Beyond an "Average Audience": Critical Race IP as a Justification for *De Minimis* Music Samples

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INTRODUCTION

In their song "Talkin' All That Jazz," hip-hop group Stetsasonic issued the following response to those who think digital music sampling, or incorporating a section of a preexisting sound recording into a new song,[1] is not an art form:

> A sample is a tactic
> A portion of my method, a tool
> In fact it's only of importance when I make it a priority
> And what we sample's loved by the majority.[2]

Unlike Stetsasonic, U.S. courts are of different minds about whether sampling is always legally significant. More specifically, the Sixth and Ninth Circuit Courts of Appeals are split on whether a *de minimis* exception applies to using unauthorized samples of copyrighted sound recordings. The *de minimis* exception protects use of unauthorized samples that courts deem trivial from infringement claims, figuring that "nobody would recognize the [sample] at all."[3] In *Bridgeport Music, Inc. v. Dimension Films*,[4] the Sixth Circuit reasoned that uses of samples are always important, holding that unauthorized samples are copyright infringement no matter the sample's triviality.[5] The court stated that artists must "[g]et a license or do not sample,"[6] a precedent with which the Ninth Circuit wholly disagreed. In *VMG Salsoul, LLC v. Ciccone*,[7] the Ninth Circuit held that the *de minimis* exception does apply to unauthorized samples of

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[1] *See* Artur Galocha, *'I've Heard that Sound Before!' How Sampling Influenced Hip-Hop*, WASH. POST (Aug. 24, 2023, 10:14 AM), https://www.washingtonpost.com/entertainment/2023/08/24/ive-heard-that-sound-before-how-sampling-influenced-hip-hop/.

[2] STETSASONIC, *Talkin' All That Jazz*, *on* IN FULL GEAR (Tommy Boy Records 1988); *Talkin' All That Jazz*, GENIUS, https://genius.com/Stetsasonic-talkin-all-that-jazz-lyrics [https://perma.cc/V56U-86HH].

[3] Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 AM. U. L. REV. 139, 141 (2018); *see* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880–83 (9th Cir. 2016). A *de minimis* exception is not the only legal recourse musicians can seek for copyright infringement. They can use fair use, a doctrine that allows for certain "unlicensed use[s] of copyright-protected works" regardless of the sample's size or triviality. *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Nov. 2023), https://www.copyright.gov/fair-use/ [https://perma.cc/GCE7-4A35]. They can also turn to copyright infringement's "substantial similarity" test and argue that using the sample is not infringement because the musician's use is not "substantially similar." *See infra* Section I.A; Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117–18 (9th Cir. 2018). While fair use and lack of substantial similarity are sound ways to object to copyright infringement, this Note will focus solely on the *de minimis* exception.

[4] 410 F.3d 792 (6th Cir. 2005).

[5] *See id.* at 802 ("[W]hen a small part of a sound recording is sampled, the part taken is something of value.").

[6] *Id.* at 801.

[7] 824 F.3d 871 (9th Cir. 2016).

copyrighted sound recordings.[8] A circuit split now lies in the wake of the decisions in *Bridgeport* and *VMG*, forcing copyright holders and musicians to forum shop, filing a lawsuit in whichever circuit best favors their opinion about whether the *de minimis* exception should apply to sound recordings.[9]

This Note supports the Ninth Circuit's holding that the *de minimis* exception applies to unauthorized samples and that this exception is justified by the economically motivated "average audience" test. This test dictates that when average audience members do not recognize samples of sound recordings, those samples are *de minimis* and thus not actionable copyright infringement.[10] Additionally, this Note argues that the *de minimis* exception should also apply to sound recordings based on a Critical Race Intellectual Property (IP) framework.

A Critical Race IP framework is particularly apt for evaluating this circuit split due to the racial dynamics underlying both cases. *Bridgeport* involved defendant N.W.A., a Black "vocally anti-authoritarian" group sampling music by George Clinton, another Black artist.[11] Record label Westbound Records owned Clinton's sound recording copyright;[12] consequently, the case was an unorthodox Black rap group defending itself against an established record company. Contrastingly, *VMG* involved defendant Madonna, a white pop star sampling Black soul musicians' work.[13] While the Black musicians' label represented them in court, the dynamic of their suit—being against a famous and influential white artist—differed significantly from *Bridgeport*'s. Professors Anjali Vats and Deidre A. Keller, noticing the racial difference between the cases, remarked that the defendants in both cases were using similarly unauthorized samples, but the white, more powerful artist's use in *VMG* was protected because the Ninth Circuit applied the *de minimis* exception to sound recordings.[14] Conversely, the Sixth Circuit denied the *de minimis* exception to the Black artists in *Bridgeport* for doing virtually the same thing.[15]

While these racial dynamics may be purely coincidental, consideration of their significance recalls sampling's inherently Black history. This Note argues that sampling's inherent Blackness implicates Critical Race IP as a useful framework for understanding *Bridgeport* and *VMG*'s impact on Black artists who sample and for revealing how the *de minimis* exception can aid Black artistry. Part I of this Note will provide key background information on the history of the *de minimis* exception, sampling's significance within the Black community, and Critical Race IP's core tenets. Part II will explain *Bridgeport* and *VMG*'s holdings,

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[8] *See id.* at 886.

[9] *See* Elyssa E. Abuhoff, Note, *Circuit Rift Sends Sound Waves: An Interpretation of the Copyright Act's Scope of Protection for Digital Sampling of Sound Recordings*, 83 BROOK. L. REV. 405, 425–26 (2017).

[10] The economic rationale behind this test is that a copyright holder's legally protected interest is in the revenue from the consumption of the sound recording. When the audience for a new sound recording, including the sampled material, does not recognize the sample, the copyright holder has not lost any potential revenue. *See VMG Salsoul*, 824 F.3d at 881 (citing Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004)). For more information about the "average audience" test, see *infra* Section I.A.

[11] *See* Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 630–31 (2019).

[12] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796 (6th Cir. 2005).

[13] *See* Rosenblatt, *supra* note 11, at 630–31. Some copyright scholars believe that Madonna's "Vogue" took large inspiration from Harlem's ballroom culture, a type of dance and performance pioneered by Black trans women and Black queer men. *See id.*

[14] *See* Deidre A. Keller & Anjali S. Vats, Bridging Race & IP: The Challenges and Potential of Utilizing Transdisciplinary Methods to Undo the Unbearable Whiteness of Intellectual Property 9–10 (July 29, 2019) (unpublished manuscript), https://commons.law.famu.edu/cgi/viewcontent.cgi?article=1038&context=faculty-books [https://perma.cc/VLC7-3T2T].

[15] *See id.*; Rosenblatt, *supra* note 11, at 631.

rationales, and impacts. Part III will argue that the d*e minimis* exception should apply to sound recordings because it can encourage Black artistry by (1) allowing Black artists to continue their collective approach via sampling without additional expenses and bureaucracy that stifle their creativity and (2) inducing Black artists to create new works, which supports copyright law's core purpose: promoting progress.

I. THEORETICAL UNDERPINNINGS: THE *DE MINIMIS* EXCEPTION, SAMPLING, AND CRITICAL RACE IP

Critical Race IP's relevance to the importance of applying the *de minimis* exception to sound recordings is built upon the history of the *de minimis* exception, sampling as a critical mode of operation for the Black community, and Critical Race IP's key principles. This Part will consider each of these three central pieces of background information.

A. HISTORY OF THE *DE MINIMIS* EXCEPTION

The applicability of the *de minimis* exception to sound recordings requires a basic understanding of first, music copyright law, and second, the tests for copyright infringement and the *de minimis* exception's relationship to copyright infringement. A fundamental concept of music copyright law is that two separate aspects of music can be copyrighted: the musical composition and the sound recording.[16] The musical composition is the written musical notation and lyrics, whereas the sound recording is the artist performing the composition.[17] This Note will focus on sound recording copyright because it is primarily at issue in digital music sampling cases. Unlike the musical composition copyright, which the work's composer or songwriter owns, the sound recording is owned by the performer featured in the recording, or the producers who "captured, manipulated, and/or edited" the sounds in the recording.[18] However, it is an industry-wide practice that performers and producers sign over their copyright to a record label.[19] Consequently, record labels like Bridgeport Music and VMG Salsoul are often plaintiffs in digital music sampling lawsuits, suing artists using unlicensed samples.

Under 17 U.S.C. § 106, the sound recording owner has the exclusive right to reproduce and create derivative works of their sound recordings.[20] A musician seeking to sample another's work can avoid infringing this exclusive right by receiving permission from the copyright holder and obtaining a license.[21] Without a license, legal liability for copyright infringement looms. To establish infringement, the plaintiff must prove that they own a valid copyright and that the defendant copied said copyright.[22] Proving "copying" requires that, first, the defendant copied in

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[16] *See Musical Works, Sound Recordings & Copyright*, U.S. COPYRIGHT OFF. (Feb. 2020), https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf [https://perma.cc/4PHR-NNHU].

[17] *See* 12 Nimmer on Copyright 802.8(A) (2024).

[18] *Author(s) of the Sound Recordings*, U.S. COPYRIGHT OFF., https://www.copyright.gov/eco/gram-sr/author.html#:~:text=If%20the%20sound%20recording%20was,who%20actually%20created%20the%20recording [https://perma.cc/YKE6-WG4Q] (last visited Apr. 4, 2023).

[19] *See id.*

[20] 17 U.S.C. § 106 (1)–(2).

[21] *See* U.S. COPYRIGHT OFF., *supra* note 16 (explaining that anyone "who wants to use a sound recording must either get a license from the copyright owner [or] use a statutory license"). For a deeper discussion of the licensing structure for digital music samples, see *infra* Section III.A.1.

[22] *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

fact; in sampling cases, this element is easily proven because a sample is an actual copy of a sound recording.[23] Second, the plaintiff must prove that the defendant's work is substantially similar to their copyrighted work.[24] Defendants can overcome copyright infringement claims by asserting fair use, a doctrine that allows unauthorized uses of copyrighted works for numerous purposes including criticism, research, or commentary.[25]

Defendants can also use the *de minimis* exception to circumvent actionable copyright infringement.[26] The *de minimis* exception is premised upon the general legal theory *de minimis non curate lex*, or "the law does not concern itself with trifles."[27] The theory is that if a legal harm is trivial, a court should not find that the "legal norm is violated . . . even if technically the relevant conduct does violate the norm."[28] While the *de minimis* exception has been applied consistently to copyright cases since the mid-1800s, *Bridgeport* and *VMG* set new and split precedents for whether the *de minimis* exception applies to sound recordings.[29] After holding that the *de minimis* exception applies to sound recordings, the Ninth Circuit applied the "average audience" test to determine whether the infringing content was a *de minimis* use.[30] The "average audience" test, as applied to a sampled sound recording, states that the sample is *de minimis* "only if the average audience would not recognize the [sample]."[31] While the "average audience" test is in and of itself a justification for the *de minimis* exception's application to sound recordings, the *de minimis* exception is also justified by thinking about the impact of the exception on digital music sampling and the Black community that pioneered the art form.

B. SAMPLING AS A CRITICAL MODE OF OPERATION FOR THE BLACK COMMUNITY

Digital music sampling is the copying and transplanting of sounds from an existing sound recording to a new sound recording.[32] Performers and producers can transplant these sounds without modifications, change the tempo or pitch, or even play the sound backward; all of these changes constitute sampling.[33] Music is considered a "deeply cumulative form of expression," and musicians rely heavily on sampling as part of that collective expression.[34] Sampling is a cumulative and collective practice in that it explicitly builds upon the work of musicians and performers by using a piece of their work to create something new. In that sense, sampling represents the collective efforts of multiple people. Additionally, while sampling is commonly

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[23] *See* KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 129 (2011).
[24] *See* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1118 (9th Cir. 2018); Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020).
[25] 17 U.S.C. § 107.
[26] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877 (9th Cir. 2016).
[27] Bracha, *supra* note 3, at 158.
[28] *Id.*
[29] *See VMG Salsoul*, 824 F.3d at 880–81.
[30] *See id.* at 880.
[31] *Id.* at 878 (quoting Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004)).
[32] *See* Michael G. Kubik, Note, *Rejecting the De Minimis Defense to Infringement of Sound Recording Copyrights*, 93 NOTRE DAME L. REV. 1699, 1704 (2018).
[33] *See VMG Salsoul*, 824 F.3d at 875.
[34] Rosenblatt, *supra* note 11, at 639 (quoting Rosemary Coombe, *Making Music in the Soundscapes of the Law*, in JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY, vii, ix (2006)).

used in hip-hop and rap music, artists across genres have subsequently adopted sampling as an art form because of the popularity and influence of those genres.[35]

Black culture, specifically Black musical culture, traditionally derives from collective creation. Black pop-cultural and literary theorists have come to identify this tradition as signifyin'.[36] Signifyin' is a critical mode of operation and rhetorical act found in African-American cultural products that involves a new creation building upon and or commenting on the previous one by using elements of the previous work.[37] Sampling is an important part of signifyin' because samples allow new generations of artists to use older generations' work to create music that "engag[es] with [the] history" of the people and culture that created it.[38] Younger artists copy or alter older music to juxtapose how things have changed with how they have stayed the same and to pay their respect to the origins of hip-hop and rap culture.[39] Jay-Z adopted this ethic in his 2017 song "The Story of O.J.," illustrating how his Blackness has shaped his life experience and subjected him to marginalization, despite his massive wealth.[40] In "The Story of O.J.," Jay-Z samples Nina Simone's 1966 classic "Four Women," a song discussing stereotypes of Black women within their own communities.[41] By using "Four Women," Jay-Z is signifyin'; he is prompting a deeper conversation about how Blackness and outside perceptions of it have impacted Black communities in the past and present.

Another example, among many, of how hip-hop and rap music sampling is part of signifyin' is the evolution of Jamaican reggae into today's rap music. Jamaican producer-engineers in the 1970s invented "versioning," the practice of "releasing different versions of an original recording . . . [by] sonically reinventing other elements of a recording through the use of various [technology]."[42] DJs played "versions" while "toasting" or rapping over the songs and then mixed them with other records; artists would then go on to copy these "versions" or mix them with another "version."[43] By building upon previous "versions" to create a new one, "versioning," like sampling, engages in the collective music-making that is part of signifyin'. Many of these Jamaican immigrants, including DJ Kool Herc, made their way to the South

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[35] *See* MCLEOD & DICOLA, *supra* note 23, at 7 ("'[W]ith the rise of disco, hip-hop, and electronic dance music, transformative appropriation has become the most important technique of today's composers and songwriters.' This statement encapsulates two key facts about sampling: it is commercially important and musicians in a wide variety of genres engage in it.").

[36] *See* Scott Ruff, *Signifyin': African-American Language to Landscape*, THRESHOLDS, Spring 2009, at 66, 69.

[37] *Id.* at 67. *See generally* HENRY LOUIS GATES JR., THE SIGNIFYING MONKEY (1988) (coining "signifyin'" as a double-voiced verb). While signifyin' is rooted in African-American culture, scholars have argued that the tool is reflective of and used by the African diaspora. *See* Ruff, *supra* note 36, at 66 (applying signifyin' to "African-diasporic aesthetic traditions" including visual art).

[38] MCLEOD & DICOLA, *supra* note 23, at 49.

[39] *See id.* at 98; Rosenblatt, *supra* note 11, at 645.

[40] *See* J'na Jefferson, *Songs that Defined the Decade: Jay-Z's 'The Story of O.J.,'* BILLBOARD (Nov. 21, 2019), https://www.billboard.com/music/music-news/jay-z-story-of-oj-songs-that-defined-the-decade-8543924/ [https://perma.cc/9B5Q-F6SZ]; Nicolas Vega, *Jay-Z Is Now Worth $2.5 Billion—Warren Buffet Once Said 'He's the Guy to Learn from,'* CNBC (Mar. 27, 2023, 2:10 PM), https://www.cnbc.com/2023/03/27/jay-z-billionaire-net-worth-increase.html [https://perma.cc/47NH-AAWE].

[41] *See* Jefferson, *supra* note 40; *Jay-Z's 'The Story of O.J.' Sample of Nina Simone's 'Four Women'*, WHOSAMPLED, https://www.whosampled.com/sample/509747/Jay-Z-The-Story-of-O.J.-Nina-Simone-Four-Women/ [https://perma.cc/L3YT-38XN] (last visited Mar. 28, 2024).

[42] MCLEOD & DICOLA, *supra* note 23, at 51–52.

[43] *Id.* at 52.

Bronx, New York.[44] DJ Kool Herc brought that sound system culture to his neighborhood, and thus, a part of hip-hop culture itself was born.[45]

Following the success of DJ Kool Herc in the early 1970s, the heyday of collective music made via sampling by Black artists occurred from approximately 1987 to 1992, an era otherwise known as the Golden Age of Hip-Hop.[46] During this era, Black hip-hop artists were sampling widely without fear of infringement because there was not much legal scrutiny over the use of samples.[47] Industry executives thought hip-hop was a fad, both not realizing the number of samples taken and not caring because hip-hop had not yet become a major source of revenue.[48] For example, seminal rap group Public Enemy made some of their early albums entirely from samples.[49] On their 1989 album *Fear of a Black Planet*, Public Enemy used eighty-one samples throughout the album, using as many as twelve samples per song.[50] Fans loved this album for its sample-dense sound.[51]

But legal trouble quickly came for Public Enemy and other artists who embraced sampling. In 1990, hip-hop trio De La Soul settled out of court with rock band The Turtles over a skit interlude in De La Soul's famous album *3 Feet High and Rising*, which includes a sample from a Turtles song.[52] A year later, the U.S. District Court for the Southern District of New York effectively ended the prolific sampling of the Golden Age of Hip Hop in *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*[53] by ruling that hip-hop artist Biz Markie's use of an unauthorized sample constituted copyright infringement.[54] These cases prompted the music industry to start a strict licensing scheme and led to cases like *Bridgeport*, thereby limiting artists' ability to create sample-heavy music and stifling Black artistry.[55] Critical Race IP can serve as a lens to interrogate how intellectual property law was designed and employed to create these ends by centering whiteness as the legal baseline.

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[44] *See id.*

[45] *Id.* at 51–52. DJ Kool Herc has been credited by Time Magazine, Entertainment Weekly, and Source Magazine as the founder of hip-hop. *See Bio*, DJ KOOL HERC, https://www.djkoolherc.com/copy-of-bio [https://perma.cc/47NH-AAWE] (last visited Apr. 4, 2024).

[46] MCLEOD & DICOLA, *supra* note 23, at 19.

[47] *Id.* at 132. In some cases, these artists did not even know that their sampling was copyright infringement. *See id.* ("Some of those first sampling cases, or those early records—whether it be De La Soul, Biz Markie, Public Enemy, and others—it wasn't that they were trying to be thieves or trying not to get caught. It was just like, we kind of didn't know.").

[48] *Cf. id.* at 27 (explaining that with the success of hip-hop albums in the late 1980s and early 1990s, "the music industry had begun to see the genre as not just an inner-city fad but as a solid source of sales revenue. With commercial validity also came increased scrutiny over samples.")

[49] *See id.* at 24.

[50] *Id.* at 24–25, 207.

[51] *See* Peter Watrous, *Public Enemy Makes Waves - and Compelling Music*, N.Y. TIMES (Apr. 22, 1990) https://www.nytimes.com/1990/04/22/arts/recordings-public-enemy-makes-waves-and-compelling-music.html (remarking that Public Enemy used so many layers of samples that the "music bec[ame] nearly tactile").

[52] *See* MCLEOD & DICOLA, *supra* note 23, at 131–32; Dan Charnas, *It's Time to Legalize Sampling*, SLATE (Mar. 3, 2023, 12:16 PM), https://slate.com/culture/2023/03/de-la-soul-streaming-legalize-sampling-rap.html [https://perma.cc/QU2P-R36S].

[53] 780 F. Supp. 182 (S.D.N.Y. 1991).

[54] MCLEOD & DICOLA, *supra* note 23 at 27, 132 (noting that Public Enemy rapper Chuck D said "[b]y 1994 . . . 'it had become so difficult to the point where it was impossible to do any of the type of records we did in the late 1980s, because every second of sound had to be cleared'").

[55] *See infra* Section II.A.

C. CRITICAL RACE IP'S KEY PRINCIPLES

Critical Race Theory (CRT), popularized by Professors Kimberlé Williams Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas in the late 1980s, was founded by and is a dynamic movement of scholars studying race as a "product of law, ideology and social relations."[56] Instead of adopting a stagnant definition, CRT defines itself as a method that uses intellectual principles to explain how racism persists and help eradicate racism's harmful effects.[57] Founded in the mid-2010s, Critical Race IP, like CRT, is a movement of scholars seeking to engage with how intellectual property law produces and amplifies race. [58] Professors Vats and Keller have clarified through their work that Critical Race IP scholars employ CRT principles to focus on the "racial . . . non-neutrality" of IP law, specifically copyright, trademark, unfair competition, patent, trade secret, and right of publicity law.[59]

Discussing race with IP is vital because the legal community has historically constructed IP under the "guise of equality and race neutrality."[60] This is true in a doctrinal sense, as exemplified by copyright law. There is nothing inherently racial about copyright law.[61] In theory, copyright law is race-neutral because it seeks to provide economic incentives for creating new works.[62] In practice, as this Note seeks to show, copyright law can limit Black artists' contributions because of a key principle of CRT: that the law constructs whiteness as its baseline.[63]

In her seminal article "Whiteness as Property," legal scholar Cheryl I. Harris chronicled how the law ratified "relative white privilege" as the "legitimate and natural baseline."[64] In this core CRT text,[65] Harris argues that whiteness is protected and given the same powers as property interests, namely the right to exclude and the power to control.[66] White people have historically had the power to create legal structures and doctrines that center themselves as the "reasonable person" in tests for infringement and legal violations, consequently excluding Black, Indigenous, and People of Color (BIPOC) people whose different perspectives could prompt different results. A Critical Race IP perspective adopts this principle, and it can be used to critique IP doctrines

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[56] Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1610 (2011); *see* Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxii (Kimberlé Crenshaw et al. eds., 1995); Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html.
[57] *See* Fortin, *supra* note 56.
[58] Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 740 (2018). Professors Vats and Keller with Professors Amit Basole and Jessica Sibley co-organized a biennial academic conference dedicated to enriching conversations about CRT and IP law. *Id.* at 736. *See generally* RACE + IP, https://raceipconference.org/ [https://perma.cc/RUD7-V6G5] (last visited Mar. 29, 2024).
[59] Vats & Keller, *supra* note 58, at 740.
[60] ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS 2 (2020).
[61] *See* Rosenblatt, *supra* note 11, at 597.
[62] *See* K. J. Greene, *Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 340 (1998).
[63] Carbado, *supra* note 56, at 1611.
[64] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).
[65] A few years after *Whiteness as Property* was published, Professors Crenshaw, Gotanda, Peller, and Thomas deemed it a key CRT text by including it in their anthology. *See generally* Cheryl I. Harris, *Whiteness as Property*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).
[66] *See* Harris, *supra* note 64, at 1714–15.

that adopt "reasonable person-esque" tests, such as the Ninth Circuit's "average audience" test.[67] The Ninth Circuit does not define who an "average audience" member is, but based on the law's construction of whiteness as the baseline, the law implicitly assumes a normative perspective that reflects the dominant cultural background of the United States' population—white.[68] In hip-hop sampling cases, a Black listener who is familiar with the genre may recognize a sample that a white listener without familiarity may not. But since the Black listener is likely not part of the court's conception of an "average audience" member, their perspective is discounted, and a sample might be ruled *de minimis* when the "average audience" member is not an actual average listener of the song.

According to a Critical Race IP framework, whiteness's power to control also manifests as IP doctrines that center traditional Western understandings of creativity.[69] Take for example, copyright law's protection of original works. Copyright's standard for originality is fairly simple: a work is original when it is "independently created by the author" and displays at least a "minimal degree of creativity."[70] The "independent creation of the author" component mandates protection of only those works created without influence from others and that draw inspiration from "raw" materials rather than finished works like published songs.[71] This hypocritical[72] originality requirement reflects an "individualistic, formalistic culture inherited from Europe."[73] It penalizes the collective nature of Black culture that creates pseudo-derivative works by explicitly copying other works through tactics like digital music sampling.[74]

A Critical Race IP perspective reveals that copyright law offers less protection to those who use unauthorized samples because it mistakes sampling's collective nature as mere nonconsensual copying. This perspective also illustrates how copyright law's approach to sampling limits Black artists' ability to engage in a historically Black practice. Adopting a Critical Race IP perspective when reading *Bridgeport* and *VMG* demonstrates how the *de minimis* exception can be an unlikely tool for helping Black artists embrace and engage in their historical practices while benefiting from copyright law.

II. *BRIDGEPORT* AND *VMG*: AT ODDS

This Part will explore the *Bridgeport* decision's holding, rationale, and impact. It will then explain the Ninth Circuit's opposite holding in *VMG*, its rationale regarding the applicability of a *de minimis* exception to sound recordings, and the case's impact.

A. *BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS*

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[67] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881 (9th Cir. 2016).

[68] According to the U.S. Census Bureau, white people (excluding those who also identify as Hispanic or Latino) make up 58.9% of United States population. *Quick Facts*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/S57L-SPDC] (last visited May 29, 2024).

[69] *See* Vats & Keller, *supra* note 58, at 758–59.

[70] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[71] *Id.* at 353; *see* Rosenblatt, *supra* note 11, at 608.

[72] Many artists are inspired by other artists or genres and yet their work is still "original" as defined by copyright law because they do not use a digital music sample and otherwise is "independently created by the author." *Feist Publ'ns, Inc.*, 499 U.S. at 344.

[73] Greene, *supra* note 62, at 360.

[74] *See* David Hesmondhalgh, *Digital Sampling and Cultural Inequality*, 15 SOC. & LEGAL STUD. 53, 54 (2006).

In 2005, the Sixth Circuit, home of music production hub Nashville, Tennessee, was tasked with deciding if a sample of George Clinton's sound recording "Get Off Your Ass and Jam" ("Get Off") was *de minimis* and consequently actionable copyright infringement.[75] "Get Off" was owned by record label Westbound Records, a plaintiff alongside Bridgeport Music.[76]At legal issue here was a three-note combination solo guitar riff in "Get Off" that was sampled by rap group N.W.A in the song "100 Miles and Runnin."[77] "100 Miles and Runnin" was part of the soundtrack for the film *I Got the Hook Up* (*Hook Up*), which the defendants made.[78] The riff's pitch was lowered, looped to last four seconds, and placed in five places throughout the song.[79] Using a version of the "average audience" test, the District Court for the Middle District of Tennessee held that the sample was *de minimis* and thus not actionable infringement.[80]

In reviewing the district court's opinion, the Sixth Circuit declined to use the "average audience" test to determine whether the sample was *de minimis*. The court instead held that no substantial similarity inquiry or *de minimis* inquiry applies when the defendant has "digitally sampled a copyrighted sound recording."[81] The court strictly read 17 U.S.C. § 114(b) as its justification for this holding, which states that sound recording copyright holders' reproduction and derivative work rights "do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds."[82] Since Congress included "entirely,"[83] the *Bridgeport* court reasoned that actionable copyright infringement occurs whenever someone, without permission, takes any portion of a sound recording and includes it in their song; this is because the sound recording owner is the only one with the right to 'sample' their own recording unless they give others permission to do so.[84]

Many legal academics, industry insiders, and musicians who heavily used samples in their work criticized the *Bridgeport* decision. The leading treatise on copyright law, *Nimmer on Copyright*, thought its legal basis was unsound.[85] Nimmer argued that *Bridgeport* was decided incorrectly because it improperly construed 17 U.S.C. § 114(b), ignoring the legislative history showing that 17 U.S.C. § 106, which outlines the reproduction and derivative work rights, has always been subject to a substantial similarity analysis, so it "defie[d] precedent for [the court] to blithely discard that requirement."[86]

Music industry insiders argued that *Bridgeport* made it more difficult for labels to clear samples.[87] The sample clearance process involves artists obtaining approval from the sound-

[75] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 795 (6th Cir. 2005).
[76] *Id.* at 796.
[77] *Id.*
[78] *Id.* at 795.
[79] *Id.* at 796.
[80] *See id.* at 798.
[81] *Id.*
[82] 17 U.S.C. § 114(b) (emphasis added).
[83] "Entirely" was not included in the Sound Recording Act of 1971, a precursor to this statute. *See Bridgeport Music, Inc.*, 410 F.3d at 800–01 (6th Cir. 2005) (citing 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")).
[84] *See Bridgeport Music, Inc.*, 410 F.3d at 801 (6th Cir. 2005); *see also* Bracha, *supra* note 3, at 147.
[85] *See* 4 Nimmer on Copyright § 13.03(A)(2)(b) (2024).
[86] *Id.*
[87] *See* MCLEOD & DICOLA, *supra* note 23, at 142.

recording owner to use a sample by negotiating a licensing fee.[88] Labels have adopted and further utilized digital technologies to detect minuscule samples, making them more diligent in ensuring their works are used only as authorized, licensed samples.[89] They also rapidly increased the price of sample licenses to increase their own profits.[90] Not only do these labels profit immensely from these licenses, but they also largely do not bear the financial burden of licensing fees when their own artists sample because "sampling licensing fees are extracted from a sampling artist's royalties."[91]

Musicians were left confused[92] and angry[93] by the decision. Non-profit music activism group Downhill Battle led an "online civil-disobedience demonstration" following *Bridgeport*, asking people to make songs exclusively with the "Get Off" three-note sample that Downhill Battle then made available digitally.[94] Despite frustrations with license prices and sample clearances' impact on creativity, musicians learned to deal with their new reality. Hip-hop producers like Timbaland and Pharrell Williams (in his duo The Neptunes) started avoiding sampling completely to increase the profits they received from their work.[95] While this proves that hip-hop is willing to adjust to the times, *Bridgeport* increased the difficulty for Black artists to make sample-dense works and practice signifyin' by doing what Public Enemy did: using numerous samples to further discussion about Black life and inequality.[96] Professor Elizabeth L. Rosenblatt remarked that sampling litigation resulted in hip-hop artists only having the money to use a few samples and consequently using them as mere "attention-grabbing 'hooks'" rather than as more intense remarks on politics and racism.[97]

B. *VMG SALSOUL, LLC V. CICCONE*

In 2016, eleven years after *Bridgeport*, the Ninth Circuit took a different stance from the Sixth, holding that the *de minimis* exception applies to sound recordings. At issue in *VMG* was a sample of a single horn hit from the song "Ooh I Love It (Love Break)" by Salsoul Orchestra.[98] The horn hit lasted .23 seconds.[99] VMG Salsoul, as a record label, owned the copyright in the sound recording of this song.[100] Pop artist Madonna and producer Shep Pettibone sampled the

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[88] *See* Karl Fowlkes, *The Art of Clearing a Sample: Deciding If It's Worth It and How to Actually Do It.*, MEDIUM, (Apr. 11, 2020), https://medium.com/the-courtroom/the-art-of-clearing-a-sample-deciding-if-its-worth-it-and-how-to-actually-do-e26fa56ad090 [https://perma.cc/FN2G-JZWR].
[89] *See* MCLEOD & DICOLA, *supra* note 23, at 142.
[90] *See id.* at 27.
[91] Rosenblatt, *supra* note 11, at 636.
[92] As put forward by Public Enemy member Hank Shocklee: "If I sampled a kick drum from someone, or I sampled a snare from someone, now you're saying that I have to get clearances for those tiny fragments?" MCLEOD & DICOLA, *supra* note 23, at 142.
[93] *See id.* at 143.
[94] *Id.; see Downhill Battle Music Activism*, DOWNHILL BATTLE, http://downhillbattle.org/ [https://perma.cc/ME55-W25Y] (last visited Apr. 4, 2024).
[95] *See* MCLEOD & DICOLA, *supra* note 23, at 188.
[96] *See* Watrous, *supra* note 51 (describing the use of samples in the album as "the sound of urban alienation, where silence doesn't exist and sensory stimulation is oppressive and predatory").
[97] Elizabeth L. Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEX. A&M J. PROP. L. 5, 17 (2020).
[98] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 879 (9th Cir. 2016).
[99] *Id.*
[100] *Id.*

horn hit for the hit song "Vogue."[101] Pettibone copied the horn hit directly and doubled it, truncated both, and overlaid it with other sounds.[102]

The Ninth Circuit held that the *de minimis* exception applies to sound recordings by first agreeing with Nimmer's argument about *Bridgeport's* holding: the substantial similarity test is an established aspect of all copyright infringement analysis, regardless of whether the infringing content is a sound recording.[103] Second, the court discussed 17 U.S.C. § 114(b), arguing that, based on a reading of the statute and the legislative history, the statute places an express limitation on the copyright holder's right to "the making or duplication of another sound recording."[104] Thus, the *VMG* court was unwilling to read the inclusion of "entirely" as an implicit expansion of copyright holder rights by saying that all copying (no matter how trivial) is copyright infringement. *VMG* built on this argument to conclude that because the *de minimis* exception has been consistently applied to copyright as an affirmative defense to infringement based on substantial similarity, *Bridgeport's* reading of 17 U.S.C. § 114(b) was too expansive, and the *de minimis* exception does apply to sound recordings.[105]

After establishing that the exception does apply to sound recordings, the Ninth Circuit then considered what test should be used to determine if the "Love Break" sample was a d*e minimis* use. The court used the "average audience" test, finding that because the average listener would not recognize the horn hit as Salsoul Orchestra's when listening to "Vogue," it was a trivial copyright infringement and thus not actionable.[106] *VMG*'s rationale for the average audience test is an economic one; the copyright holder's legally protected interest is in the revenue stream from consumption of the sound recording.[107] If those consuming the sound recording, including the sampled material, do not recognize the sample, then the copyright holder has not lost any potential revenue.[108]

Regarding *VMG*'s impact, its legal rationale addressed the concerns proposed by academics like Nimmer. The decision acts as a starting point to reform the sample clearance regime that music industry insiders remember as beginning in earnest after *Bridgeport.*[109] Since not all courts apply the *de minimis* exception to sound recordings, many musicians who sample are averse to making sample-dense music due to fear of litigation.[110] As discussed in Part III, all courts should apply the *de minimis* exception to unauthorized digital music samples. It allows all musicians to continue the sample-rich tradition of hip-hop music without fear of litigation, and,

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[101] *Id.* at 874.
[102] *See id.* at 879; Keith Caulfield, '*Vogue' Producer Shep Pettibone's First Interview in 20 Years: On Making a Madonna Classic & Why He Left Music Behind*, BILLBOARD (May 22, 2015), https://www.billboard.com/music/music-news/vogue-producer-shep-pettibone-interview-6575923/ [https://perma.cc/T7RM-E9LN].
[103] *See VMG Salsoul*, 824 F.3d at 880–81.
[104] 17 U.S.C. § 114(b); *see VMG Salsoul*, 824 F.3d at 883.
[105] *See VMG Salsoul*, 824 F.3d at 881. The Court also relied on their holding in *Newton v. Diamond* that the *de minimis* exception "*applies throughout the law of copyright*, including cases of music sampling." *Id.* (quoting Newton v. Diamond, 388 F.3d 1189,1195 (9th Cir. 2004)).
[106] *See VMG Salsoul*, 824 F.3d at 880.
[107] *See id.* at 881.
[108] *See id.*
[109] *See* Tamany Vinson Bentz & Matthew J. Busch, VMG Salsoul, LLC v. Madonna Louise Ciccone, et al*: Why a Bright Line Infringement Rule for Sound Recordings Is No Longer in Vogue*, VENABLE LLP (June 28, 2016), https://www.venable.com/insights/publications/2016/06/emvmg-salsoul-llc-v-madonna-louise-ciccone-et-alem [https://perma.cc/S93U-QAAR].
[110] *See* MCLEOD & DICOLA, supra note 23, at 196.

by allowing them to engage in a traditionally Black practice, it especially benefits Black artists who sample.

III. THE *DE MINIMIS* EXCEPTION ENCOURAGES BLACK ARTISTRY

The Ninth Circuit correctly decided in *VMG* that the *de minimis* exception applies to sound recordings not only because of the "average audience" test's economic rationale, but also because Critical Race IP justifies applying the exception. A Critical Race IP perspective reveals that copyright law offers less protection to unauthorized digital music sampling by considering these samples illegal copies. In doing so, copyright law limits Black artists' ability to engage in sampling, which is a historically Black practice. But a Critical Race IP point of view embraces the *de minimis* exception for unauthorized copyrighted sound recordings because it encourages Black culture's artistry.

As this Part will explore, the *de minimis* exception encourages Black artistry in two ways. First, the *de minimis* exception allows Black artists to continue their collective approach via sampling without additional expenses and bureaucracy that block their creativity. However, record labels may be averse to letting artists use *de minimis* samples, which could limit the exception's ability to encourage Black artistry. Second, the *de minimis* exception, because it embodies Critical Race IP ideals, induces Black artists to create new works while upholding copyright law's purpose of promoting progress.

A. THE EXCEPTION ENCOURAGES BLACK ARTISTRY BY AIDING SAMPLING'S COLLECTIVE APPROACH

This section proceeds in two subsections. The first subsection explains how, according to Critical Race IP, copyright law offers less protection for sampling by conceptualizing music without samples as original and music with samples as "theft." The legal and financial consequences of said "theft" force artists to either, as Professor Rosenblatt argued, "buy in" to copyright's norms or "step out of the power structure and economic opportunity [copyright] creates."[111] The first subsection then discusses how the *de minimis* exception allows all artists who sample, but especially Black artists, to avoid the problems that accompany "buying in" to and "stepping out" of copyright protection, such as additional costs and bureaucracy. The *de minimis* exception helps them pay less in sample licensing fees, utilize the trial-and-error creative process, participate in signifyin', and receive economic support from the record labels, which have historically under-compensated Black artists. The second subsection acknowledges a possible disadvantage of the *de minimis* exception regarding how it encourages Black artistry: record labels' reluctance to accept *de minimis* uses instead of sample clearance because the *de minimis* exception lacks a bright-line rule.

1. The Exception Allows Artists to Avoid Problems Associated with "Buying In" to and "Stepping Out" of Copyright Protection

Judge Duffy's opening line, "Thou Shall Not Steal," in *Grand Upright Music, Ltd. v. Warner Bros. Records*,[112] effectively labeled use of an unauthorized sample as "theft" and began

[111] Rosenblatt, *supra* note 11, at 598.
[112] 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

a legacy of other U.S. courts doing the same.[113] Copyright law and the music industry's licensing scheme have created numerous consequences for "stealing" another artist's work through a sample, including paying high licensing fees to use samples or having to remove the samples from their works. The *Bridgeport* court essentially posits that these penalties are appropriate because they discourage this "theft," but do not prevent it nor make it more difficult for artists to create more works.[114]

A Critical Race IP perspective on this issue takes the opposite stance. Labeling unauthorized samples as "theft" and offering those who use unauthorized samples no protection makes it more difficult for artists to make new works by forcing artists that sample to either "buy in" to copyright's norms or "step out of the power structure and economic opportunity [copyright] creates."[115] Without a *de minimis* exception, buying into copyright's norms requires that artists who sample must legally clear all their samples with the copyright holders, usually negotiating a licensing fee in exchange for the sample. These licensing fees can be extremely expensive. Sample licensing fees cost on average anywhere from $250 to $10,000, with most samples costing $1,000 to $2,000 per sample.[116] Based on the high cost of individual samples, the sample-dense songs that made albums like *Fear of a Black Planet* hits are nearly impossible to make for most musicians.[117]

As a result of the expense, "buying in" to copyright norms requires many musicians to reduce the number of samples used in each song, which can stifle the trial-and-error creative process and lessen the music's complexity.[118] Industry insiders advise that musicians must decide what samples they want to use in their work at the beginning of the process to avoid the upcharged licensing fees that accompany clearing a sample later in the process and add an "extra hassle in getting sample-based tracks released."[119] This process reduces the opportunity for trial and error with the samples; if a musician has already cleared a sample and decides they no longer want to use it, they risk losing the money and time they have already spent or potentially paying more to use a different sample. Since the sample clearance process makes it cost-prohibitive to use more than one or two samples, some producers and musicians argue that, compared to the sample-dense music of Public Enemy and De La Soul, hip-hop music sampling is not as complex anymore.[120]

Without a *de minimis* exception, "stepping out" of copyright law's power structure and opportunities to build revenue presents three major options for musicians who create sample-dense music: not using samples in their music, using samples that are available in the public domain that do not require clearance, or using samples but not clearing some or all of them.[121] By not sampling, musicians are not subjecting themselves to the financial constraints that using

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[113] *See* Anjali Vats, *The Racial Politics of Fair Use Fetishism*, 1 LSU J. SOC. JUST. & POL'Y 67, 68–69 (2022).
[114] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) ("Get a license or do not sample. We do not see this as stifling creativity in any significant way.").
[115] Rosenblatt, *supra* note 11, at 598.
[116] Jessica Mauceri, Note, *Why the Bridgeport Rule for Infringement of Sound Recordings Is No Longer Vogue*, 36 CARDOZO ARTS & ENT. L.J. 541, 555 (2018); *see* Fowlkes, *supra* note 88.
[117] *See* MCLEOD & DICOLA, *supra* note 23, at 14 (noting that, in the authors' estimation, "Public Enemy's *Fear of a Black Planet* . . . probably would *not* be released today without taking a significant loss on each copy sold").
[118] *See* MCLEOD & DICOLA, *supra* note 23, at 190–91.
[119] *Id.* at 155.
[120] *See id.* at 25 (Rapper MC Eyedea stated "'One of the reasons why we don't like most modern hip-hop is because [hip-hop musicians] can listen to [Public Enemy records], and their arrangements are so much more complex than *anything* today'" (second omission in original)).
[121] *See id.* at 196–97.

many samples causes. Also, as previously mentioned, hip-hop musicians have found ways to avoid using samples and still make interesting, popular music,[122] but not using samples implies a creative constraint: not engaging in the juxtaposition and social commentary that sampling uniquely creates.[123] This is especially harmful for Black artists, because these barriers to sampling can deny them the opportunity to participate in signifyin'.[124] Though artists can still use samples available in the public domain, this also imposes a creative constraint. Considering copyrighted works' duration, many sound recordings available in the public domain are nearly one hundred years old and, due to their age, might reflect outdated sentiments or styles that artists do not want to engage with.[125]

In choosing to use samples and not clearing some or all of them, musicians do not get to participate in the commercial recording system, where both major and independent record labels require musicians to clear all of their samples.[126] Participating in the commercial recording system can be lucrative enough to offset the expense of paying for every sample used, no matter the triviality, because these labels can provide increased revenues to their artists in the long term. This revenue comes from labels providing artists with a share of streaming music royalties, as well as arranging sponsored tours and selling merchandise, among other forms of support.[127] By refusing to pay for all the samples they use, musicians can no longer participate in the commercial recording process, meaning they must release their songs for non-commercial uses or through underground channels.[128]

Artists release their music non-commercially by making it free to download on the internet, which, though it may still constitute infringement, helps to provide these artists with a fair use defense because the work is non-commercial.[129] Alternatively, artists can also release their music through underground channels by selling their songs through small record stores and online retailers.[130] They choose not to license the samples used to avoid both payment for and detection of them.[131] Both of these processes lack the sort of support and increased opportunity for revenue that a record label can create. Though these artists may get to avoid the costs associated with sampling in the short term, they can lose out on increased revenue streams in the long term.

It is worth noting that "stepping out" of copyright protection is especially dangerous for Black artists when considering their history in the music industry. "History [suggests] that the social structure of our racially stratified society, along with structural elements of the copyright

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[122] *See id.* at 188.
[123] *See supra* Section I.B.
[124] *See supra* Section I.B.
[125] Works published or registered in the United States predating 1929 are now in the public domain due to copyright expiration. *See Copyright Services: Copyright Term and the Public Domain*, CORNELL UNIV. LIBR., https://guides.library.cornell.edu/copyright/publicdomain [https://perma.cc/L6QB-PWJ5] (last visited Apr. 23, 2024).
[126] *See* MCLEOD & DICOLA, *supra* note 23, at 197.
[127] *See id.* at 198; Glenn Peoples, *Who Gets Paid for a Stream?*, BILLBOARD PRO (Feb. 24, 2022). https://www.billboard.com/pro/music-streaming-royalty-payments-explained-song-profits/ [https://perma.cc/XH4C-Y2ZY]; Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 EUR J. CULTURAL STUD. 77, 84 (2013).
[128] *See* Rosenblatt, *supra* note 91, at 8–9 n.14 ("Although copyright law applies to both commercial and non-commercial releases, the creators of non-commercial rap and hip hop works (such as independently released mixtapes) often do not obtain licenses for their samples, and must seek licenses if and when they decide to shift those works to commercial release.").
[129] *See* MCLEOD & DICOLA, *supra* note 23, at 197–98.
[130] *See id.* at 198.
[131] *See id.*

system—such as the requirements of tangible (written) form, and minimal standard of originality—combined to deny Black artists . . . compensation . . . for their cultural contributions."[132] Further, reports suggest that Black artists may still receive lower royalty payouts than their white counterparts.[133] In 2020, record label and publisher BMG found that in four of their thirty-three catalogs, some of which date back to the mid-twentieth century, there were "statistically significant differences between the royalties paid to Black and non-Black artists."[134] Stepping outside of copyright adds to this legacy of mistreatment because doing so denies Black artists the lucrative economic opportunities that record labels facilitate, such as merchandising and commercial deals.[135] Thus, stepping out exacerbates the financial strain Black artists are already more likely to face based on a history of under-compensation.

With that context in mind, a *de minimis* exception allows all artists who sample, but especially Black artists, to avoid *some* of the problems that accompany both "buying in" to copyright laws and "stepping out" of that power structure. A *de minimis* exception helps musicians avoid some of the expensive costs associated with buying into the sample clearance process. For artists who make sample-dense music, a *de minimis* exception would likely reduce the amount spent on samples. They would not have to pay for the numerous small samples that comprise their work, but could instead reserve their funds for large, non-*de minimis* samples. Independent artists who use samples would receive the largest financial benefit from the *de minimis* exception, allowing them to continue the rich tradition of sampling in genres like hip-hop.[136] Additionally, the *de minimis* exception enables musicians to maintain the trial-and-error creative process they must surrender when buying into the extensive sample clearance system. Since a *de minimis* exception would potentially allow artists not to clear their samples, they would not have to license their samples at the beginning of making a work. Instead, the artists could try out many small samples until they achieve a sound they like, restoring the trial-and-error creative process.

A *de minimis* exception enables Black musicians who use sampling to participate in the tradition of signifyin' that they opt out of when they step out of copyright's legal structure by not using samples. More specifically, the *de minimis* exception gives musicians the freedom to use small samples to engage with and comment upon previous works, allowing for the evolution of hip-hop and rap music while staying true to African-American rhetorical acts.[137] Finally, the *de minimis* exception lets musicians who sample still participate in the commercial recording system and receive the financial revenue that a record label helps to provide. These musicians can use small samples legally without having to pay for them and without needing to seek record label approval. This sort of financial support is especially important for Black artists when considering the history of under-compensation for Black musicians. In these ways, applying the *de minimis* exception to sound recordings supports the existence of Black artistry.

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[132] Greene, *supra* note 62, at 342.
[133] *See* Jem Aswad, *BMG Finds Evidence of 'Discriminatory Contract Terms for Black Artists' in Four Catalog Labels*, VARIETY (Dec. 18, 2020, 6:55 AM), https://variety.com/2020/music/news/bmg-catalogs-racial-discrimination-1234865532/ [https://perma.cc/8HJS-4VXV]; Almuhtada Smith, *Black Artists Have Waited Long Enough for IP Reparations*, BLOOMBERG L. (Apr. 24, 2023, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBV5IFC000000.
[134] Aswad, *supra* note 133.
[135] *See* MCLEOD & DICOLA, *supra* note 23, at 198.
[136] *Cf.* Abuhoff, *supra* note 9, at 427–28 ("Eliminating the *de minimis* exception . . . would leave [the evolution of hip-hop and rap] to only those who have the money to advance these genres through sampling.").
[137] *See id.*

2. Record Labels May Be Anti-*De Minimis* Exception Because It Lacks a Bright-Line Rule

The advantage of the *de minimis* exception discussed above is premised upon the notion that record labels would accept the *de minimis* exception instead of sample clearance. However, it is possible that labels would still demand sample clearance even if the exception is consistently applied among courts because the *de minimis* exception for sound recordings lacks a bright-line rule. The "average audience" test involves a somewhat arbitrary standard for determining when a use is *de minimis*; it does not set a clear standard for the duration of a *de minimis* use.[138] Consequently, risk-averse labels may still require sample clearance because the "average audience" test's arbitrariness will help copyright holders claim that the use was not *de minimis*.

However, if legal scholars and courts were to consider a Critical Race IP justification for the *de minimis* exception, their acceptance of this perspective could potentially lessen the risk for these labels. This justification gives judges another reason to enforce the *de minimis* exception besides the "average audience" test in cases involving BIPOC artists; labels could have the additional, albeit marginal, assurance that courts would apply the *de minimis* exception to their case. If other circuits and lower courts were to adopt a Critical Race IP perspective as part of their rationale for applying the *de minimis* exception to sound recordings, this could help labels feel more confident in accepting *de minimis* uses and avoiding the sample-clearing process.

B. THE EXCEPTION ENCOURAGES BLACK ARTISTRY BY UPHOLDING COPYRIGHT'S PURPOSE

The *de minimis* exception should apply to sound recordings because, from a Critical Race IP perspective, the exception upholds copyright law's central goal of promoting progress by inducing Black artists to make new works. As articulated in the United States Constitution's Copyright Clause, copyright's mission is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries."[139] Barbara Ringer, former Register of Copyrights and one of the primary engineers of the Copyright Act of 1976, argued that one of the goals evident from the Copyright Clause is to "induce . . . artists to create and disseminate original works, and to reward them for their contributions to society."[140]

The *de minimis* exception induces artists to create new songs by allowing them to pay less for samples, reducing financial barriers to allow artists to use more samples in their work if they so choose. The *de minimis* exception specifically induces Black artists to create new works because the exception further enables their participation in the historically Black practice of signifyin' through sampling.[141] The opportunity for Black artists to sample while still receiving copyright protection can allow these artists to produce more works, accomplishing copyright's core purpose in the process.

CONCLUSION

[138] *Cf.* Mauceri, *supra* note 116, at 571 (suggesting a time limit as a possible reform for the *de minimis* exception).
[139] U.S. CONST., art. I, § 8, cl. 8.
[140] Barbara Ringer, *Authors' Rights in the Electronic Age: Beyond the Copyright Act of 1976*, 1 LOYOLA ENT. L. REV. 1, 2 (1981).
[141] *See supra* Section I.B.

In the circuit split between *Bridgeport* and *VMG*, the Ninth Circuit court decided *VMG* correctly because it applied a *de minimis* exception to unauthorized copyrighted sound recordings, specifically unauthorized digital music samples. The exception has primarily been justified by the "average audience" test's economic rationale, but arguably it is also justified from a Critical Race IP perspective.[142] A Critical Race IP perspective illustrates that the *de minimis* exception should apply to unauthorized digital music samples because the exception encourages Black artistry by supporting sampling's collective nature; the *de minimis* exception as applied to this situation lessens artists' legal fees, creates access to the trial-and-error creative process, provides Black artists the opportunity to engage in historically Black modes of operation like signifyin', and allows Black artists to have vital economic support from record labels. The *de minimis* exception also encourages Black artistry by prompting Black artists to create new works, which is one of copyright law's core goals.

While this Note views applying the *de minimis* exception as encouraging Black artistry and culture, this argument has potentially harmful implications. One can argue that using the *de minimis* exception to encourage Black cultural production associates a historically Black artform with being reliant on the use of insignificant "trifles" and thus disregards sampling as a complex and brilliant[143] practice. But sampling is far from being insignificant or trivial. From a Critical Race IP viewpoint, the *de minimis* exception has the capacity to support and encourage Black artistry, and thus, it is a successful, albeit imperfect, tool for achieving these ends. Though associating Black art with legal triviality is harmful, this harm is arguably outweighed by the *de minimis* exception's power to help Black art thrive under copyright protection.

The importance of this harm also lessens when considering that the de minimis exception not only encourages Black art but also acknowledges and honors its brilliance. Historically, "unequal copyright protection" has allowed the music industry to deny Black artists compensation and recognition for their work, disregarding Black music's brilliance.[144] In using the de minimis exception to help Black artists continue that brilliance through sampling, the legal community is using copyright law to honor this artistry. Doing so is a small but necessary step toward undoing the harm the music industry has caused Black artists and creating a more liberated world where Black artists and their contributions are compensated, championed, and celebrated.

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[142] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881 (9th Cir. 2016).

[143] Professor Vats has extensively discussed hip-hop and sampling as inherently brilliant practices. *See* Vats, *supra* note 113, at 74.

[144] Greene, *supra* note 62, at 367; *see* Vats, *supra* note 113, at 74.