congress Endorsed The *De Minimis* Rule For Sound Recording Copyrights

Congress has recognized the substantiality threshold for sound recording copyrights. In 1976 – five years after the enactment of 17 U.S.C. §114(b), establishing copyright in sound recordings – Congress overhauled the Copyright Act. According to the House Judiciary Committee Report accompanying the revision, §114(b) "makes clear that ... infringement takes place whenever *all or any substantial portion* of the actual sounds that go to make up a copyrighted sound are reproduced . ..." H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added); *accord Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 322 (2d Cir. 1995).[3] The inclusion of

[3] The *Agee* court erroneously cited to the 1971, not the 1976 House Report.

this language in the House Report clearly shows that Congress intended the substantial similarity doctrine, and the *de minimis* rule, to apply to sound recordings.

Creating sound recording copyright protection in 1971, Sound Recording Amendment of 1971, 85 Stat. 391, Congress made clear that "this limited copyright *not grant any broader rights than are accorded to other copyright proprietors* under the existing Title 17." H.R. Rep. 92-487, 1971 U.S.C.C.A.N. 1566, 1572 (emphasis added); *see also* S. Rep. 92-72 at 3 (1971) ("The purpose of the new [statutory language] is to extend to the owners of copyrighted music used in the making of recordings the *same* remedies available for other copyright infringements. ..." (emphasis added)). Courts are properly "reluctan[t] to expand the protections afforded by the copyright without explicit legislative guidance." *Sony Corp., of Am., v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). Sound recording copyrights therefore should not be extended by abolition of the generally applicable *de minimis* doctrine.

Given Congress's unequivocal position, it is unsurprising that a "bright-line" rule eliminating *de minimis* for sound recordings finds little support in academic commentary. *See, e.g.,* 4-13 Nimmer and Nimmer, *supra*, §13.03[A][2], 13-50 ("The practice of digitally sampling prior music

to use in a new composition should not be subject to any special analysis. ..."); David S. Blessing, Note, *Who Speaks Latin Anymore? Translating* De Minimis *for Application to Music Copyright Infringement and Sampling*, 45 William & Mary L. Rev. 2399, 2421 (2004) (a sample is *de minimis* if it is "so insignificant that it does not frustrate the purpose of copyright law"); Kaplicer, *supra*, at 250-52; Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap? Copyright Infringement or Technological Creativity?*, 1992 U. Ill. L. Rev. 559, 575.

Moreover, the panel decision is without precedent. Cases cited in the decision simply do not support extinguishing the *de minimis* rule for sound recordings. The Ninth Circuit in *United States v. Taxe* rejected the panel's position, stating that a jury "instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements." 540 F.2d 961, 965 (9th Cir. 1976) (also observing that no error resulted as the jury could consider substantial similarity). The court in *Agee v. Paramount Communications* quoted legislative history to the effect that "all or any substantial portion" of a sound recording must be taken to constitute infringement, and reserved the question "whether all copying of sound recordings ... infringes the copyright owner's exclusive right of reproduction." 59 F.3d at 322-23.

In short, the panel decision flatly contradicts legislative history, runs counter to the weight of precedent, and contradicts a substantial body of scholarship.

C. Sampling Technology Does Not Justify Rejection of the *De Minimis* Rule

The panel analogized digital sampling to a physical taking. "[I]t is not the 'song' but the sounds that ... are taken directly. ... It is a physical taking rather than an intellectual one." *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004). This distinction ignores similarities between digital sampling and ways of copying other media.

In digital sampling:

> [T]he electrical signal from the microphone travels to a device known as the analog converter. The analog-to-digital converter *measures* the voltage of the sound signal in equally spaced intervals called "windows." The windows are also called "samples" and hence the name digital sound sampling. Next the device *converts* each window into "bits" so it can be recognized by a computer. ... The samples are played in the same order that they were taken to *reproduce* a waveform of the original sound source.

Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 Loyola L. Rev. 879, 881 (1992) (footnotes omitted and emphases added); *accord* Ronald Mark Wells,

Comment, *You Can't Always Get What You Want But Digital Sampling Can Get You What You Need!*, 22 Akron L. Rev. 691, 699-700 (1989).

This description of sampling demonstrates the flaw in an analogy to a physical taking: Digital sampling is the creation of a copy, not the seizure of the original sound. Digital sampling of sound recording is no more a "physical taking" than photocopying a page from a book. In both cases, technology creates an exact replica of copyrighted material, leaving the original intact. By contrast, in collages in the visual arts, actual newspaper or magazine illustrations are physically cut out and pasted into new works. A distinction between physical and intellectual taking thus is not meaningful and does not distinguish copying of sound recordings from many other types of copying.

Moreover, the panel's analogy would seem to apply *a fortiori* to video recordings of broadcast television signals. A video recorder "receives electromagnetic signals transmitted over the television band of the public airways" and "*records such signals* on a magnetic tape." *Sony Corp.*, 464 U.S. at 422 (emphasis added). The *Sony Corporation* Court observed, however, that copying by a video-recorder "does not even remotely entail ... consequences to a copyright owner" like the theft of tangible goods. *Id.* at

450 n.33. If video-recording of television programs is not analogous to a physical taking, it is difficult to see why digital sampling should be.

D. Judicial Efficiency Supports Application of the *De Minimis* Rule to Sound Recordings

The panel decision will not advance judicial efficiency, as courts will still engage in *de minimis* inquiries. Worse, the panel's rule will burden the federal courts, as fewer cases are dismissed under the *de minimis* doctrine, and instead proceed to complex fair-use fact-finding.

"Sound recordings and their underlying musical compositions are separate musical works with their own distinct copyrights." *Bridgeport Music*, 383 F.3d at 394 n.3; 17 U.S.C. §102(a)(2) & (7). Many infringement suits likely will pertain to the two related copyrights. In the instant case, for example, the district court rejected infringement claims based on the musical composition of "100 Miles." *Bridgeport Music,* 230 F. Supp. 2d at 833-38. Given the Order Granting Panel Rehearing, which makes clear that the fair use defense is still available in sound recording infringement actions, many suits will be bifurcated into a *de minimis* determination concerning the musical composition, *see, e.g., Newton*, 388 F.3d at 1194-95, and a fair-use inquiry about the sound recording. Multiplying inquiries hardly eases courts' burdens. Indeed, because the substantiality of copying is also an

element of fair use, eliminating the *de minimis* rule for sound recordings affords courts no gain in judicial economy.

As the Second Circuit observed, when an "allegedly infringing work makes such a quantitatively insubstantial use of the copyrighted work as to fall below the threshold required for actionable copying it makes more sense to reject that claim on that basis and find no infringement, than undertake an elaborate fair use analysis. ..." *Ringgold*, 126 F.3d at 76. The *de minimis* test is necessarily less involved than the fair-use test. As the Supreme Court has explained, fair use determinations are "not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis" of four intricate factors. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Successful applications of the *de minimis* test to visual artifacts suggest that concerns about the doctrine's manageability are misplaced. See *Ringgold*, 126 F.3d at 76; *Sandoval*, 147 F.3d at 218.

II. THE *DE MINIMIS* RULE HAS SPECIAL IMPORTANCE FOR ARTISTIC CREATION

"The monopoly privileges that Congress may authorize [pursuant to the Copyright Clause] are neither unlimited nor primarily designed to provide a special private benefit." *Sony Corp.*, 464 U.S. at 429. Rather, Congress grants copyrights for the "purpose of inducing the creation of new material

of potential ... value." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985). Thus, despite Congress's use of the term "exclusive" in 17 U.S.C. §106, "the law has never recognized an author's right to absolute control of his work." *Sony Corp.*, 464 U.S. at 432 n.13. "[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. ... When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

The *de minimis* rule has particular significance in this context. Artists' and musicians' ability to draw small quotations from past work boosts their ability to create new works:

> Creating a new work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it. ... The less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work. ...

William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, J. Legal Stud. 325, 332 (1989). One justification for the substantial similarity doctrine hinges on the dynamic use of earlier creative work. *Id.* at 360.

The centrality of imitation and appropriation to literary and visual creativity supports that insight. Justice Joseph Story explained that "[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C. Mass. 1845); *accord Campbell*, 510 U.S. at 575. Authors have long used quotation of small fragments and pastiche for new creations. *E.g.,* T.S. Eliot, "The Wasteland," in *Selected Poems* 45 (1954) (poem comprising numerous quoted fragments); John Dos Passos, *The 42nd Parallel* (1930); *1919* (1932); *The Big Money* (1937) (using collages of newspaper headlines, slogans, and snatches of articles and song).[4] The *de minimis* rule ensures that this practice continues unabated by the uncertainty that reliance solely on fair use would generate.

In the visual arts, the technique of appropriation "borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works" for which "the artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning." William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 Geo. Mason L. Rev. 1, 1 (2001). Some appropriations are

[4] Numerous book titles are also copied from fragments of earlier literature: *For Whom the Bell Tolls, Tender is the Night,* and *The Sound and the Fury*, to name a few.

relatively trivial and should be considered *de minimis*, without a complicated fair use inquiry. Artists like Robert Rauschenberg "embraced collage as a method of incorporating 'reality,'" in photographic form, into his paintings. Calvin Tomkins, *The Bride and the Bachelors* 217 (1976). Collages by Rauschenberg, Jasper Johns, Picasso, Braque, and many others incorporate fragments often minor enough to qualify as *de minimis*. Like music sampling, such art imports bits of past work to fashion new creations. *See* Richard Shusterman, *The Fine Art of Rap*, 22 New Literary Hist. 613, 617 (1991) (noting similarity between sampling and art by Andy Warhol and Rauschenberg).

Before the advent of recording technologies, varieties of borrowing and quotation were widespread in canonical Western "classical" music. Many Western composers borrowed chords and themes from other works; Handel, for one, "ruthlessly plagiarized." *Heim v. Universal Pictures Co.*, 154 F.2d 480, 488 (2d Cir. 1946); John Winemiller, *Reconceptualizaing Handel's Borrowing*, 15 J. Musicology 444, 469 (1997). Charles Ives famously used past work in manifold small ways. J. Burkholder, *"Quotation" and Emulation, Charles Ives's Use of His Models*, 71 Musical Q. 1, 2-3 (1985).

Digital sampling is today's variant in this "long history and broad range of practices." J. Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, Notes 851, 863 (1994). Major contemporary composers like Steve Reich and John Cage use sound samples to create collages. *See* Antonella Puca, *Steve Reich and Hebrew Cantillation*, 81 Musical Q. 537, 549 (1997); Kyle Gann, *American Music in the Twentieth Century* 139 (1997). One genre, *musique concrète*, involves "[t]aking sounds from different sources, from pianos to railway trains, [to] produc[e] a series of short pieces by placing them at different speeds, ... isolating fragments and superimposing them." Michael Chanan, *Repeated Takes* 141 (1995). If insubstantial, all such borrowings should be considered *de minimis*.

Sampling often yields "a completely new work" in a new genre. Hampel, *supra*, at 580; Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 13 U.C.L.A. Ent. L. Rev. 271, 314 (1996). "Samples inspire producers to create a new piece of music. Sometimes they use a sound like a snare or a kick drum that no one else may even notice in a recording." Susan Butler, *Court Ruling Could Chill Sample Use*, Billboard, Sept. 16, 2004, at 1. Sampling thus is "transformative ... not superseding; [it does] not compete with the original." Leval, *supra*, at 1465.

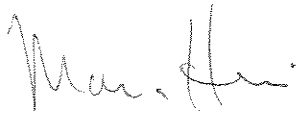
Courts view transformative uses with less skepticism than superseding uses. *See Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841). The fact that much sampling is transformative thus undermines arguments for eliminating the *de minimis* rule for sound recordings.

The *de minimis* rule is a critical element of copyright law that recognizes that the very air creation breathes is the fruit of prior creativity. It recognizes that copyright should not chill creation by triggering complex fair-use analysis when borrowed inspiration is minimal. Without a *de minimis* rule, creativity would be stifled.

CONCLUSION

The district court correctly applied the longstanding *de minimis* doctrine. *Amici* urge this Court to endorse the district court's conclusion that the *de minimis* rule applies to sound recordings.

Respectfully submitted,



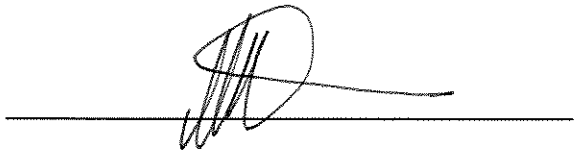
Marjorie Heins
Aziz Huq
Brennan Center for Justice
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730

Fred von Lohmann
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333

January 20, 2005

Certificate of Compliance

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae* in Support of Appellee No Limit Films complies with the type-volume limitation specified in the Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The Brief is proportionately spaced, has a typeface of 14 points or more and contains 3486 words exclusive of the corporate disclosure statement, table of contents, table of authorities, and certificate of service.



Aziz Huq

January 20, 2005