

cy in support of Proposition 204.” As circumstantial evidence of ABOR’s retaliatory intent, the ASA notes that “[s]everal members of [ABOR] criticized ASA for supporting Proposition 204,” and that the Board’s allegedly retaliatory conduct was temporally proximate to ASA’s exercise of its free-speech rights. Taken together, those allegations sufficiently identify ABOR’s retaliatory intent and the nexus between the Board’s intent and its later suspension and amendment of its policies.

The ASA adequately and plainly pleaded a plausible claim for First Amendment retaliation on the basis that ABOR deprived it of a valuable government benefit. We therefore reverse the district court’s dismissal of the ASA’s retaliation claim and remand for further proceedings consistent with this opinion.

V.

[27, 28] When justice requires, a district court should “freely give leave” to amend a complaint. Fed. R. Civ. P. 15(a)(2). A district court’s decision to deny a party leave to amend its complaint is reviewed for an abuse of discretion. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). Dismissal of a complaint without leave to amend is only proper when, upon de novo review, it is clear that the complaint could not be saved by any amendment. *Thinket Ink Info. Res., Inc. v. Sun Microsys., Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). As discussed above, the amendment of the ASA’s complaint would not have been futile.

The district court abused its discretion when it failed to grant the ASA leave to amend its complaint to conform with the requirements of *Young*. On remand, the district court shall afford the ASA a reasonable opportunity to file an amended complaint.

* * *

For the reasons set forth above, we affirm in part and reverse in part the dismissal of the ASA’s complaint, and we remand for further proceedings consistent with this opinion.

The ASA shall recover its costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.



VMG SALSOUL, LLC, a Delaware limited liability company,
Plaintiff-Appellant,

v.

Madonna Louise CICCONE, professionally known as Madonna, an individual; Shep Pettibone, an individual; WB Music Corporation, a Delaware corporation; Webo Girl Publishing, Inc., a California corporation; Lexor Music, Inc., a New York corporation; Warner Music Group, a Delaware corporation; Warner Bros. Records, Inc., a Delaware corporation, Defendants-Appellees.

Nos. 13-57104
14-55837

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 5,
2016 Pasadena, California

Filed June 2, 2016

Background: Owner of copyrights to composition and sound recording of “Ooh I

Love It (Love Break)" brought infringement action alleging that singer and producer of the song "Vogue" violated copyrights by sampling material from the copyrighted song. The United States District Court for the Central District of California, Beverly Reid O'Connell, J., 2013 WL 8600435, granted summary judgment in favor of singer and producer and awarded attorney's fees. Owner appealed.

Holdings: The Court of Appeals, Graber, Circuit Judge, held that:

- (1) any copying of quarter-note single horn hit, full measure containing rests, and double horn hit from musical composition "Ooh I Love It (Love Break)" by singer and producer was de minimis, and thus was not copyright infringement;
- (2) any sampling of single horn hit from sound recording "Ooh I Love It (Love Break)" by signer and producer to create double horn hit used in song "Vogue" was de minimis, and thus was not copyright infringement;
- (3) as matter of first impression, Congress intended to maintain the "de minimis" exception for claims alleging copyright infringement of sound recordings when it enacted Copyright Act provision, which stated that exclusive rights of owner of copyright in sound recording did not extend to making or duplication of another sound recording; and
- (4) copyright owner's infringement claim was objectively reasonable, and thus, district court would be required on remand to reconsider award of attorney's fees under Copyright Act.

Affirmed in part, vacated in part, and remanded.

Silverman, Circuit Judge, filed dissenting opinion.

1. Copyrights and Intellectual Property

☞67.2

The "de minimis" exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions.

2. Copyrights and Intellectual Property

☞67.2

"Sampling" in the context of a copyright infringement claim means the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo.

See publication Words and Phrases for other judicial constructions and definitions.

3. Copyrights and Intellectual Property

☞53(1)

To establish its copyright infringement claim, plaintiff must show that the copying was greater than de minimis.

4. Copyrights and Intellectual Property

☞53(1)

A use of a copyrighted work is "de minimis" only if the average audience would not recognize the appropriation.

See publication Words and Phrases for other judicial constructions and definitions.

5. Copyrights and Intellectual Property

☞66

When considering an infringement claim of a copyrighted musical composition, what matters is not how the musicians actually played the notes but, rather, a generic rendition of the composition.

6. Copyrights and Intellectual Property

☞66

Copying of quarter-note single horn hit, full measure containing rests, and double horn hit from musical composition "Ooh I Love It (Love Break)" by singer and producer of the song "Vogue" was de

minimis, and thus was not copyright infringement; copied elements from “Ooh I Love It (Love Break)” were very short, single horn hit lasted less than quarter-second, double-horn hit lasted less than second, and horn hits appeared only five or six times in “Vogue.” 17 U.S.C.A. § 102(a)(2).

7. Copyrights and Intellectual Property
☞66

Any sampling of single horn hit from sound recording “Ooh I Love It (Love Break)” by signer and producer to create double horn hit used in song “Vogue” was de minimis, and thus was not copyright infringement; sampling of horn hit was less than second, horn hit occurred only few times in “Vogue,” and producer truncated the horn hit, transposed it to different key, and added other sounds and effects to horn hit itself. 17 U.S.C.A. § 102(a)(7).

8. Copyrights and Intellectual Property
☞67.2

When considering a claimed infringement of a copyrighted sound recording, what matters is how the musicians played the notes, that is, how their rendition distinguishes the recording from a generic rendition of the same composition.

9. Copyrights and Intellectual Property
☞67.2

Congress intended to maintain the “de minimis” exception for claims alleging copyright infringement of sound recordings when it enacted Copyright Act provision, which stated that exclusive rights of owner of copyright in sound recording did not extend to making or duplication of another sound recording; sound recordings were treated identically to all other types of protected works under Copyright Act, Congress intended to limit, not expand, rights of copyright holders, and passage from house report articulated principle

that infringement only took place whenever all or any substantial portion of actual sounds were reproduced. 17 U.S.C.A. §§ 102, 106, 114(b).

10. Copyrights and Intellectual Property
☞53(1)

The reason for the rule, that copyright infringement occurs only when a substantial portion is copied, is that the plaintiff's legally protected interest is the potential financial return from his compositions which derive from the lay public's approbation of his efforts; if the public does not recognize the appropriation, then the copier has not benefited from the original artist's expressive content.

11. Copyrights and Intellectual Property
☞90(2)

Attorney's fees are to be awarded under the Copyright Act to prevailing parties only as a matter of the court's discretion. 17 U.S.C.A. § 505.

12. Copyrights and Intellectual Property
☞90(2)

In deciding whether to award fees under the Copyright Act, the district court should consider, among other things: the degree of success obtained on the claim; frivolousness; motivation; objective reasonableness of factual and legal arguments; and need for compensation and deterrence. 17 U.S.C.A. § 505.

13. Copyrights and Intellectual Property
☞90(2)

Copyright owner's claim, that singer and producer of the song “Vogue” infringed on its copyrights to composition and sound recording of “Ooh I Love It (Love Break),” was objectively reasonable, and thus, district court would be required on remand to reconsider its award of attorney's fees to producer and singer under Copyright Act; it was reasonable for owner to bring claim founded on only circuit-

court precedent to have considered legal issue, and claim that hinged on disputed facts sufficient to reach jury was reasonable. 17 U.S.C.A. § 505.

Appeals from the United States District Court for the Central District of California, Beverly Reid O'Connell, District Judge, Presiding, D.C. No. 2:12-cv-05967-BRO-CW

Robert S. Besser (argued) and Christopher Chapin, Law Offices of Robert S. Besser, Santa Monica, California, for Plaintiff-Appellant.

Alexander Kaplan (argued), Proskauer Rose LLP, New York, New York; Richard S. Busch (argued) and Paul H. Duvall, King & Ballow, San Diego, California; and Sandra A. Crawshaw-Sparks and Susan L. Gutierrez, Proskauer Rose LLP, Los Angeles, California, for Defendants-Appellees.

Before: BARRY G. SILVERMAN and SUSAN P. GRABER, Circuit Judges, and DAVID A. EZRA,** District Judge.

Dissent by Judge SILVERMAN

OPINION

GRABER, Circuit Judge:

In the early 1990s, pop star Madonna Louise Ciccone, commonly known by her first name only, released the song *Vogue* to great commercial success. In this copyright infringement action, Plaintiff VMG Salsoul, LLC, alleges that the producer of *Vogue*, Shep Pettibone, copied a 0.23-second segment of horns from an earlier song, known as *Love Break*, and used a modified version of that snippet when recording *Vogue*. Plaintiff asserts that Defendants

Madonna, Pettibone, and others thereby violated Plaintiff's copyrights to *Love Break*. The district court applied the long-standing legal rule that "de minimis" copying does not constitute infringement and held that, even if Plaintiff proved its allegations of actual copying, the claim failed because the copying (if it occurred) was trivial. The district court granted summary judgment to Defendants and awarded them attorney's fees under 17 U.S.C. § 505. Plaintiff timely appeals.

[1] Reviewing the summary judgment de novo, *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1051 (9th Cir. 2015), we agree with the district court that, as a matter of law, a general audience would not recognize the brief snippet in *Vogue* as originating from *Love Break*. We also reject Plaintiff's argument that Congress eliminated the "de minimis" exception to claims alleging infringement of a sound recording. We recognize that the Sixth Circuit held to the contrary in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), but—like the leading copyright treatise and several district courts—we find *Bridgeport*'s reasoning unpersuasive. We hold that the "de minimis" exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions. Accordingly, we affirm the summary judgment in favor of Defendants.

But we conclude that the district court abused its discretion in granting attorney's fees to Defendants under 17 U.S.C. § 505. See *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1180 (9th Cir. 2013) (holding that we review for abuse of discretion the district court's award of attorney's fees under § 505). A claim premised on a legal theory

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sit-

ting by designation.

adopted by the only circuit court to have addressed the issue is, as a matter of law, objectively reasonable. The district court's conclusion to the contrary constitutes legal error. We therefore vacate the award of fees and remand for reconsideration.

FACTUAL AND PROCEDURAL HISTORY

Because this case comes to us on appeal from a grant of summary judgment to Defendants, we recount the facts in the light most favorable to Plaintiff. *Alcantar*, 800 F.3d at 1051.

[2] In the early 1980s, Pettibone recorded the song *Ooh I Love It (Love Break)*, which we refer to as *Love Break*. In 1990, Madonna and Pettibone recorded the song *Vogue*, which would become a mega-hit dance song after its release on Madonna's albums. Plaintiff alleges that, when recording *Vogue*, Pettibone "sampled" certain sounds from the recording of *Love Break* and added those sounds to *Vogue*. "Sampling" in this context means the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo. *See Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004) (discussing the term "sampling").

Plaintiff asserts that it holds copyrights to the composition and to the sound recording of *Love Break*. Plaintiff argues that, because *Vogue* contains sampled material from *Love Break*, Defendants have violated both copyrights. Although Plaintiff originally asserted improper sampling of strings, vocals, congas, "vibraslap," and

horns from *Love Break* as well as another song, Plaintiff now asserts a sole theory of infringement: When creating two commercial versions of *Vogue*, Pettibone sampled a "horn hit"¹ from *Love Break*, violating Plaintiff's copyrights to both the composition and the sound recording of *Love Break*.

The horn hit appears in *Love Break* in two forms. A "single" horn hit in *Love Break* consists of a quarter-note chord comprised of four notes—E-flat, A, D, and F—in the key of B-flat. The single horn hit lasts for 0.23 seconds. A "double" horn hit in *Love Break* consists of an eighth-note chord of those same notes, followed immediately by a quarter-note chord of the same notes. Plaintiff's expert identified the instruments as "predominantly" trombones and trumpets.

The alleged source of the sampling is the "instrumental" version of *Love Break*,² which lasts 7 minutes and 46 seconds. The single horn hit occurs 27 times, and the double horn hit occurs 23 times. The horn hits occur at intervals of approximately 2 to 4 seconds in two different segments: between 3:11 and 4:38, and from 7:01 to the end, at 7:46. The general pattern is single-double repeated, double-single repeated, single-single-double repeated, and double-single repeated. Many other instruments are playing at the same time as the horns.

The horn hit in *Vogue* appears in the same two forms as in *Love Break*: single and double. A "single" horn hit in *Vogue* consists of a quarter-note chord comprised of four notes—E, A-sharp, D-sharp, and F-sharp—in the key of B-natural.³ A double

1. Plaintiff prefers the label "horn part," but the label has no effect on the legal analysis. For simplicity, we follow the district court's convention.
2. The label "instrumental" is misleading: The recording contains many vocals. But again we adopt the terminology used by the district court.
3. In musical terms, assuming that the compo-

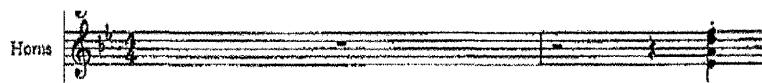
horn hit in *Vogue* consists of an eighth-note chord of those same notes, followed immediately by a quarter-note chord of the same notes.

The two commercial versions of *Vogue* that Plaintiff challenges are known as the “radio edit” version and the “compilation” version. The radio edit version of *Vogue* lasts 4 minutes and 53 seconds. The single horn hit occurs once, the double horn hit occurs three times, and a “breakdown” version of the horn hit occurs once.⁴ They occur at 0:56, 1:02, 3:41, 4:05, and 4:18. The pattern is single-double-double-double-breakdown. As with *Love Break*, many

other instruments are playing at the same time as the horns.

The compilation version of *Vogue* lasts 5 minutes and 17 seconds. The single horn hit occurs once, and the double horn hit occurs five times. They occur at 1:14, 1:20, 3:59, 4:24, 4:40, and 4:57. The pattern is single-double-double-double-double. Again, many other instruments are playing as well.

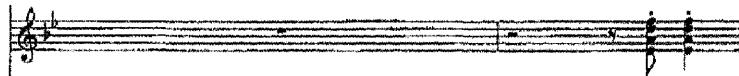
One of Plaintiff’s experts transcribed the composition of the horn hits in the two songs as follows. *Love Break*’s single horn hit:



Vogue’s single horn hit:



Love Break’s double horn hit:



Vogue’s double horn hit:



In a written order, the district court granted summary judgment to Defendants on two alternative grounds. First, neither the composition nor the sound recording of the horn hit was “original” for purposes of copyright law. Second, the court ruled

that, even if the horn hit was original, any sampling of the horn hit was “de minimis or trivial.” In a separate order, the district court awarded attorney’s fees to Defendants under 17 U.S.C. § 505. Plaintiff timely appeals both orders.

sition was copied, Pettibone “transposed” the horn hit in *Love Break* by one-half step, resulting in notes that are half a step higher in *Vogue*.

4. The record does not appear to disclose the meaning of a “breakdown” version of the horn hit, and neither party attributes any significance to this form of the horn hit.

DISCUSSION

Plaintiff has submitted evidence of actual copying. In particular, Tony Shimkin has sworn that he, as Pettibone's personal assistant, helped with the creation of *Vogue* and that, in Shimkin's presence, Pettibone directed an engineer to introduce sounds from *Love Break* into the recording of *Vogue*. Additionally, Plaintiff submitted reports from music experts who concluded that the horn hits in *Vogue* were sampled from *Love Break*. Defendants do not concede that sampling occurred, and they have introduced much evidence to the contrary.⁵ But for purposes of summary judgment, Plaintiff has introduced sufficient evidence (including direct evidence) to create a genuine issue of material fact as to whether copying in fact occurred. Taking the facts in the light most favorable to Plaintiff, Plaintiff has demonstrated actual copying. Accordingly, our analysis proceeds to the next step.

[3] Our leading authority on actual copying is *Newton*, 388 F.3d 1189. We explained in *Newton* that proof of actual copying is insufficient to establish copyright infringement:

For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. *See Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997). This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial. *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A], at

⁵. For example, Plaintiff hired Shimkin and then brought this action, raising doubts about Shimkin's credibility; Pettibone and others testified that Shimkin was not present during

13-30.2. The principle that trivial copying does not constitute actionable infringement has long been a part of copyright law. Indeed, as [a judge] observed over 80 years ago: “Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.” *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909). This principle reflects the legal maxim, *de minimis non curat lex* (often rendered as, “the law does not concern itself with trifles”). *See Ringgold*, 126 F.3d at 74–75.

Newton, 388 F.3d at 1192–93. In other words, to establish its infringement claim, Plaintiff must show that the copying was greater than de minimis.

Plaintiff's claim encompasses two distinct alleged infringements: infringement of the copyright to the *composition* of *Love Break* and infringement of the copyright to the *sound recording* of *Love Break*. Compare 17 U.S.C. § 102(a)(2) (protecting “musical works”) with *id.* § 102(a)(7) (protecting “sound recordings”); *see Erickson v. Blake*, 839 F.Supp.2d 1132, 1135 n.3 (D. Or. 2012) (“Sound recordings and musical compositions are separate works with their own distinct copyrights.”); *see also Newton*, 388 F.3d at 1193–94 (noting the distinction). We squarely held in *Newton*, 388 F.3d at 1193, that the de minimis exception applies to claims of infringement of a copyrighted composition. But it is an open question in this circuit whether the excep-

the creation of *Vogue* and was not even employed by Pettibone at that time; and Defendants' experts dispute the analysis and conclusions of Plaintiff's experts.

tion applies to claims of infringement of a copyrighted sound recording.

Below, we address (A) whether the alleged copying of the composition or the sound recording was *de minimis*, (B) whether the *de minimis* exception applies to alleged infringement of copyrighted sound recordings, and (C) whether the district court abused its discretion in awarding attorney's fees to Defendants under 17 U.S.C. § 505.⁶

A. *Application of the De Minimis Exception*

[4] A "use is *de minimis* only if the average audience would not recognize the appropriation." *Newton*, 388 F.3d at 1193; *see id.* at 1196 (affirming the grant of summary judgment because "an average audience would not discern Newton's hand as a composer . . . from Beastie Boys' use of the sample"); *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986) ("As a rule, a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation."); *see also Dymow v. Bolton*, 11 F.2d 690, 692 (2d Cir. 1926) ("[C]opying which is infringement must be something which ordinary observations would cause to be recognized as having been taken from the work of another." (internal quotation marks omitted)). Accordingly, we must determine whether a reasonable juror could conclude that the average audience would recognize the appropriation. We will consider the composi-

6. Because we affirm the judgment on the ground that any copying was *de minimis*, we do not reach Defendants' alternative arguments. Accordingly, we assume without deciding that the horn hits are "original." *See Newton*, 388 F.3d at 1192 (assuming originality). We also assume without deciding that Pettibone is not a co-owner of *Love Break*.

7. It appears that Plaintiff did not introduce into the summary judgment record a copy of

tion and the sound recording copyrights in turn.⁷

1. *Alleged Infringement of the Composition Copyright*

[5] When considering an infringement claim of a copyrighted musical composition, what matters is not how the musicians actually played the notes but, rather, a "generic rendition of the composition." *Newton*, 388 F.3d at 1194; *see id.* at 1193 (holding that, when considering infringement of the composition copyright, one "must remove from consideration all the elements unique to [the musician's] performance"). That is, we must compare the written compositions of the two pieces.

[6] Viewing the evidence in the light most favorable to Plaintiff, Defendants copied two distinct passages in the horn part of the score for *Love Break*. First, Defendants copied the quarter-note single horn hit. But no additional part of the score concerning the single horn hit is the same, because the single horn hit appears at a different place in the measure. In *Love Break*, the notes for the measure are: half-note rest, quarter-note rest, single horn hit. In *Vogue*, however, the notes for the measure are: half-note rest, eighth-note rest, single horn hit, eighth-note rest. Second, Defendants copied a full measure that contains the double horn hit. In both songs, the notes for the measure are: half-note rest, eighth-note rest, eighth-note horn hit, quarter-note horn hit. In sum,

the copyrighted composition and did not introduce a copy of one of the two allegedly infringing sound recordings. We need not decide whether those omissions are fatal to Plaintiff's claims. For purposes of our analysis, we accept the partial transcription of the composition by Plaintiff's expert, and we analyze the sound recordings that Plaintiff did submit.

Defendants copied, at most, a quarter-note single horn hit and a full measure containing rests and a double horn hit.

After listening to the recordings, we conclude that a reasonable jury could *not* conclude that an average audience would recognize the appropriation of the composition. Our decision in *Newton* is instructive. That case involved a copyrighted composition of “a piece for flute and voice.” *Newton*, 388 F.3d at 1191. The defendants used a six-second sample that “consist[ed] of three notes, C—D flat—C, sung over a background C note played on the flute.” *Id.* The composition also “require[d] overblowing the background C note that is played on the flute.” *Id.* The defendants repeated a six-second sample “throughout [the song], so that it appears over forty times in various renditions of the song.” *Id.* at 1192. After listening to the recordings, we affirmed the grant of summary judgment because “an average audience would not discern [the composer’s] hand as a composer.” *Id.* at 1196.

The snippets of the composition that were (as we must assume) taken here are much smaller than the sample at issue in *Newton*. The copied elements from the *Love Break* composition are very short, much shorter than the six-second sample in *Newton*. The single horn hit lasts less than a quarter-second, and the double horn hit lasts—even counting the rests at the beginning of the measure—less than a second. Similarly, the horn hits appear only five or six times in *Vogue*, rather than the dozens of times that the sampled material in *Newton* occurred in the challenged song in that case. Moreover, unlike in *Newton*, in which the challenged song copied the *entire composition* of the original work for the given temporal segment, the sampling at issue here involves only *one instrument group* out of many. As noted above, listening to the audio recordings

confirms what the foregoing analysis of the composition strongly suggests: A reasonable jury could not conclude that an average audience would recognize an appropriation of the *Love Break* composition.

2. *Alleged Infringement of the Sound Recording Copyright*

[7, 8] When considering a claimed infringement of a copyrighted sound recording, what matters is how the musicians *played* the notes, that is, how their rendition distinguishes the recording from a generic rendition of the same composition. See *Newton*, 388 F.3d at 1193 (describing the protected elements of a copyrighted sound recording as “the elements unique to [the musician’s] performance”). Viewing the evidence in the light most favorable to Plaintiff, by accepting its experts’ reports, Pettibone sampled one single horn hit, which occurred at 3:35 in *Love Break*. Pettibone then used that sampled single horn hit to create the double horn hit used in *Vogue*.

The horn hit itself was not copied precisely. According to Plaintiff’s expert, the chord “was modified by transposing it upward, cleaning up the attack slightly in order to make it punchier [by truncating the horn hit] and overlaying it with other sounds and effects. One such effect mimicked the reverse cymbal crash.... The reverb/delay ‘tail’ ... was prolonged and heightened.” Moreover, as with the composition, the horn hits are not isolated sounds. Many other instruments are playing at the same time in both *Love Break* and *Vogue*.

In sum, viewing the evidence in the light most favorable to Plaintiff, Pettibone copied one quarter-note of a four-note chord, lasting 0.23 seconds; he isolated the horns by filtering out the other instruments playing at the same time; he transposed it to a different key; he truncated it; and he

added effects and other sounds to the chord itself.⁸ For the double horn hit, he used the same process, except that he duplicated the single horn hit and shortened one of the duplicates to create the eighth-note chord from the quarter-note chord. Finally, he overlaid the resulting horn hits with sounds from many other instruments to create the song *Vogue*.

After listening to the audio recordings submitted by the parties, we conclude that a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit. That common-sense conclusion is borne out by dry analysis. The horn hit is very short—less than a second. The horn hit occurs only a few times in *Vogue*. Without careful attention, the horn hits are easy to miss. Moreover, the horn hits in *Vogue* do not sound identical to the horn hits from *Love Break*. As noted above, assuming that the sampling occurred, Pettibone truncated the horn hit, transposed it to a different key, and added other sounds and effects to the horn hit itself. The horn hit *then* was added to *Vogue* along with many other instrument tracks. Even if one grants the dubious proposition that a listener recognized some similarities between the horn hits in the two songs, it is hard to imagine that he or she would conclude that sampling had occurred.

A quirk in the procedural history of this case is illuminating on this point. Plaintiff's primary expert originally *misidentified* the source of the sampled double horn hit. In his original report, the expert concluded that both a single horn hit *and* a double horn hit were sampled from *Love Break*. The parties later discovered the original tracks to *Vogue* and were able to listen to

8. For all of those reasons, we decline to apply the “fragmented literal similarity” test: Defendants did not copy “a portion of the plaintiff’s work exactly or nearly exactly.” *Newton*, 388

the horn hits without interference from the many other instruments. After listening to those tracks, the expert decided that he had erred in opining that a double horn hit was sampled. He concluded instead that only a single horn hit was sampled, which was used to create the double horn hit in *Vogue*. In other words, a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job.

In sum, the district court correctly held that summary judgment to Defendants was appropriate on the issue of de minimis copying.

B. *The De Minimis Exception and Sound Recordings*

[9] Plaintiff argues, in the alternative, that even if the copying here is trivial, that fact is irrelevant because the de minimis exception does not apply to infringements of copyrighted sound recordings. Plaintiff urges us to follow the Sixth Circuit’s decision in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), which adopted a bright-line rule: For copyrighted sound recordings, any unauthorized copying—no matter how trivial—constitutes infringement.

[10] The rule that infringement occurs only when a substantial portion is copied is firmly established in the law. The leading copyright treatise traces the rule to the mid-1800s. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A][2][a], at 13-56 to 13-57, 13-57 n.102 (2013) (citing *Folsom v. Marsh*, 9

F.3d at 1195; *see also Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 n.4 (9th Cir. 1997) (rejecting the category of “fragmented literal similarity”).

F.Cas. 342, No. 4901 (C.C. Mass. 1841)); *id.* § 13.03[E][2], at 13-100 & n.208 (citing *Daly v. Palmer*, 6 F.Cas. 1132, No. 3,552 (C.C.S.D.N.Y. 1868)); *see also Perris v. Hexamer*, 99 U.S. 674, 675-76, 25 L.Ed. 308 1878 (stating that a “copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced.”); *Dymow*, 11 F.2d 690 (applying the rule in 1926). We recognized the rule as early as 1977: “If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue the test is the response of the ordinary lay hearer....” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (alteration and internal quotation marks omitted), superseded in other part by 17 U.S.C. § 504(b); *see Fisher*, 794 F.2d at 434 n.2 (using the term “de minimis” to describe the concept). The reason for the rule is that the “plaintiff’s legally protected interest [is] the potential financial return from his compositions which derive from the lay public’s approbation of his efforts.” *Krofft*, 562 F.2d at 1165 (quoting *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946)). If the public does not recognize the appropriation, then the copier has not benefitted from the original artist’s expressive content. Accordingly, there is no infringement.

Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the de minimis doctrine does not apply in a copyright infringement case. Instead, courts consistently have applied the rule in *all*

9. Defendants incorrectly assert that the quoted sentence controls the outcome in this case. *Newton* considered an alleged infringement of the *composition* only; it had no occasion to

cases alleging copyright infringement. Indeed, we stated in dictum in *Newton* that the rule “applies *throughout the law of copyright*, including cases of music sampling.”⁹ 388 F.3d at 1195 (emphasis added).

Plaintiff nevertheless argues that Congress intended to create a special rule for copyrighted sound recordings, eliminating the de minimis exception. We begin our analysis with the statutory text.

Title 17 U.S.C. § 102, titled “Subject matter of copyright: In general,” states, in relevant part:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(Emphasis added.) That provision treats sound recordings identically to all other types of protected works; nothing in the

consider—and did not consider—the argument that a different rule applies to the infringement of *sound recordings*.

text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works. Similarly, nothing in the neutrally worded statutory definition of “sound recordings” suggests that Congress intended to eliminate the de minimis exception. *See id.* § 101 (“‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”).

Title 17 U.S.C. § 106, titled “Exclusive rights in copyrighted works,” states:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

10. The full subsection states:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the 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. 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. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Again, nothing in that provision suggests differential treatment of de minimis copying of sound recordings compared to, say, sculptures. Although subsection (6) deals exclusively with sound recordings, that subsection concerns public performances; nothing in its text bears on de minimis copying.

Instead, Plaintiff’s statutory argument hinges on the third sentence of 17 U.S.C. § 114(b), which states:¹⁰

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of

that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

17 U.S.C. § 114(b). Nothing in the other sentences advances Plaintiff’s argument.

another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

Like all the other sentences in § 114(b), the third sentence imposes an express *limitation* on the rights of a copyright holder: “The exclusive rights of the owner of a copyright in a sound recording . . . do not extend to the making or duplication of another sound recording [with certain qualities].” *Id.* (emphasis added); *see id.* (first sentence: “exclusive rights . . . do not extend” to certain circumstances; second sentence: “exclusive rights . . . do not extend” to certain circumstances; fourth sentence: “exclusive rights . . . do not apply” in certain circumstances). We ordinarily would hesitate to read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights. Given the considerable background of consistent application of the de minimis exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule.

A straightforward reading of the third sentence in § 114(b) reveals Congress’ intended limitation on the rights of a sound recording copyright holder: A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying. That is, if a band played and recorded its own version of *Love Break* in a way that sounded very similar to the copyrighted recording of *Love Break*, then there would be no infringement so long as there was no actual copying of the recorded *Love Break*. But the quoted passage does not speak to the question that we face: whether Congress intended to eliminate the longstanding de minimis exception for sound recordings in all circumstances even where, as here, the

new sound recording as a whole sounds nothing like the original.

Even if there were some ambiguity as to congressional intent with respect to § 114(b), the legislative history clearly confirms our analysis on each of the above points. Congress intended § 114 to limit, not to expand, the rights of copyright holders: “The approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made ‘subject to sections 107 through 118,’ and must be read in conjunction with those provisions.” H.R. Rep. No. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674.

With respect to § 114(b) specifically, a House Report stated:

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another’s performance as exactly as possible.

Id. at 106, *reprinted in* 1976 U.S.C.C.A.N. at 5721 (emphasis added). That passage strongly supports the natural reading of

§ 114(b), discussed above. Congress intended to make clear that imitation of a recorded performance cannot be infringement so long as no actual copying is done. There is no indication that Congress intended, through § 114(b), to expand the rights of a copyright holder to a sound recording.

Perhaps more importantly, the quoted passage articulates the principle that “infringement takes place whenever all *or any substantial portion* of the actual sounds . . . are reproduced.” *Id.* (emphasis added). That is, when enacting this specific statutory provision, Congress clearly understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works. In sum, the statutory text, confirmed by the legislative history, reveals that Congress intended to maintain the de minimis exception for copyrighted sound recordings.

In coming to a different conclusion, the Sixth Circuit reasoned as follows:

[T]he rights of sound recording copyright holders under clauses (1) and (2) of section 106 “do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” 17 U.S.C. § 114(b) (emphases added). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word “entirely” to this language. *Compare* Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971) (adding subsection (f) to former 17 U.S.C. § 1) (“does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds”). In other words, a sound recording owner

has the exclusive right to “sample” his own recording.

Bridgeport, 410 F.3d at 800–01.

We reject that interpretation of § 114(b). *Bridgeport* ignored the statutory structure and § 114(b)’s express *limitation* on the rights of a copyright holder. *Bridgeport* also declined to consider legislative history on the ground that “digital sampling wasn’t being done in 1971.” 410 F.3d at 805. But the state of technology is irrelevant to interpreting Congress’ intent as to statutory structure. Moreover, as Nimmer points out, *Bridgeport*’s reasoning fails on its own terms because contemporary technology plainly allowed the copying of small portions of a protected sound recording. Nimmer § 13.03[A][2][b], at 13-62 n.114.16.

Close examination of *Bridgeport*’s interpretive method further exposes its illogic. In effect, *Bridgeport* inferred from the fact that “exclusive rights . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds,” 17 U.S.C. § 114(b) (emphases added), the conclusion that exclusive rights *do extend* to the making of another sound recording that *does not consist* entirely of an independent fixation of other sounds. As pointed out by Nimmer, *Bridgeport*’s interpretive method “rests on a logical fallacy.” Nimmer § 13.03[A][2][b], at 13-61; *see also Saregama India Ltd. v. Mosley*, 687 F.Supp.2d 1325, 1340–41 (S.D. Fla. 2009) (critiquing *Bridgeport*’s interpretive method for a similar reason). A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional. *E.g.*, Joseph G. Brennan, *A Handbook of Logic* 79–80 (2d ed. 1961).

For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessarily follow that “if it has not rained, then the grass is dry.” Someone may have watered the lawn, for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us *anything* about the condition of the grass if it has not rained. Accordingly, even though it is true that, “if the recording consists entirely of independent sounds, then the copyright does not extend to it,” that statement does not necessarily mean that “if the recording does not consist entirely of independent sounds, then the copyright does extend to it.”

The Sixth Circuit also looked beyond the statutory text, to the nature of a sound recording, and reasoned:

[E]ven when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the “song” but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.

Bridgeport, 410 F.3d at 801–02 (footnote omitted).

We disagree for three reasons. *First*, the possibility of a “physical taking” exists with respect to other kinds of artistic works as well, such as photographs, as to which the usual de minimis rule applies. *See, e.g., Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998) (affirming summary judgment to the defendant because the defendant’s use of the

plaintiff’s photographs in a movie was de minimis). A computer program can, for instance, “sample” a piece of one photograph and insert it into another photograph or work of art. We are aware of no copyright case carving out an exception to the de minimis requirement in that context, and we can think of no principled reason to differentiate one kind of “physical taking” from another. *Second*, even accepting the premise that sound recordings differ qualitatively from other copyrighted works and therefore *could warrant* a different infringement rule, that theoretical difference does not mean that Congress *actually adopted* a different rule. *Third*, the distinction between a “physical taking” and an “intellectual one,” premised in part on “sav[ing] costs” by not having to hire musicians, does not advance the Sixth Circuit’s view. The Supreme Court has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and *not* the “fruit of the [author’s] labor.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). Indeed, the Supreme Court in *Feist* explained at length why, though that result may seem unfair, protecting only the expressive aspects of a copyrighted work is actually a key part of the design of the copyright laws. *Id.* at 349–54, 111 S.Ct. 1282 (explaining how “the ‘sweat of the brow’ doctrine flouted basic copyright principles”). Accordingly, all that remains of *Bridgeport*’s argument is that the second artist has taken some expressive content from the original artist. But that is always true, regardless of the nature of the work, and the de minimis test nevertheless applies. *See* Nimmer § 13.03[A][2][b], at 13-63 to 13-64 (providing a similar critique of *Bridgeport*’s physical/intellectual distinction and concluding that it “seems to be built on air”).

Because we conclude that Congress intended to maintain the “*de minimis*” exception for copyrights to sound recordings, we take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit’s contrary holding in *Bridgeport*. We do so only after careful reflection because, as we noted in *Seven Arts Filmed Entertainment Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1256 (9th Cir. 2013), “the creation of a circuit split would be particularly troublesome in the realm of copyright. Creating inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.” (Citation, internal quotations marks, and brackets omitted.) We acknowledge that our decision has consequences. But the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent. Otherwise, we would have no choice but to blindly follow the rule announced by whichever circuit court decided an issue first, even if we were convinced, as we are here, that our sister circuit erred.

Moreover, other considerations suggest that the “troublesome” consequences ordinarily attendant to the creation of a circuit split are diminished here. In declining to create a circuit split in *Seven Arts*, we noted that “the leading copyright treatise,” Nimmer, agreed with the view of our sister circuits. 733 F.3d at 1255. As to the issue before us, by contrast, Nimmer devotes many pages to explaining why the Sixth Circuit’s opinion is, in no uncertain terms, wrong. Nimmer § 13.03[A][2][b], at 13-59 to 13-66.

Additionally, as a practical matter, a deep split among the federal courts *already exists*. Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to

apply *Bridgeport*’s rule. See, e.g., *Saregama*, 687 F.Supp.2d at 1340-41 (rejecting *Bridgeport*’s rule after analysis); *Steward v. West*, No. 13-02449, Docket No. 179 at 14 n.8 (C.D. Cal. 2014) (unpublished civil minutes) (“declin[ing] to follow the per se infringement analysis from *Bridgeport*” because *Bridgeport* “has been criticized by courts and commentators alike”); *Batiste v. Najm*, 28 F.Supp.3d 595, 625 (E.D. La. 2014) (noting that, because some courts have declined to apply *Bridgeport*’s rule, “it is far from clear” that *Bridgeport*’s rule should apply); *Pryor v. Warner/Chappell Music, Inc.*, No. CV13-04344, 2014 WL 2812309, at *7 n.3 (C.D. Cal. June 20, 2014) (unpublished) (declining to apply *Bridgeport*’s rule because it has not been adopted by the Ninth Circuit); *Zany Toys, LLC v. Pearl Enters., LLC*, No. 13-5262, 2014 WL 2168415, at *11 n.7 (D.N.J. May 23, 2014) (unpublished) (stating *Bridgeport*’s rule without discussion); see also *EMI Records Ltd v. Premise Media Corp.*, No. 601209, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008) (unpublished) (expressly rejecting *Bridgeport*’s analysis). Although we are the first circuit court to follow a different path than *Bridgeport*’s, we are in well-charted territory.

Plaintiff next argues that, because Congress has not amended the copyright statute in response to *Bridgeport*, we should conclude that *Bridgeport* correctly divined congressional intent. We disagree. The Supreme Court has held that congressional inaction in the face of a judicial statutory interpretation, even with respect to the Supreme Court’s own decisions affecting the entire nation, carries almost no weight. See *Alexander v. Sandoval*, 532 U.S. 275, 292, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (“It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court’s statutory interpretation.” (internal quotation marks omit-

ted)). Here, Congress' inaction with respect to a decision by one circuit court has even less import, especially considering that many other courts have declined to apply *Bridgeport*'s rule.

Finally, Plaintiff advances several reasons why *Bridgeport*'s rule is superior *as a matter of policy*. For example, the Sixth Circuit opined that its bright-line rule was easy to enforce; that "the market will control the license price and keep it within bounds"; and that "sampling is never accidental" and is therefore easy to avoid. *Bridgeport*, 410 F.3d at 801. Those arguments are for a legislature, not a court. They speak to what Congress *could decide*; they do not inform what Congress *actually decided*.¹¹

We hold that the "de minimis" exception applies to actions alleging infringement of a copyright to sound recordings.

C. Attorney's Fees

[11, 12] Finally, we consider the district court's award of attorney's fees to Defendants. The Copyright Act permits a court to "award a reasonable attorney's fee to the prevailing party." 17 U.S.C. § 505. "[A]ttorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). "In deciding whether to award fees under the Copyright Act, the district court should consider, among other things: the degree of success obtained on the claim; frivolousness; motivation; ob-

jective reasonableness of factual and legal arguments; and need for compensation and deterrence." *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 (9th Cir. 1996).

[13] Here, the district court concluded that Plaintiff's legal claim premised on *Bridgeport* was objectively unreasonable because, in the court's view, Plaintiff should have been aware of the critiques of *Bridgeport* and should have declined to bring the claim. In relying on that reasoning, the court erred as a matter of law. It plainly is reasonable to bring a claim founded on the only circuit-court precedent to have considered the legal issue, whether or not our circuit ultimately agrees with that precedent.

The district court also ruled that Plaintiff's claim was objectively unreasonable because of issues that hinged on "disputed facts and credibility determinations." Again, the court erred as a matter of law. If a plaintiff has a claim that hinges on disputed facts sufficient to reach a jury, that claim necessarily is reasonable because a jury might decide the case in the plaintiff's favor.

Because the district court erred in finding that Plaintiff's claim was objectively unreasonable, we vacate the award of fees and remand for reconsideration.

Judgment AFFIRMED; award of fees VACATED and REMANDED for reconsideration. The parties shall bear their own costs on appeal.

11. It also is not clear that the cited policy reasons are necessarily persuasive. For example, this particular case presents an example in which there is uncertainty as to enforcement—musical experts disagree as to whether sampling occurred. As another example, it is not necessarily true that the market will keep license prices "within bounds"—it is possible that a bright-line rule against sampling would unduly stifle creativity in certain segments of

the music industry because the licensing costs would be too expensive for the amateur musician. In any event, even raising these counterpoints demonstrates that the arguments, as Plaintiff concedes, rest on policy considerations, not on statutory interpretation. One cannot answer questions such as how much licensing cost is too much without exercising value judgments—matters generally assigned to the legislature.

SILVERMAN, Circuit Judge,
dissenting:

The plaintiff is the owner of a copyright in a fixed sound recording. This is a valuable property right, the stock-in-trade of artists who make their living recording music and selling records. The plaintiff alleges that the defendants, without a license or any sort of permission, physically copied a small part of the plaintiff's sound recording—which, to repeat, is property belonging to the plaintiff—and, having appropriated it, inserted into their *own* recording. If the plaintiff's allegations are to be believed, the defendants deemed this maneuver preferable to paying for a license to use the material, or to hiring their own musicians to record it. In any other context, this would be called theft. It is no defense to theft that the thief made off with only a “de minimis” part of the victim's property.

The majority chooses to follow the views of a popular treatise instead of an on-point decision of the Sixth Circuit, a decision that has governed the music industry in Nashville—“Music City”¹—and elsewhere for over a decade without causing either the sky to fall in, or Congress to step in. And just exactly what is the Sixth Circuit's radical holding in *Bridgeport Music, Inc. v. Dimension Films* that the majority finds so distasteful? It's this: if you want to use an *identical copy* of a portion of a copyrighted fixed sound recording—we're not talking about “substantially similar” tunes or rhythms, but an actual *identical copy* of a sound that has already been recorded in a fixed medium—get a license. You can't just take it. 410 F.3d 792, 800–01 (6th Cir. 2005).

As the majority acknowledges, after *Newton v. Diamond*, 388 F.3d 1189 (9th

Cir. 2003), it is an “open question” in the Ninth Circuit whether a de minimis defense applies to fixed sound recordings as it does to less tangible works. The *Bridgeport* court explained why it should not.

First, by statute, sound recording copyright holders have an *exclusive* right to sample their *own* recordings. It's an exclusive right; the statute does not give that right to others. 410 F.3d at 800–01. Under 17 U.S.C. §§ 106 and 114, the holder of a copyright in a sound recording (but not others) has the exclusive right to reproduce the work in copies or records “that directly or indirectly recapture the actual sounds fixed in the recording,” as well as the exclusive right to prepare derivative works “in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” 17 U.S.C. §§ 106(1) and (2); 114(b). Congress clearly qualified these exclusive rights, writing that “another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording” are not within the scope of the copyright holder's exclusive rights. 17 U.S.C. § 114(b). In other words, the world at large is free to imitate or simulate the creative work fixed in the recording (like a tribute band, for example) so long as an actual copy of the sound recording itself is not made. 410 F.3d at 800.

The majority rejects this straightforward reading, explaining by way of a rhetorical exercise that *Bridgeport*'s reading of § 114(b) is a logical fallacy, expanding the rights of copyright holders beyond that allowed under the judicial de minimis rule. As I see it, it is the majority that tortures

1. Nashville also describes itself as the “Songwriting Capital of the World.” See The Story of Music City, Nashville Convention & Visi-

tors Corp., <http://www.visitmusiccity.com/visitors/aboutmusiccity/storyofmusiccity> (last visited May 20, 2016).

the natural reading of these provisions. Bear in mind that § 114(b) simply explains the scope of exclusive rights already granted to copyright holders under § 106. These two provisions must be read together, as the Sixth Circuit did. 410 F.3d at 799–801. When read together, their message is clear: copyright holders have exclusive rights to their recordings, but cannot be heard to complain (i.e., there can be no infringement of those exclusive rights) where a new recording consists *entirely* of independently created sounds, such as might be found in a very good imitation. By the same token, if a new recording includes something other than independently created sounds, such as a blatant copy, the copyright holder whose work was sampled has a legitimate gripe. That right was not invented by the Sixth Circuit: it already exists in the statutes. And these statutes say nothing about the de minimis exception.

The second reason the Sixth Circuit gave for not adopting the de minimis rule is that sound recordings are different than their compositional counterparts: when a defendant copies a recording, he or she takes not the song but the sounds as they are fixed in the medium of the copyright holders' choice. *Id.* at 801–02. In other words, the very nature of digital sampling makes a de minimis analysis inapplicable, since sampling or pirating necessarily involves copying a fixed performance. *See id.* at 801 n.13. The defendants wanted horns to punctuate their song, so they took the plaintiff's copyrighted recording of horns. The horn hit is brief, but clearly perceptible and does its job. This is unlike indiscernible photographs used, not for their content (which cannot be made out), but to dress a movie set. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998).

This is a physical taking, not an intellectual one. *Id.* at 802. Sampling is never

accidental. *Id.* at 801. As the Sixth Circuit observed, it is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another that he has heard before. *Id.* When you sample a sound recording you know you are taking another's work product. *Id.* Accordingly, the pertinent inquiry in a sampling case is not whether a defendant sampled a little or a lot, but whether a defendant sampled at all. *Id.* at 798 n.6, 801–02 and n.13.

Again, the majority disagrees, rejecting *Bridgeport*'s characterization of a sample as a "physical taking" on the basis that copyright protection extends only to expressive aspects of a work, not the fruit of the author's labor. According to the majority, copyright protection doesn't extend to the sweat of an author's brow. *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (discussing originality as applied to factual compilations, such as telephone directories). But that's irrelevant here, since there is no question that the underlying sound recording can be copyrighted, and it is the taking of that protectable work that is at issue.

I find *Bridgeport*'s arguments well-reasoned and persuasive. Equally compelling is, I think, Congress's silence in the wake of *Bridgeport*, especially in light of the fact that the Sixth Circuit explicitly invited Congress to clarify or change the law if *Bridgeport*'s bright-line rule was not what Congress intended. 410 F.3d at 805. While it's true that congressional inaction in the face of judicial interpretation is not iron-clad evidence of Congressional approval, *see Alexander v. Sandoval*, 532 U.S. 275, 292, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), it's not chopped liver either. In this case *Bridgeport* has not been hiding out in the woods, waiting to be found: it has been governing the music industry in Nashville

and elsewhere for eleven years. The majority now proposes to introduce a different rule for this circuit, creating a circuit split, and providing a lower level of protection for copyright holders in a different area of the country. *See Seven Arts Filmed Entertainment Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1256 (9th Cir. 2013). This inconsistent approach is plainly in contravention of Congressional intent that copyright laws be predictable and uniform, yet the majority defends its rogue path on the ground that Congress must have intended something other than what the Sixth Circuit has concluded, even though we've heard not a peep from Congress, or for that matter the Supreme Court, in the eleven years since *Bridgeport* has been on the books.

In short, the majority's fuzzy approach would require a factual and largely visceral inquiry into whether each and every instance of sampling was "substantial," whereas *Bridgeport* provides in the case of a fixed sound recording a bright-line rule, and I quote: "Get a license or do not sample." 410 F.3d at 801. True, *Get a license or do not sample* doesn't carry the same divine force as *Thou Shalt Not Steal*, but it's the same basic idea. I would hold that the de minimis exception does not apply to the sampling, copying, stealing, pirating, misappropriation—call it what you will—of copyrighted fixed sound recordings. Once the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission. I therefore respectfully dissent.²



2. Since I think that summary judgment was improperly granted on the plaintiff's sampling claims, I also would reverse the award of attorneys' fees. However, I agree with the

Danny FLORES; Robert Barada; Kevin Watson; Vy Van; Ray Lara; Dane Woolwine; Rikimaru Nakamura; Christopher Wenzel; Shannon Casillas; James Just; Steve Rodrigues; Enrique Deanda, Plaintiffs-Appellees/Cross-Appellants,

and

Cruz Hernandez, Plaintiff-Appellee,

and

Gilbert Lee; Rene Lopez, Plaintiffs,

v.

CITY OF SAN GABRIEL, Defendant-Appellant/Cross-Appellee.

Nos. 14-56421, 14-56514

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted February 10,
2016 Pasadena, California

Filed June 2, 2016

Background: Current and former city police officers brought action against city, alleging violation of the Fair Labor Standards Act (FLSA) arising from city's failure to include cash payments made in lieu of medical benefits under the city's flexible benefits plan when calculating the officers' regular rate of pay for overtime purposes. The United States District Court for the Central District of California, Jesus G. Bernal, J., 969 F.Supp.2d 1158, partially granted summary judgment in favor of officers, and then denied, 2013 WL

majority that the fee award was erroneous in any event. I also agree that the district court properly granted summary judgment on the plaintiff's composition infringement claim.