



Program in Law and Technology

Twenty-Seventh Annual Seminar

June 9, 2017

Panel Discussion: Digital Music Sampling: Back in "Vogue" After the 9th Circuit Madonna Ruling?

11:00 a.m. – 12:00 p.m.

Joe Bogdan, Attorney, Silvershift®, Chicago, IL (Moderator)

John C. Beiter, Leavens Strand & Glover, Nashville, TN

Dalindyebo B. Shabalala, Visiting Assistant Professor of Law, Case Western Reserve University School of Law, Cleveland, OH

1. *Bridgeport Music, Inc., et. al v. Dimension Films, et. al*
2. *VMG Salsoul, LLC v. Ciccone, et. al*
3. Similarities and Differences
 - a. Similarities
 - i. Sound Recording
 - ii. Literal copying
 - b. Differences
 - i. Amount taken
 1. Bridgeport – seven seconds
 2. VMG Salsoul – .23 seconds (~1/28th of the quantity taken in Bridgeport)
 - ii. How used
 1. Bridgeport – 5 times (for total of 35 seconds)
 2. VMG Salsoul
 - a. 5 times (for total of ~1.25 seconds)
 - b. Modified
 - i. Truncated
 - ii. Transposed to different key
 - iii. Overlain with other sounds and effects
 - iv. Not isolated
 - iii. Discernibility
 1. Bridgeport – "...captures the listener's attention and creates anticipation of what's to follow,"

2. VMG Salsoul

- a. "...easy to miss..."
- b. "...do not sound identical [to the material sampled]..."
- c. "If the public does not recognize the appropriation, then the copier has not benefitted from the artist's expressive content. Accordingly, there is no infringement."

4. Analysis

a. Court Differences

- i. "Conservative" court vs. "Liberal" court?
- ii. Copyright Experience
 1. Ninth Circuit has historically been pro-copyright – now, no bright-line rule on this issue
 2. Sixth Circuit, because of Nashville, sees many © cases as well

b. 17 U.S.C. 114(b)

- i. Limitations on owner's rights, rather than expansion (VMG Court)
- ii. Plain reading of statute (Bridgeport Court)
- iii. Even a small portion of a sound recording has value (Bridgeport Court)
- iv. It is a physical taking, rather than an intellectual one (Bridgeport Court)
 1. Counterpoint (VMG Salsoul)
 - a. "physical taking" applies to other types of works as well, for this there *is* a de minimis exception
 - b. Theoretical difference doesn't mean Congress adopted a different rule
 - c. Economic view irrelevant (no "sweat of the brow")
 - v. Economy, for music industry and/or courts (Bridgeport Court)

c. Bridgeport Court's "justifications"

- i. Ease of enforcement
- ii. Market will control
- iii. Sampling is never accidental

d. Which interpretation furthers the Constitutional purpose of copyright?

5. A View of the Future

- a. Other circuits
- b. U.S. Supreme Court
- c. Congressional action

6. Q&A