

WHEN IS A LITTLE TOO MUCH?: THE DE MINIMIS
DOCTRINE AND ITS IMPLICATIONS FOR ONLINE
COMMUNICATION TOOLS

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INTRODUCTION

A picture is worth a thousand words. In today's technologically advanced world, this phrase could not be more accurate. The internet and its vast innovations over the years have opened up and expanded the ways we communicate and share information with others on the web and through our mobile devices. Instead of typing an email or a text message, we can respond with shortened graphic clips, such as GIFs, to express a wide range of emotions and ideas, or send a meme to share a funny joke with our friends. Because the internet has provided a nearly infinite source of content—from movies, shows, and other pop culture references—to form the basis of these GIFs and memes, these communication tools are being used and shared at an increasing rate. The desire to use these communication tools is not simply for efficiency's sake, but also because they enable a "richer, funnier, more contextual, more personalized communication than ever before."¹

However, what all of these communication tools have in common is that they often contain some range of copyrighted material. Without contemplating the potentially harmful implications of illegal copyright infringement, users around the United States post and share these images on a daily basis. This "copyright cloud" hangs over the internet as more and more users share GIFs, memes, and other similar graphics.² To illustrate, one of the most famous websites containing such content, Know Your Meme, has already received numerous infringement notice complaints regarding its memes.³ In order to protect cultural production and the free exchange of ideas, the legal system must carefully consider the impact copyright infringement suits have on this freedom of expression when applied to petty and minimal copying such as this.

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¹ Jeff John Roberts, *The Copyright Law Behind a \$600M Startup and Millennials' Favorite Form of Expression*, *FORTUNE* (Nov. 7, 2016), <http://fortune.com/2016/11/07/giphy-gifs-copyright/>.

² *Id.*

³ See Lorelei Laird, *That's Awkward! Do Memes Violate Copyright Law?*, 102 *A.B.A. J.*, Sept. 2016, at 10, 10.

De minimis non curat lex, better known for the shortened version “de minimis,” is a legal doctrine that is translated literally into “the law does not concern itself with trifles.”⁴ In addition to its application in contract, tort, civil, and criminal matters, the doctrine has maintained a complex application in copyright law.⁵ Specifically, a circuit split recently developed between the U.S. Court of Appeals for the Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films*⁶ and the U.S. Court of Appeals for the Ninth Circuit in *VMG Salsoul, LLC v. Ciccone*,⁷ regarding the application of the de minimis doctrine to digital sampling of copyrighted sound recordings. While the Sixth Circuit held that the de minimis doctrine did not apply to a digital sound recording of a guitar solo used in a rap song,⁸ the Ninth Circuit later rejected the Sixth Circuit’s reasoning and held that the de minimis doctrine was applicable not just to sound recordings, but to all copyright infringement cases.⁹ Ultimately, the Sixth Circuit’s decision to completely reject the de minimis doctrine in digital sampling could have some implications for copyright infringement cases in the future. Because the de minimis doctrine has always been applicable in copyright infringement cases up until the Sixth Circuit’s opinion in *Bridgeport Music*, the question remains as to whether the Sixth Circuit’s analysis will preclude future use of the de minimis doctrine in other copyright infringement cases. Therefore, although rejected by the Ninth Circuit, the Sixth Circuit’s reasoning could limit the de minimis doctrine to only certain categories of copyrighted works.

In the wake of the uncertainty created by the recent circuit split, this Comment argues that the Sixth Circuit’s approach was incorrect and that the Ninth Circuit correctly applied the de minimis doctrine. Because the de minimis doctrine discourages litigation of petty infringement cases and promotes creativity and innovation, the doctrine is an important legal theory that should be applied to all copyrighted works, especially works that are heavily influenced by technological innovations. Therefore, given the Ninth Circuit’s application of the de minimis doctrine to sound recording sampling, this Comment argues that the de minimis doctrine should also be applied to new communication tools, such as GIFs and memes, in order to protect the free exchange of ideas and promote future innovation in the way that users communicate with one another.

Part I of this Comment extensively describes the de minimis doctrine, including its use and importance in copyright law and the three common applications of the doctrine. Part I also describes the increasing popularity of communication tools on the internet, specifically GIFs and memes, and the

⁴ Andrew Inesi, Comment, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 947 (2006).

⁵ *Id.*

⁶ 410 F.3d 792 (6th Cir. 2005).

⁷ 824 F.3d 871 (9th Cir. 2016).

⁸ *Bridgeport Music*, 410 F.3d at 796, 798.

⁹ *VMG Salsoul*, 824 F.3d at 874, 887.

potential impact the increased use of these tools might have on copyright litigation. Part II examines the current circuit split between the Sixth and Ninth Circuits' applications of the de minimis doctrine. Specifically, Part II compares the Sixth Circuit's analysis to the Ninth Circuit's analysis and ultimately concludes that the Ninth Circuit is correct. In arguing that the Ninth Circuit's use of the de minimis doctrine should be the starting point for any analysis of a potential copyright infringement suit, this section looks to prior precedent, statutory interpretation, and policy implications of broad use of the de minimis doctrine. Due to the uncertainty that the Sixth Circuit's analysis creates for future copyright infringement cases, Part III argues that the Ninth Circuit's analysis of the de minimis doctrine should be applied in the same manner to new communication tools as it is to samplings of sound recordings. In light of this argument, Part IV outlines certain characteristics of the Ninth Circuit's de minimis analysis that could impact a copyright infringement case involving online communication tools. While not specifically describing how to apply the Ninth Circuit's analysis directly to GIFs and memes, Part IV provides some initial considerations for the courts.

I. BACKGROUND

A. *Copyright Infringement*

Copyrightable material is an “original work[] of authorship fixed in any tangible medium of expression.”¹⁰ Works of authorship include the following eight categories: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.¹¹ Thus, a wide variety of written, spoken, and performed expressions can be broadly protected under this provision.¹² To establish a prima facie case for copyright infringement, a plaintiff must show: “(1) ownership of a valid copyright; and (2) copying of constituent elements of the work” by the infringer that invades the rights of the original author.¹³ While proof of a valid copyright is often easily met, plaintiffs have difficulties proving the second element, copying.¹⁴ Copying is a factual question that is determined by either

¹⁰ 17 U.S.C. § 102 (2012).

¹¹ *Id.* § 102(a)(1)–(8).

¹² *Id.* (see accompanying Historical and Revision Notes, H.R. No. 94-1476).

¹³ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

¹⁴ Jason E. Sloan, *An Overview of the Elements of a Copyright Infringement Cause of Action—Part I: Introduction and Copying*, A.B.A. YOUNG LAW. DIV. (Jan. 27, 2012), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copy-right.html.

direct evidence or indirect, circumstantial evidence.¹⁵ Direct evidence typically includes witness testimony, photographs or videos of the defendant copying the material in question, or the defendant's own admission.¹⁶ Indirect evidence, such as similarities between the works and the defendant's overall access to the original copyrighted work, is far more highly contestable in court.¹⁷ Once factual copying is shown, the court then analyzes whether or not the allegedly infringing work is substantially similar to the constituent elements of the copyrighted work before proceeding on the merits of the case.¹⁸

B. *The De Minimis Doctrine*

The English courts first introduced the concept of *de minimis non curat lex* into the legal system in the sixteenth century.¹⁹ Although the phrase has been translated in various ways and used in several different areas of the law, the saying commonly stands for the proposition that “the law will not resolve petty or unimportant disputes.”²⁰ Even if a right has been violated, this right may not be actionable in the courts if the violation is so petty or frivolous that the court does not want to address the merits of the case.²¹ Beginning with the English courts, this doctrine was likely seen as way to promote “judicial economy” because the courts wanted to avoid litigating suits when the harm was insignificant.²² Instead, the English courts chose to save limited judicial resources for cases that involved a greater harm to the plaintiff.²³ As the record noted over one hundred years ago in *West Publishing Co. v. Edward Thompson Co.*,²⁴ “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.”²⁵ With this in mind, the *de minimis* doctrine is typically applied when the facts of the case show an exact copying, yet the court questions whether or not this

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* The Ninth Circuit's *de minimis* analysis is applied at this point in a copyright infringement case.

¹⁹ Inesi, *supra* note 4, at 948.

²⁰ *Id.* at 947–48.

²¹ Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. REV. 261, 262 (2006).

²² *Id.*

²³ *Id.* at 262–63.

²⁴ 169 F. 833 (E.D.N.Y. 1909).

²⁵ *Id.* at 861.

copying is substantial enough to cause harm to the plaintiff.²⁶ Courts and scholars alike view this decision as a “value judgment.”²⁷ Accordingly, this judgment is based on whether so much is taken that it substantially diminishes the value of the original or constitutes injurious appropriation of the author’s labor.²⁸

The de minimis doctrine, in addition to fair use²⁹ and independent creation,³⁰ is one of the most common doctrines used to protect defendants from liability in a copyright infringement suit.³¹ While the doctrine protects only the most trivial amount of copying, its importance in copyright law should not be underestimated. Recently, disputes of petty infringement violations have increased, as copyright holders are taking action to protect sole usage of their copyrighted work.³² The importance of the doctrine stems from the solution it provides: it combats the social costs of petty litigation without wasting any more of the courts’ or the litigants’ time and resources.³³ Additionally, the doctrine contravenes unnecessary enforcement of strict copyright laws that would ultimately hinder creativity and freedom of expression.³⁴ Because copyright law promotes creativity by rewarding copyright holders with exclusive rights for their creative work, the de minimis doctrine adds an additional boundary on how far this protection can and should go in order to protect the copyright holder without discouraging the creativity of other authors.³⁵

C. *The De Minimis Doctrine’s Differing Applications in Copyright Law*

Unsurprisingly, due to the long history of the de minimis doctrine in copyright law, the doctrine has been applied in different ways depending upon the type of copyrighted work in question and the jurisdiction where the

²⁶ Lee S. Brenner & Allison S. Rohrer, *The De Minimis Doctrine: How Much Copying Is Too Much?*, COMM. LAW., Spring 2006, at 9, 9.

²⁷ *Id.*

²⁸ *Id.* at 10 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][2]).

²⁹ Rich Stim, *What Is Fair Use?*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/> (last visited on Feb. 6, 2018) (defining fair use as “any copying of copyrighted material done for a limited and ‘transformative’ purpose, such as to comment upon, criticize, or parody a copyrighted work”).

³⁰ HAROLD ERIC PAHLCK, *Independent Creation Defense and Patent Law*, in LAW SCHOOL STUDENT SCHOLARSHIP 282, at 4–5 (Seton Hall Law, 2013) (defining independent creation as a rebuttal to a copyright infringement claim based on the argument that the defendant did not copy the work but created the work completely on her own).

³¹ Cromer, *supra* note 21, at 266.

³² Inesi, *supra* note 4, at 977–78.

³³ *Id.* at 946, 957.

³⁴ *Id.* at 946, 966.

³⁵ *Id.*

copyright infringement suit is brought.³⁶ Consequently, prior precedent does not provide a clear and specific legal framework that can be evenly applied to all copyright infringement suits. Instead, much of the case law on the subject only clarifies the specific factors that influence the application of the de minimis doctrine.³⁷ What further complicates the doctrine's use is that many disputes that could be considered de minimis are dismissed outright without the court even documenting its reasoning.³⁸ Further confusion results because courts often use the doctrine in two different ways.³⁹ First, the doctrine is used under the full definition of the term, *de minimis non curat lex*, as a general defense to minor legal violations.⁴⁰ Secondly, the doctrine is used informally by the literal meaning of de minimis—"trifling unimportant, or insufficient"—and is thereafter applied as an adjective to describe the *type* of claim brought.⁴¹

The de minimis doctrine has typically been applied in three different ways in copyright law: in connection with the substantial similarity analysis, in connection with the fair use doctrine, and on its own.⁴² Generally, the doctrine focuses on either the amount of the work infringed or on the benefit received by the copier compared to the harm to the original author.⁴³ First, the de minimis doctrine is applied in correlation with the substantial similarity test. This test outlines that a copyright infringement is not actionable if it falls below the threshold of a "substantial similarity," meaning no infringement occurred if the copyright is de minimis.⁴⁴ The substantial similarity test originates from the two prima facie requirements necessary for every copyright infringement case.⁴⁵ Under the second requirement of copying, the plaintiff not only has to show an actionable copying, but this copying must be considered substantially similar to the original work.⁴⁶ Therefore, a use is considered substantially similar only when the amount copied is greater than de minimis.⁴⁷ An example of this use of the doctrine was presented in *Neal Publications v. F & W Publications, Inc.*,⁴⁸ in which the court found that the defendant's copying of only a few words and pieces from the plaintiff's

³⁶ See *id.* at 960–62.

³⁷ *Id.* at 949.

³⁸ Inesi, *supra* note 4, at 950.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997); Cromer, *supra* note 21, at 266; Inesi, *supra* note 4, at 960.

⁴³ Cromer, *supra* note 21, at 266.

⁴⁴ See Inesi, *supra* note 4, at 960–61; see also Cromer, *supra* note 21, at 266 (citing *Ringgold*, 126 F.3d at 74–75).

⁴⁵ Inesi, *supra* note 4, at 960.

⁴⁶ *Id.* at 960–61.

⁴⁷ *Id.* at 961.

⁴⁸ 307 F. Supp. 2d. 928 (N.D. Ohio 2004).

human resource manual was de minimis and therefore not substantially similar.⁴⁹ This use was also applied in *Newton v. Diamond*,⁵⁰ where the Ninth Circuit held that the sampling of three notes by a musical group, the Beastie Boys, was de minimis and therefore not substantially similar.⁵¹ In reaching this conclusion, the court analyzed the quantitative and qualitative importance of the sample to the plaintiff's original work.⁵² Additionally, the court focused on whether or not the average audience could recognize that the three notes were taken from the original work, and ultimately the court decided the question in favor of the defendant.⁵³ Overall, these two examples show that courts typically observe the amount of the author's original work that was taken, rather than the amount in the defendant's work, to determine whether another work is substantially similar to the original.⁵⁴

Secondly, the de minimis doctrine is used in conjunction with the fair use analysis.⁵⁵ The fair use analysis has four specific factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the market.⁵⁶ The use of de minimis in a fair use analysis often depends on the court. De minimis can either be used as a descriptive term to describe petty or unimportant use, or as a legal doctrine in combination with the fair use doctrine.⁵⁷ Regardless, courts will often apply the de minimis analysis to either the third factor or the fourth factor of the fair use test.⁵⁸ For example, in *Amsinck v. Columbia Pictures Indus.*,⁵⁹ the U.S. District Court for the Southern District of New York addressed whether the defendant's use of the plaintiff's artwork in the background of the defendant's film was substantial enough to render a copyright infringement.⁶⁰ The plaintiff's artwork was portrayed in the background throughout several scenes of the film, totaling one minute and thirty-six seconds of visibility altogether.⁶¹ While the court ultimately ruled no actionable copying occurred, the court also went to great lengths to demonstrate that the use would still have been protected under a fair use analysis.⁶² Specifically, the court said the de minimis doctrine should

⁴⁹ *Id.* at 930–32.

⁵⁰ 388 F.3d 1189 (9th Cir. 2004).

⁵¹ *Id.* at 1195–96.

⁵² *Id.*

⁵³ *Id.* at 1196.

⁵⁴ Inesi, *supra* note 4, at 962.

⁵⁵ *Id.* at 966–67.

⁵⁶ *Measuring Fair Use: The Four Factors*, STANFORD UNIVERSITY LIBRARIES, <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Oct. 26, 2016).

⁵⁷ Inesi, *supra* note 4, at 967.

⁵⁸ *Id.* at 966–67.

⁵⁹ 862 F. Supp. 1044 (S.D.N.Y. 1994).

⁶⁰ *Id.* at 1047–48.

⁶¹ *Id.* at 1046.

⁶² *Id.* at 1048–50.

be applied in conjunction with the fourth element of the fair use test to show that the harm to the plaintiff was trivial and therefore did not arise to copyright infringement.⁶³ Another district court invoked the de minimis doctrine in combination with the fair use test in *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*⁶⁴ It stated that the substantial similarity and de minimis tests are “fundamentally related, and wholly encompassed within the fair use affirmative defense.”⁶⁵ Therefore, the court used de minimis in relation to the fourth factor of the fair use test to declare that the harm on the plaintiff was de minimis because the plaintiff had not provided compelling evidence that the use substantially harmed the original literature.⁶⁶

Lastly, the courts have applied the de minimis doctrine by itself. While infrequently used, most courts recognize that the de minimis doctrine is an independent protection against a copyright infringement suit that is available even if the court does not explicitly acknowledge its application.⁶⁷ For example, in *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*,⁶⁸ the court solely relied on the de minimis doctrine to dismiss the case.⁶⁹ The defendant was accused of using an illustration from the plaintiff’s copyrighted product on the defendant’s blister card.⁷⁰ However, the blister card was only used within the defendant’s company and was never distributed publicly.⁷¹ Without turning to any other test or analysis, the court dismissed the case based solely on the trivial nature of the copyright infringement.⁷²

D. *New Communication Tools on the Internet*

Since the advent of online and mobile communication, the way we communicate with one another has changed with the invention of new applications and social media forums. In the beginning of online and mobile communication, many users sent simple emoticons, or keyboard symbols, to create and send various images such as smiley faces.⁷³ More recently, emojis, or small digital icons, have also been used to communicate feelings, ideas, and

⁶³ *Id.* at 1049.

⁶⁴ 953 F. Supp. 2d 701 (N.D. Miss. 2013).

⁶⁵ *Id.* at 707.

⁶⁶ *Id.* at 710–11.

⁶⁷ Inesi, *supra* note 4, at 970.

⁶⁸ 668 F.2d 699 (2d Cir. 1982).

⁶⁹ *See id.* at 702–03.

⁷⁰ *Id.* at 702.

⁷¹ *Id.*

⁷² *Id.* at 703.

⁷³ Hailey Heishman, *Visual Storytelling Through Emojis, Memes, & GIFs: Learn How to Use Them to Connect with Your Audience on a Deeper Level*, LEAPAGENCY.COM (2016), <http://www.leapagency.com/blog/logic-magic/2016/05/09/visual-storytelling-through-emojis-memes-gifs-learn-how-to-use-them-to-connect-with-your-audience-on-a-deeper-level>.

emotions to others.⁷⁴ Today, online and mobile communication allows users to not only speak to others through simple emoticons or emojis, but also through various images and interactive graphics, such as memes and GIFs.⁷⁵

1. Internet Memes

The term “meme” refers to “the rapid uptake and spread of a particular idea presented as a written text, image, language ‘move,’ or some other unit of cultural ‘stuff.’”⁷⁶ These memes have been created and shared over the Internet, sparking the term “internet meme.”⁷⁷ More simply defined, internet memes are pieces of culture that gained influence and popularity through their rapid transmission online.⁷⁸ Internet memes first gained popularity in 2007 when the KnowYourMeme.com website was launched by Kenyatta Cheese.⁷⁹ Cheese had the idea to create an internet database with the latest jokes and cultural trends all in one place.⁸⁰

What makes a meme so memorable is the underlying content, which causes the meme to be shared repeatedly from person to person.⁸¹ Often, a particular meme is repeatedly shared when it invokes a form of mainstream “familiarity and relatability with the individuals exposed to it,” which influences one person to share it with others.⁸² Accordingly, something is considered a meme when it has been shared so many times on the internet that it becomes recognizable to the average internet user.⁸³ Memes often express cultural trends, including “political views, [social] norms and [known] habits.”⁸⁴ For example, one common group of memes entitled “First World Problems” displays various images commenting about the complaints and inconveniences of only those individuals who live in wealthy countries.⁸⁵

⁷⁴ Samantha Karas, *What Is an Emoji? ‘Face with Tears of Joy’ Is World’s Most Popular Emoticon*, IBTIMES.COM (Jan. 6, 2017), <http://www.ibtimes.com/what-emoji-face-tears-joy-worlds-most-popular-emoticon-2470964>.

⁷⁵ Heishman, *supra* note 73.

⁷⁶ Michele Knobel & Colin Lankshear, *Online Memes, Affinities, and Cultural Production*, in A NEW LITERACIES SAMPLER 199, 202 (Michele Knobel & Colin Lankshear eds., 2007).

⁷⁷ Patrick Davison, *The Language of Internet Memes*, in THE SOCIAL MEDIA READER 120, 122 (Michael Mandiberg, ed., 2012).

⁷⁸ *Id.*

⁷⁹ Kyle Chayka, *How the Meme Went Mainstream*, THE DAILY DOT (Oct. 24, 2014), <http://www.dailydot.com/unclick/how-the-meme-went-mainstream-kyle-chayka/>.

⁸⁰ *Id.*

⁸¹ Knobel & Lankshear, *supra* note 76, at 202.

⁸² Caleb Tan, *The Significance of Internet Memes*, ALL THE MEMES (Oct. 11, 2012), <https://allthememes.wordpress.com/2012/10/11/the-significance-of-internet-memes/>.

⁸³ Ronak Patel, Comment, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. R. 235, 250 (2013).

⁸⁴ Tan, *supra* note 82.

⁸⁵ *Id.*

Furthermore, what is so different about memes is that these images are often created and distributed on the internet anonymously.⁸⁶ This anonymity contributes in part to the rapid success and use of internet memes because they can be shared and altered without any true identification of the original creator.⁸⁷

2. GIFs (Graphics Interchange Format)

GIFs, or graphics interchange format, are usually soundless and made of small, graphic clips taken from typically a second-long snippet of various copyrighted materials of movies, TV shows, and other videos.⁸⁸ GIFs usually replay the same animated image in a loop, often with a short expression added at the bottom of the graphic that either quotes the image above or addresses the feeling the image is intended to convey.⁸⁹ As compared to the original image or video, GIFs are usually much smaller, shorter, and lesser in quality.⁹⁰

GIFs can express simple to complex emotions in just the click of a button.⁹¹ Similar to memes, GIFs can be sent as text messages, attached to an email, posted on Facebook, or listed on a blog post.⁹² According to journalist Mike Isaac of the *New York Times*, a GIF “can be an even more effective form of visual communication than [an] emoji because of the movement in an animation that provides a greater range of expression.”⁹³ Furthermore, GIFs are captivating because they constantly play on a loop without needing to press a “play” button and waiting for the graphic to load.⁹⁴ GIFs additionally are increasingly popular because the images and graphics displayed are often from things media users have already seen, and therefore, people can more easily identify with them.⁹⁵

⁸⁶ Davison, *supra* note 77, at 120.

⁸⁷ *Id.* at 132.

⁸⁸ Shannon Doyne, *Can a GIF Work Better Than Words?*, THE N.Y. TIMES (Sept. 21, 2015), http://learning.blogs.nytimes.com/2015/09/21/can-a-gif-work-better-than-words/?_r=0.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Mike Isaac, *For Mobile Messaging, GIFs Prove to Be Worth at Least a Thousand Words*, N.Y. TIMES (Aug. 3, 2015), <http://www.nytimes.com/2015/08/04/technology/gifs-go-beyond-emoji-to-express-thoughts-without-words.html>.

⁹³ *Id.*

⁹⁴ Mihir Patkar, *GIFs, the Language of the Web: Their History, Culture, and Future*, MAKEUSEOF.COM (Jan. 27, 2015), <http://www.makeuseof.com/tag/gifs-language-internet-history-culture-art-future/>.

⁹⁵ *Id.*

In recent years, GIFs have gained increasing popularity on social media websites including Tumblr, Facebook, and Twitter.⁹⁶ In 2015 alone, Tumblr, a blogging website, recorded that approximately twenty-three million GIFs were posted daily to its website.⁹⁷ Furthermore, GIFs have spread to mobile devices with the help of technology companies like Riffsy, which creates GIF keyboards for smartphones, and Giphy, which provides a searchable database of various GIFs.⁹⁸ GIF powerhouses like Giphy have tremendous influence over the collection and distribution of GIFs online. Giphy boasted that it served over one million GIFs to over 100 million users on its website in 2016 alone. Although Giphy has no revenue, the company is worth approximately \$600 million.⁹⁹

In the summer of 2014, Apple Inc. created technology in its iOS software that made it easier to insert GIFs into messages, increasing the number of GIF companies and applications.¹⁰⁰ Dating applications soon followed, including GIFs in their online messaging devices.¹⁰¹ Even the House Judiciary Committee recently used a series of GIFs from popular teenage movies to express the Committee's criticism of President Barack Obama's immigration law enforcement.¹⁰² Although the list has since been removed from the House Judiciary website, GIFs have crept into other settings as well. In early 2015, a *The Daily Dot* reporter reached out to Google for a comment regarding the relaunching of a streaming service on YouTube.¹⁰³ Instead of responding "no comment," Google sent back a GIF of a little girl shaking her head and throwing her arms up.¹⁰⁴

As a result of the popularity of GIFs and memes, both have become increasingly common ways for individuals to communicate with others online and over mobile devices.¹⁰⁵ However, with the expansion of the use of GIFs and memes comes the increasing threat of litigation over the copyrights

⁹⁶ Michelle Panzironi, *Animated GIFs and Fair Use: What Is and Isn't Legal, According to Copyright Law*, FORBES (Apr. 30, 2016), <http://www.forbes.com/sites/propointgraphics/2016/04/30/animated-gifs-and-fair-use-what-is-and-isnt-legal-according-to-copyright-law/#6a12047166af> (noting that Twitter, Facebook, and Tumblr have all integrated GIF-search capabilities into their mobile apps and messaging platforms).

⁹⁷ *Id.*

⁹⁸ Isaac, *supra* note 92.

⁹⁹ Roberts, *supra* note 1.

¹⁰⁰ Isaac, *supra* note 92.

¹⁰¹ Roberts, *supra* note 1.

¹⁰² Roque Planas, *Republicans Try to Sell Border Security Bills with 'Little Mermaid,' Jennifer Lawrence GIFs*, HUFFINGTON POST (Mar. 18, 2015), http://www.huffingtonpost.com/2015/03/18/house-judiciary-committee_n_6897190.html.

¹⁰³ Louise Ridley, *Google Sends Journalist a Sassy GIF Instead of a Comment for His Article*, HUFFINGTON POST (Mar. 26, 2015), http://www.huffingtonpost.co.uk/2015/03/26/google-sends-gif-instead-no-comment-journalist_n_6945944.html.

¹⁰⁴ *Id.*

¹⁰⁵ Doyne, *supra* note 88.

of the underlying pictures, graphics, and videos that these GIFs and memes portray.

II. THE DE MINIMIS SPLIT

A. *The Sixth Circuit*

In 2005, the Sixth Circuit heard argument in *Bridgeport Music, Inc. v. Dimension Films*.¹⁰⁶ The plaintiffs, three music recording studios, all claimed that the defendant, No Limit Films, used a sample from the sound recording of “Get Off Your Ass and Jam” in the rap song “100 Miles and Runnin’.”¹⁰⁷ In particular, the plaintiffs alleged that the song “100 Miles and Runnin’” contained a two-second sample from a guitar solo “riff” used in “Get Off Your Ass and Jam.”¹⁰⁸ The plaintiffs alleged that the defendant copied the guitar solo sample, lowered the pitch, and placed the piece on a loop that extended to sixteen beats.¹⁰⁹ The plaintiffs further claimed that the guitar solo sample was included five different times during “100 Miles and Runnin’.”¹¹⁰

The plaintiffs appealed the district court’s decision granting summary judgment to the defendant based on the de minimis doctrine. Among other claims, the plaintiffs argued on appeal that a “substantial similarity” and “de minimis inquiry” should not be applied “when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”¹¹¹ In other words, the plaintiffs claimed that the substantial similarity analysis in combination with the de minimis test did not apply at all when something, no matter how trivial, was in fact directly copied from an original work. Agreeing with the plaintiffs, the Sixth Circuit reversed the district court’s grant of summary judgment.¹¹²

The Sixth Circuit first outlined five clarifications of its holding that are relevant to the de minimis analysis: (1) the analysis applied only to sound recordings and differed from the analysis of all other works of authorship; (2) the appropriate definition of “digital sampling” was the common definition from the recording industry;¹¹³ (3) because of the court’s limited knowledge of sound recordings, the analysis was limited in scope to digital

¹⁰⁶ 410 F.3d 792 (6th Cir. 2005).

¹⁰⁷ *Id.* at 795.

¹⁰⁸ *Id.* at 796.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 798.

¹¹² *Bridgeport Music*, 410 F.3d at 805.

¹¹³ Sampling is defined as “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.” *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 875 (9th Cir. 2016) (citing *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004)).

sampling of a sound recording and left open the possibility for other courts' extending the court's analysis further; (4) technological advances have led to increasing instances of digital sampling in the music industry; and (5) because of the problem of digital sampling, the industry would be better served to have a bright-line test to prohibit any type of copying and to add clarity to the qualifications of copyright infringement.¹¹⁴

The Sixth Circuit began its analysis by looking directly to the text of 17 U.S.C. § 114(b) and the specific rights of 17 U.S.C. § 106 mentioned in 17 U.S.C. § 114(b).¹¹⁵ The court relied on the following portion of 17 U.S.C. § 114(b): “[t]he 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.”¹¹⁶ The court stated that this provision should be read to mean that any sampled recording taken from the original sound recording could be defined as “rearranged, remixed, or otherwise altered in sequence and quality.”¹¹⁷ Therefore, any recording sample is copyright infringement upon the author's right to prepare a derivative work.¹¹⁸ Further, the exclusive rights classified under 17 U.S.C. § 106(1)–(2)¹¹⁹ “do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds.”¹²⁰ The court reasoned that this provision should be interpreted to mean that anyone can “imitate or simulate” a creative work in a sound recording as long as an actual copy of the recording is never made.¹²¹ Therefore, the court applied a literal, textual reading to conclude that the word “entirely” meant that anyone who sampled another's song recording, rather than independently creating or recreating the recording, infringed on that owner's original, copyrighted material.¹²² Overall, the court held that anyone who sampled another's song recording infringed on the original author's exclusive rights and, therefore, should be liable for copyright infringement regardless of how small or incidental the copying was.¹²³ The court believed this reading provided the

¹¹⁴ *Bridgeport Music*, 410 F.3d at 798–99.

¹¹⁵ *Id.* at 800.

¹¹⁶ *Id.* (alteration in original).

¹¹⁷ *Id.* at 803 n.18.

¹¹⁸ *Id.*

¹¹⁹ 17 U.S.C. § 106(1) (2012) (stating “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; [and] (2) to prepare derivative works based upon the copyrighted work”).

¹²⁰ *Bridgeport Music*, 410 F.3d at 800 (emphasis added).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 801.

bright-line test the recording industry needed: “Get a license or do not sample.”¹²⁴

The court also addressed several arguments for why a bright-line test was necessary in the context of sound recordings. While the court noted that strict liability for sound recording infringement might stifle creativity, the court ultimately concluded that sampling cannot be considered “creative” when it directly involves copying a piece of music.¹²⁵ Therefore, artists do not create something on their own when “[they] know [they] are taking another’s work product” and using it as their own.¹²⁶ Furthermore, an artist is free to independently recreate the sounds in a particular recording as long as he or she does not directly copy it.¹²⁷ The court suggested that because sampling has become so popular, especially in the rap and hip hop industries, artists should seek a license to avoid copyright infringement for sampling another’s work.¹²⁸ If licensing requirements become incredibly burdensome and stifle creativity, the court suggested that recording artists should instead work out particular guidelines and licensing fees to limit this burden.¹²⁹ The court further said a substantial similarity or a de minimis analysis should never be used in a sound recording infringement case because whenever anything from a sound recording is copied, something of value is taken from the original work.¹³⁰ Lastly, the court used the differentiation between a physical taking and an intellectual taking to demonstrate the importance of such a strict standard for sound recording samplings.¹³¹ In this case, the sampling was a physical taking,¹³² rather than an intellectual taking,¹³³ because it involved copying someone else’s work either to provide some additional benefit to the copier, such as saving money or adding a new sound to the copier’s work.¹³⁴ Because sampling is a physical taking, the court reasoned that it was much more harmful to the original artist’s work than an intellectual taking.¹³⁵

¹²⁴ *Id.*; see also Lesley Grossberg, *A Circuit Split at Last: De Minimis Exception*, 27 INTEL. PROP. LITIG. 29 (2016).

¹²⁵ *Bridgeport Music*, 410 F.3d at 800.

¹²⁶ *Id.* at 801.

¹²⁷ *Id.*

¹²⁸ *Id.* at 801.

¹²⁹ *Id.* at 804.

¹³⁰ *Id.* at 801–02.

¹³¹ *Bridgeport Music*, 410 F.3d at 802.

¹³² Michael Suppapola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTEL. PROP. L.J. 93, 120 (2006) (describing a physical taking as one “that merely saves cost” on producing something).

¹³³ *Id.* (describing an intellectual taking as “necessary to further the goals of copyright”).

¹³⁴ *Bridgeport Music*, 410 F.3d at 802.

¹³⁵ *Id.*

B. *The Ninth Circuit*

On June 2, 2016, the Ninth Circuit responded directly to the Sixth Circuit's decision with its own analysis in *VMG Salsoul, LLC v. Ciccone*.¹³⁶ The Ninth Circuit not only split from the Sixth Circuit's decision in *Bridgeport* but also directly addressed the Sixth Circuit's opinion and stated why it was wrong to disregard the de minimis doctrine in application to sound recordings.¹³⁷ In *VMG Salsoul*, the plaintiff copyright holder alleged that the producer of "Vogue," a song performed by recording artist Madonna Louise Ciccone (better known simply as Madonna), copied a 0.23-second horn sample from the song "Ooh I Love It" that infringed upon the plaintiff's copyrights of both the musical composition and sound recording.¹³⁸ According to the plaintiff, producer Shep Pettibone recorded the song "Ooh I Love It" in the 1980s, and then later used a horn sample from "Ooh I Love It" in the 1990s when he produced the song "Vogue" with Madonna.¹³⁹ Under the district court's factual findings, the horn sample from "Vogue" appeared in two forms, single and double, just as it appeared in "Ooh I Love it."¹⁴⁰ The plaintiff alleged copyright infringement from the horn sample in both the radio edit of "Vogue," which lasted four minutes with five instances of the horn sample, and the longer compilation of the song, which lasted five minutes with six instances of the horn sample.¹⁴¹ Additionally, the plaintiff introduced evidence that Tony Shimkin, Pettibone's personal assistant, was present when Pettibone asked a musical engineer to introduce the horn samples from "Ooh I Love It" into "Vogue," and the plaintiff provided submitted reports from music experts who confirmed the sampling occurred.¹⁴² While the defendants denied that any sampling occurred, the Ninth Circuit concluded that the defendant did in fact copy the horn sample from "Ooh I Love It."¹⁴³

Once it was determined that sampling had in fact occurred, the Ninth Circuit proceeded to determine if the use was "significant enough" to constitute an actionable copyright infringement.¹⁴⁴ Accordingly, the Ninth Circuit stated that in order to proceed with the analysis of an infringement claim, the court must first determine if the copying was "greater than de minimis."¹⁴⁵

¹³⁶ 824 F.3d 871 (9th Cir. 2016).

¹³⁷ *Id.* at 874.

¹³⁸ *Id.*

¹³⁹ *Id.* at 874–75.

¹⁴⁰ *Id.* at 875.

¹⁴¹ *Id.* at 876.

¹⁴² *VMG Salsoul*, 824 F.3d at 877.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (quoting *Newton v. Diamond*, 388 F.3d 1189, 1192–93) (9th Cir. 2004)).

¹⁴⁵ *Id.*

Noting its prior holding in *Newton v. Diamond*,¹⁴⁶ the court defined a work as “de minimis only if the average audience would not recognize the appropriation.”¹⁴⁷ In looking at the alleged sampling, the Ninth Circuit considered “how the musicians played the notes” to be important in the de minimis analysis.¹⁴⁸ The Ninth Circuit determined the following key facts about how both the double and single horn samples were played in “Vogue”: (1) the horn sample was copied from one quarter note of a four-note chord that lasted approximately 0.23 seconds; (2) the horn was not copied exactly because it 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”; and (3) other instruments played at the same time as the horn sample.¹⁴⁹

The Ninth Circuit ultimately held for the defendants and concluded that the 0.23-second horn sampling was de minimis because the “general audience would not recognize the brief snippet in ‘Vogue’ as originating from ‘[Ooh I Love It].’”¹⁵⁰ The Ninth Circuit relied on the information about how the horn samples were played, including the sub-one-second sampling, which was not copied precisely and combined with other instruments, to determine that it was not substantially similar to the plaintiff’s original work.¹⁵¹ The court also pointed to a mistake in the musical expert’s report, stating that if an expert could not determine what portion of the song had been sampled, the average juror could not do so either.¹⁵²

Furthermore, in applying the de minimis doctrine to sound recordings, the Ninth Circuit specifically rejected the Sixth Circuit’s holding in *Bridgeport* as “unpersuasive.”¹⁵³ The Ninth Circuit said the de minimis doctrine should apply to sound recordings, as it does to all other copyright infringement actions, because Congress did not express an intent to treat sound recordings differently than other works of authorship under 17 U.S.C. §§ 102 and 106.¹⁵⁴ Moreover, the court reasoned that for two centuries the legal system in the United States has qualified that an infringement occurs only when a substantial portion of the original work is copied.¹⁵⁵ Therefore, the Sixth Circuit could not eliminate this requirement for sound recordings without an express intent from Congress. The Ninth Circuit further rejected the Sixth

¹⁴⁶ 388 F.3d 1189 (9th Cir. 2004) (holding that the de minimis doctrine applies to a copyrighted musical composition after comparing the written compositions of the two pieces).

¹⁴⁷ *VMG Salsoul*, 824 F.3d at 878 (quoting *Newton*, 388 F.3d at 1193).

¹⁴⁸ *Id.* at 879.

¹⁴⁹ *Id.* at 879–80.

¹⁵⁰ *Id.* at 874.

¹⁵¹ *Id.* at 880.

¹⁵² *Id.*

¹⁵³ *VMG Salsoul*, 824 F.3d at 874.

¹⁵⁴ *Id.* at 882.

¹⁵⁵ *Id.* at 880.

Circuit's interpretation of 17 U.S.C. § 114(b) in *Bridgeport*.¹⁵⁶ Instead, the court said this provision was just another clause in a series limiting, not expanding, the power of sound recording copyright holders.¹⁵⁷ Read literally, the court said 17 U.S.C. § 114(b) stood as a provision to prevent copyright holders from claiming infringement on a work that solely recreates the original sound without actually copying it.¹⁵⁸

Lastly, the Ninth Circuit rejected the Sixth Circuit's argument that the de minimis doctrine was inapplicable for sampling of sound recordings because the sampling involved a physical taking rather than an intellectual taking.¹⁵⁹ The Ninth Circuit instead argued that physical takings have been and can be protected under the de minimis doctrine.¹⁶⁰ For example, copying photographs is considered a "physical taking,"¹⁶¹ yet the court in *Sandoval v. New Line Cinema Corp.*¹⁶² held that the defendant's use of a photograph in a movie was de minimis.¹⁶³ In addition, while the Sixth Circuit reasoned that sampling a sound recording provided the infringer with the opportunity to save costs or use the sample to add something new to his or her work,¹⁶⁴ the Ninth Circuit reasoned that "saving costs" should not impact the original artist's copyright protections.¹⁶⁵ Even the Supreme Court has held that the Copyright Act protects only the "expressive" aspects, rather than the original author's labor.¹⁶⁶ Because the sampler copies "expressive" content from the original author when creating a sound recording sample, the Ninth Circuit concluded that any savings awarded to the sampler should not be considered in the copyright infringement analysis.¹⁶⁷

C. *Gaps in the Sixth Circuit's Analysis*

While the Sixth and Ninth Circuits outline completely contradictory viewpoints of the de minimis doctrine as applied to sound recording samplings, the Sixth Circuit's analysis diverges from prior precedent and statutory interpretation, and also promotes negative policy implications for the

¹⁵⁶ *Id.* at 881–83; *see also* Grossberg, *supra* note 124, at 30.

¹⁵⁷ *VMG Salsoul*, 824 F.3d at 883.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 885 (citing *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 147 F.3d 215 (2d Cir. 1998).

¹⁶³ *Id.* at 216.

¹⁶⁴ *VMG Salsoul*, 824 F.3d at 885 (citing *Bridgeport Music*, 410 F.3d at 801–02).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)); *see also* *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁶⁷ *VMG Salsoul*, 824 F.3d at 885.

sound recording industry. First, the Sixth Circuit’s statutory interpretation of 17 U.S.C. § 114(b) deviated from the proper textual interpretation of the statute.¹⁶⁸ The textual canon of interpreting a provision in a way that is consistent with the overall structure of the statute provides insight on how to interpret 17 U.S.C. § 114(b).¹⁶⁹ Because the statute itself defines 17 U.S.C. § 114 as the “Scope of exclusive rights in sound recordings” and lists a series of limitations to the exclusive rights of these copyright holders,¹⁷⁰ it would be inconsistent with the overall structure of 17 U.S.C. § 114 to find that subsection (b) created more extensive rights for the holder. Under the Sixth Circuit’s interpretation, subsection (b) gives the copyright owner the chance to file a copyright infringement suit if another recording copies “*any* sounds” from the original.¹⁷¹ Thus, the Sixth Circuit’s analysis creates strict liability for any type of copyright infringement, regardless of the typical *prima facie* requirements in a copyright infringement case.¹⁷² The Ninth Circuit more accurately interpreted the statute by reasoning that subsection (b) stood for the limitation on the rights of copyright holders.¹⁷³ Specifically, copyright holders of sound recordings are not able to claim infringement on sound recording samples that are solely recreated, rather than copied.¹⁷⁴ The Ninth Circuit additionally noted that under the longstanding copyright precedent, copyright infringement occurs only when a *substantial* amount of copying occurs.¹⁷⁵ The Ninth Circuit’s reading of 17 U.S.C. § 114 is further supported by the main treatise on copyright law, which declared:

When one reflects that Section 114 imposes a *limitation* on the rights granted copyright holders by Section 106, it becomes even less comprehensible how the court could interpret Section 114 to *expand* the rights enjoyed by proprietors, such that they do not need to demonstrate substantial similarity between defendant’s purportedly infringing production and their own copyrighted works.¹⁷⁶

Further, the legislative history of 17 U.S.C. § 114 clarified the well-known principle that infringement occurs only when a “*substantial portion*”

¹⁶⁸ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (Matthew Bender, Rev. ed.) (noting that the *Bridgeport* decision “adopted a bright-line rule at odds with the balance of jurisprudence canvassed throughout this section”).

¹⁶⁹ See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 99–100 (1992) (describing the textual integrity canon that the Court should not interpret a provision as inconsistent with the overall statute).

¹⁷⁰ 17 U.S.C. § 114(b) (2012).

¹⁷¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 803 n.18 (6th Cir. 2005).

¹⁷² See *id.* at 801.

¹⁷³ *VMG Salsoul*, 824 F.3d at 883.

¹⁷⁴ *Id.*

¹⁷⁵ See Grossberg, *supra* note 124, at 30.

¹⁷⁶ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (Matthew Bender, Rev. Ed.) (footnote omitted).

of the original sound is used in the sampling.¹⁷⁷ A reading of both the section itself and its legislative history determine that Congress's purpose was to ensure copyright infringement suits only occurred when actual, substantial copying was proved—not just any copying at all.¹⁷⁸

Secondly, other federal courts have rejected the Sixth Circuit's holding in *Bridgeport*.¹⁷⁹ As the Ninth Circuit outlined in its opinion, almost every district court not bound by the Sixth Circuit's opinion has rejected the application of its bright-line rule.¹⁸⁰ For example, in *Saregama India Ltd. v. Mosley*,¹⁸¹ the U.S. District Court for the Southern District of Florida explicitly rejected the *Bridgeport* text after a careful analysis.¹⁸² Additionally, the U.S. District Court for the Central District of California in *Steward v. West*¹⁸³ explicitly rejected the Sixth Circuit's analysis, stating that the rule “has been criticized by courts and commentators alike.”¹⁸⁴ These two examples show the overall confusion and uncertainty that other federal courts have with applying the rule announced in *Bridgeport*. If the Sixth Circuit's reasoning did not deviate from prior precedent regarding the de minimis doctrine and its application to copyright law, other courts would likely follow its bright-line test.

Lastly, the Sixth Circuit's analysis, which eliminates the need for any analysis of the substantial similarity or de minimis application, has harmful policy implications. This analysis has been characterized by a legal scholar as “not only improper, but reckless” because of the negative impacts it is bound to create.¹⁸⁵ The bright-line test may reduce the amount of litigation clogging up the court system,¹⁸⁶ but this solution creates an even greater harm by stifling the creativity of recording artists. The Sixth Circuit's solution is for each recording artist who samples music to get a license.¹⁸⁷ However, the court is ultimately adding a heavy burden on an artist who simply takes a minimal, unrecognizable sample from another's work. The Sixth Circuit's reasoning that licensing would be beneficial for both artists and samplers is also likely true only for major recording artists who do not have monetary limitations.¹⁸⁸ Applying for a license for every sampling of each note or beat

¹⁷⁷ *Id.* (quoting H.R. Rep. No. 94-1476, at 106 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5721).

¹⁷⁸ *VMG Salsoul*, 824 F.3d at 883–84.

¹⁷⁹ See Grossberg, *supra* note 124, at 29.

¹⁸⁰ *VMG Salsoul*, 824 F.3d at 886.

¹⁸¹ 687 F. Supp. 2d 1325 (S.D. Fla. 2009).

¹⁸² *Id.* at 1340–41.

¹⁸³ No. 13-02449 BRO (JCx), 2014 U.S. Dist. LEXIS 186012 (C.D. Cal. Aug. 14, 2014).

¹⁸⁴ *Id.* at *25 n.8.

¹⁸⁵ Cromer, *supra* note 21, at 283.

¹⁸⁶ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 803 n.18 (6th Cir. 2005).

¹⁸⁷ *Id.* at 801.

¹⁸⁸ *How Do You get the Rights to Play Music that Has a Copyright?*, NEW MEDIA RIGHTS (Nov. 27, 2011, 8:37 PM), http://www.newmediarights.org/business_models/artist/how_do_you_get_rights_play_

is especially burdensome for amateur artists without the financial means to purchase multiple licenses.¹⁸⁹ Getting a license can be “difficult, time consuming, and expensive.”¹⁹⁰ If the sound recording sample belongs to a song from a major recording artist, the artist requesting the license usually will need to contact the publisher, get permission, and pay a hefty fee.¹⁹¹ While something like a note, beat, or guitar riff may seem like an easy license to negotiate, the difficulty in locating the publisher and obtaining permission should not be underestimated.¹⁹² If this sampling is from a major record label, the label will often charge a hefty fee.¹⁹³ For example, a sound recording for a three-second sample used once in a major label song will cost around \$1,500.¹⁹⁴ If that sound recording is looped, the fee can increase to around \$5,000.¹⁹⁵ Furthermore, as the Ninth Circuit illuminates in its opinion, the policy implications surrounding licensing agreements are for the legislature, not the court, to decide.¹⁹⁶

D. *The Viability of the Ninth Circuit’s Analysis*

In future litigation, courts should use the Ninth Circuit’s overall construction in *VMG Salsoul* as applied to both sound recordings and other similar works of authorship, such as online communication tools, which have yet to be fully litigated in the copyright infringement context. As illustrated in *VMG Salsoul* and *Newton*, the Ninth Circuit’s analysis of the de minimis doctrine ultimately combines the de minimis doctrine with the prima facie requirement of “substantial similarity” as a threshold question to determine if actionable copyright infringement has occurred.¹⁹⁷ As explained above, the Ninth Circuit’s analysis suggests that copyright infringement does not occur when the copying is seen as de minimis, or not substantially similar.¹⁹⁸ Overall, the Ninth Circuit’s approach requires a court to address the de minimis question first, before proceeding to any other step in the copyright

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¹⁸⁹ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 n.11 (9th Cir. 2016).

¹⁹⁰ *How Do You Get the Rights to Play Music that Has a Copyright?*, *supra* note 188.

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ Josh Norek, Comment, “*You Can’t Sing Without the Bling*”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 89–90 (2004).

¹⁹⁴ *Id.* at 89.

¹⁹⁵ *Id.*

¹⁹⁶ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016).

¹⁹⁷ *Id.* (discussing *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005)).

¹⁹⁸ *See infra* Part I.C.

infringement analysis, such as fair use.¹⁹⁹ Accordingly, the courts should first determine if there was an actual copying. If actual copying has been found based on either direct or circumstantial evidence, the court should next decide if the copying was substantial or whether the copying was de minimis.²⁰⁰

The Ninth Circuit's approach eliminates the Sixth Circuit's strict liability, bright-line test.²⁰¹ Instead, the Ninth Circuit's analysis follows the substantial similarity application of the de minimis doctrine.²⁰² This application is more favorable than a strict liability test in copyright law because copyright law often does not contain any bright-line rules and because many copyright infringement cases must be decided on a case-by-case basis.²⁰³ Because prior precedent does not provide a clear formula on what should be considered de minimis in copyright law, the importance of the step-by-step analysis is key to determining whether undisputed copying is substantial enough to constitute infringement.²⁰⁴ Moreover, strict liability is rarely used in copyright law, and several jurisdictions, including the U.S. Supreme Court, have rejected its introduction into copyright infringement suits.²⁰⁵ For example, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,²⁰⁶ the Supreme Court included the element of fault to determine whether copyright infringement occurred rather than holding that any actionable copyright was means to hold the copier liable.²⁰⁷ After all, strict liability is generally applied to offenses that involve direct harm to others, such as environmental and health law, rather than the economic harms that copyright infringement typically causes.²⁰⁸

Additionally, the Ninth Circuit's de minimis analysis ensures an added check on burdensome copyright infringement litigation.²⁰⁹ Copyright infringement suits can be extremely harmful to the freedom of expression²¹⁰ and to economic innovations.²¹¹ Copyright law itself, especially a strict liability application to copyright infringement, arguably stands in opposition to

¹⁹⁹ *VMG Salsoul*, 824 F.3d at 877 (citing *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997)).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 880–81.

²⁰² *Id.*

²⁰³ Cromer, *supra* note 21, at 273.

²⁰⁴ *Id.*

²⁰⁵ *See id.* at 287 (additional jurisdictions have rejected to consider copyright infringement as a tort of strict liability).

²⁰⁶ 545 U.S. 912 (2005).

²⁰⁷ *See* Cromer, *supra* note 21, at 287.

²⁰⁸ *Id.* at 288–89.

²⁰⁹ *Id.* at 274.

²¹⁰ *Id.*

²¹¹ Jodie Griffin, *The Economic Impact of Copyright*, PUBLICKNOWLEDGE.ORG (2012), <https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf>.

First Amendment principles.²¹² And copyright protection can be seen as a barrier to new innovation and technological advances.²¹³ Although intellectual property protection arguably encourages creators to invent more because they retain a profit from their creativity, copyright law also gives a “monopolistic right” to the original copyright holders to protect the works they created, which in turn prevents new uses and creations involving existing works.²¹⁴ Because of the rapid growth of the technology industry, restrictive intellectual property laws unduly burden technological innovations.²¹⁵ While copyright holders may be incentivized to invent more, these copyright holders may have an even larger incentive to block new technologies since they already hold the copyright to current technology.²¹⁶

The Ninth Circuit’s analysis, however, is not without flaws or potential challenges from other jurisdictions. In addition to the arguments outlined by the Sixth Circuit, including the need for a bright-line rule in an industry with increasing copyright infringement litigation, the Ninth Circuit’s analysis could ultimately be questioned by those jurisdictions that use the *de minimis* doctrine solely in conjunction with the fair use test, rather than as part of the threshold analysis.²¹⁷ Furthermore, the Ninth Circuit’s analysis could be questioned by those who might argue that if the *de minimis* doctrine is not applied, then the fair use test will serve as a safeguard against a copyright infringement finding. Even with these arguments in mind, courts should consider the *de minimis* doctrine as the first step of any copyright infringement analysis, even before reaching a fair use question for the following reasons.²¹⁸

The entire purpose of the *de minimis* doctrine is to keep petty infringement suits out of court.²¹⁹ Yet when one uses the *de minimis* doctrine as solely part of the fair use test, it severely limits this purpose. The doctrine, for example, is typically used in the fair use analysis in combination with the third and fourth factors.²²⁰ However, either factor by itself is not sufficient to determine whether or not the work is considered a fair use. As an illustration of this, the Supreme Court has clarified that the third factor, how much of the

²¹² Cromer, *supra* note 21, at 274 (“Because copyright grants a monopoly over written and oral expression, copyright law has been perceived to be at odds with the First Amendment principles of free press and free speech.”)

²¹³ Griffin, *supra* note 211.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* (quoting MATTHEW LE MERLE ET AL., THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT: A QUANTITATIVE STUDY 8 (2011)).

²¹⁷ See, e.g., Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F. Supp. 2d 701, 707 (N.D. Miss. 2013); Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044, 1050 (S.D.N.Y. 1994).

²¹⁸ Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998) (citing Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997)) (noting that the *de minimis* defense should be determined before evaluating the fair use defense).

²¹⁹ Inesi, *supra* note 4, at 947-48.

²²⁰ See, e.g., Amsinck, 862 F. Supp. at 1050.

work is actually copied, is not enough to declare a fair use.²²¹ Therefore, even if the use was considered de minimis under the third factor of the fair use test, this determination would not be enough to prevent a copyright infringement suit.²²² Placing the de minimis doctrine within the fair use analysis confines its use. The de minimis doctrine is a legal theory that declares no copyright infringement occurred, and therefore, it should not be limited to only being a portion of another defense.²²³ This reasoning, however, does not mean that de minimis should never be included within the fair use test. The adjective itself, de minimis, can and should be used in correlation with the fair use test so long as the de minimis doctrine is the first step of any copyright infringement analysis.²²⁴

Due to the soundness of the Ninth Circuit's de minimis analysis and the necessity of using the doctrine as a threshold question in any copyright infringement suit, this analysis should be applied to all eight types of copyrightable works defined under 17 U.S.C. § 102 on a case-by-case basis.²²⁵

III. NINTH CIRCUIT FRAMEWORK: APPLYING THE DE MINIMIS DOCTRINE TO COMMUNICATION TOOLS ON THE INTERNET

In *Bridgeport*, one of the Sixth Circuit's clarifications of its holding acknowledged possible future applications of the court's bright-line rule against copying.²²⁶ Specifically, the Sixth Circuit noted that the increase in technological advances in the sound recording industry has led the court to determine such a bright-line test is necessary because the advances have made it easier and more efficient to sample another's work.²²⁷ Although the Sixth Circuit classified its holding as applicable only to the sampling of sound recordings,²²⁸ the Sixth Circuit's break from well-known copyright precedent makes it more likely that another jurisdiction would apply the same

²²¹ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

²²² See Cromer, *supra* note 21, at 291–92.

²²³ Mike Masnick, *Faulkner Estate Can't Sue Sony Because Owen Wilson Misquotes Nine Word Faulkner Quote in Movie*, TECH DIRT (July 19, 2013, 6:41 PM), <https://www.techdirt.com/articles/20130718/18351123862/faulkner-estate-cant-sue-sony-because-owen-wilson-misquotes-nine-word-faulkner-quote-movie.shtml>.

²²⁴ *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (citing *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)) (noting that the de minimis defense should be considered before evaluating the fair use defense).

²²⁵ 17 U.S.C. § 102 (2012) (“works of authorships 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 audiovisual works; (7) sound recordings; and (8) architectural works”).

²²⁶ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798–99 (6th Cir. 2005).

²²⁷ *Id.*

²²⁸ *Id.*

rationale to a different work of authorship.²²⁹ The Sixth Circuit's analysis calls into question whether the de minimis doctrine should be used for all copyrighted works, or only a limited few. Because copyright infringement suits regarding internet GIFs and memes have yet to be litigated, and the technological advances in online and mobile communication make copying easier than ever, the Sixth Circuit's application opens the door for other courts to bar the use of the de minimis doctrine in future infringement cases with any minimal copying whatsoever. However, "[t]he abolition of substantial similarity or the de minimis defense with respect to sound recordings sets a dangerous precedent" for other types of copyrighted works.²³⁰ In contemplation of this possibility, the de minimis doctrine should be applied to new communication tools on the internet, such as GIFs and memes, in the same manner as the Ninth Circuit applied the analysis to samplings of sound recordings.

A. *Legal Precedent and Statutory Comparisons*

To begin any copyright infringement analysis, some form of copying from a work of authorship classified under 17 U.S.C. § 102 must have occurred.²³¹ In order to create a GIF or a meme, a portion of some copyrighted work is often used,²³² such as from motion pictures and audiovisual works²³³ or pictorial, graphic, and sculptural works.²³⁴ Therefore, copying that work can infringe on the original author's right to reproduction and the right to produce derivative works²³⁵ under 17 U.S.C. § 106.²³⁶ Additionally, if and when GIFs or memes are posted on the internet, the original author's distribution right²³⁷ and right to public display²³⁸ could also potentially be undermined.²³⁹ Under the Ninth Circuit's reasoning, the de minimis doctrine has always been applied to the eight works of authorship listed under 17 U.S.C. § 102.²⁴⁰ The Ninth Circuit declared, "[W]e are aware of no case that has held that the de minimis doctrine does not apply in a copyright infringement case"

²²⁹ *Id.*

²³⁰ Cromer, *supra* note 21, at 284.

²³¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

²³² Peter Van Valkenburgh, *Do Animated GIFs Infringe on Copyrights?*, PETERVV.COM (Jan. 4, 2014), <http://www.petervv.com/2014/01/04/do-animated-gifs-infringe-on-copyrights/>.

²³³ 17 U.S.C. § 102(6) (2012).

²³⁴ *Id.* at § 102(5).

²³⁵ 17 U.S.C. § 106(2).

²³⁶ Van Valkenburgh, *supra* note 232.

²³⁷ 17 U.S.C. § 106(3).

²³⁸ *Id.* at §§ 106(4)–(5).

²³⁹ Van Valkenburgh, *supra* note 232.

²⁴⁰ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881 (9th Cir. 2016).

other than the Sixth Circuit's conclusion in *Bridgeport*.²⁴¹ The court also emphasized that copyright law has historically held that a *prima facie* infringement case occurs only when a *substantial* portion of the original work is copied, not just any copying whatsoever.²⁴²

Congress did not create a special rule for sound recording sampling,²⁴³ and it also did not create a special rule for motion pictures, audiovisual works, or a pictorial, graphic, and sculptural work; thus, under the Ninth Circuit's reasoning, GIFs and memes should receive the same threshold *de minimis* analysis. Nothing in the statutory text²⁴⁴ notes any special reference to the medium (e.g., the internet or mobile messaging) used to convey these works of authorship as precluding them from the *de minimis* analysis.²⁴⁵ Similarly to the Ninth Circuit's analysis of the statutory definition of a sound recording,²⁴⁶ nothing in the statutory definition of a motion picture,²⁴⁷ audiovisual work,²⁴⁸ or a pictorial, graphic, and sculptural work²⁴⁹ demonstrates that Congress intended to completely eliminate the *de minimis* doctrine from a copyright infringement suit involving these works. Like the provision explaining the scope of exclusive rights for sound recordings under 17 U.S.C. § 114(b), a provision exists for pictorial, graphic, and sculptural works under 17 U.S.C. § 113(b).²⁵⁰ As 17 U.S.C. § 114(b) limits the scope of copyrighted sound recordings, 17 U.S.C. § 113(b) limits the scope of copyrighted pictorial, graphic, and sculptural works by excluding protection of any "useful

²⁴¹ *Id.*

²⁴² *Id.* at 880.

²⁴³ *Id.* at 881–82 (“[N]othing in the 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.”).

²⁴⁴ See 17 U.S.C. § 102 (2012).

²⁴⁵ The Sixth Circuit reasoned that creating a greater copyright protection for sound recordings was based partly upon the technological medium that sound recordings are fixed in. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798–99 (6th Cir. 2005); see also *Cromer, supra* note 21, at 283.

²⁴⁶ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882 (9th Cir. 2016).

²⁴⁷ 17 U.S.C. § 101 (defining an audiovisual work as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied”)

²⁴⁸ *Id.* (defining a motion picture as “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any”)

²⁴⁹ *Id.* (defining a pictorial, graphic, and sculptural work as “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”).

²⁵⁰ *Id.* §§ 113(b), 114(b).

article”²⁵¹ included in the copyrighted work.²⁵² This subsection determines that because Congress placed a limitation on a copyright holder’s exclusive rights to pictorial, graphic, and sculptural works, the legislature did not intend for every type of copying of these works to be actionable.

Moreover, even if the copying of each GIF or meme is a direct, physical taking of some copyrighted motion picture or pictorial, graphic, and sculptural work for the benefit of another, that also does not preclude application of the de minimis doctrine.²⁵³ As the Ninth Circuit clarified, physical takings, like intellectual takings, have long been protected under the Copyright Act as long as they are considered de minimis, are considered fair use, or fall under another copyright infringement defense.²⁵⁴ The Ninth Circuit further noted, “[W]e can think of no principled reason to differentiate one kind of ‘physical taking’ from another.”²⁵⁵ In other words, a physical taking, no matter the kind of work involved, is and has always been protected under the Copyright Act. As illustrated in *Sandoval v. New Line Cinema Corp.*, copying a photograph is a physical taking yet still subject to a de minimis analysis.²⁵⁶ Likewise, creating a GIF or meme should be subject to a de minimis analysis even when the creation involves a “physical taking” of some small part of a motion picture, audiovisual work, or pictorial, graphic, and sculptural work.

B. Policy Considerations

The Ninth Circuit’s analysis should also be applied to future copyright infringement cases for policy reasons. While the use of these various online communication tools cannot compare in terms of sampled sound recordings’ revenue and licensing costs, they are comparable in terms of the stifled creativity and innovation that would result from a bright-line rule as articulated by the Sixth Circuit. Whether we realize it or not, these online communication tools have changed the way we communicate with one another.²⁵⁷ Creators who want to innovate already protected, copyrighted content are left almost helpless under a bright-line limitation.²⁵⁸ Application of the Sixth Circuit’s bright-line test could prevent average online users, companies, or other

²⁵¹ *Id.* § 101 (defining a useful article as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article.’”).

²⁵² *Id.* §113(b).

²⁵³ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016).

²⁵⁴ *Id.* at 885–86.

²⁵⁵ *Id.* at 885.

²⁵⁶ *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998).

²⁵⁷ *The Way the Internet Has Changed the Way We Communicate*, MASHABLE.COM (Mar. 28, 2015), <http://mashable.com/2015/03/28/internet-communication-brandspeak/#Y.BvwbishsqE>.

²⁵⁸ Griffin, *supra* note 211, at 5.

organizations from quickly disseminating information through these online communication tools.

As an illustration of the need to discourage a bright-line test and apply the Ninth Circuit's analysis to GIFs and memes, consider the increasing occurrence of copyright infringement notices and settlements in this area.²⁵⁹ For example, the "Socially Awkward Penguin" meme, an off-balanced penguin plastered across a brightly colored background, was widely circulated across multiple, noncommercial platforms on the internet.²⁶⁰ The penguin image was originally taken by a *National Geographic* staffer and then licensed to the stock photo company, Getty Images. From the point that the first meme was made, other authors took the work and added on or changed the previous version in a way that completely transformed the look and background of the original image.²⁶¹ After years of the meme's wide circulation online, Getty Images provided a notice asking for an elevated licensing fee to the German company Get Digital, which produced several different versions of the "Socially Awkward Penguin" meme.²⁶² Getty Images also "pursued and settled" several other infringement cases involving the meme.²⁶³ Stock photo companies, such as Getty Images, are among the most prominent companies that issue takedown notices over memes that potentially pose copyright infringement issues, even though the average person simply uses memes to communicate on the internet or his mobile device.²⁶⁴ Moreover, websites that provide meme contents to online users as a means of communication between individual users are often the targets of copyright infringement suits.²⁶⁵ Brad Kim, editor of the website Know Your Meme, recently removed twenty meme entries based on infringement notices, and he also deleted several others based on requests from copyright owners.²⁶⁶ Because of the increase in takedown and infringement notices in this area, the Ninth Circuit's analysis should be applied in order to prevent unnecessary censorship of online communication. Copyright laws should not overly burden the average person who simply uses GIFS and memes to communicate with others; such a burden would prevent users from contributing to these forms of communication and from developing new ways of using well-known copyrighted works to communicate.

Nevertheless, the Ninth Circuit's analysis should not be used to preclude copyright holders from pursuing copyright infringement violations when

²⁵⁹ See generally Patel, *supra* note 83, at 237 n.6, 252.

²⁶⁰ *Id.* at 237.

²⁶¹ *Id.* at 250.

²⁶² Caitlin Dewey, *How Copyright Is Killing Your Favorite Memes*, WASH. POST (Sept. 8, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/>.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Laird, *supra* note 3.

memes or GIFs are used for harmful commercial purposes.²⁶⁷ Consider a GIF containing the content of a sporting event, such as a GIF highlighting a Hail Mary touchdown pass or a homerun.²⁶⁸ In contrast to GIFs and memes used solely for communication purposes, this GIF has the potential to harm the sports broadcasting market.²⁶⁹ Television networks that broadcast sporting events must typically pay a hefty fee to secure the rights to show a game and the highlights from that game.²⁷⁰ When a website or social media platform displays a series of GIFs summarizing important highlights and plays, an online user arguably has less of an incentive to watch the sporting event in full or watch a broadcasted recap of the events.²⁷¹ Therefore, the websites portraying the GIFs would likely cross the line into copyright infringement.²⁷² For example, in 2014, the International Federation of Football (FIFA) sent Twitter a complaint alleging copyright infringement for such a GIF.²⁷³ FIFA filed the suit against the account @ReplayLastGoal and Twitter asking them to take down the account because it did not get permission to display and/or offer “2014 FIFA World Cup Brazil audio visual content” in its GIFs.²⁷⁴ Ever since this infringement suit was filed, FIFA has followed a strict no-GIF policy.²⁷⁵ In addition to FIFA, the International Olympics Committee also prohibited the use of GIFs during the 2016 Summer Olympics.²⁷⁶

While anyone, especially profitable companies, can pay for the right to use the underlying image or graphic in a meme or GIF, licenses come at an economic and innovative cost.²⁷⁷ Licensing costs increase as the “scope and term of copyright are expanded and copyright grants more exclusive rights to copyright owners.”²⁷⁸ In the past few decades, new legislation has been

²⁶⁷ Ann Friedman, *What Journalists Need to Know About Animated GIFs — Really*, POYNTER.ORG (Aug. 8, 2012), <http://www.poynter.org/2012/what-journalists-need-to-know-about-animated-gifs-really/183802/>.

²⁶⁸ Ricardo Bilton, *The Legal Murkiness of Sports Highlight GIFs*, DIGIDAY.COM (Oct. 13, 2014), <http://digiday.com/publishers/sports-publishers-gif-problem/>.

²⁶⁹ *Id.*; See also Shan Wang, *Fair use or copyright infringement? Deadspin and SB Nation get tossed off Twitter for NFL GIFs*, NIEMAN LAB (Oct. 13, 2015), <http://www.niemanlab.org/2015/10/fair-use-or-copyright-infringement-deadspin-and-sb-nation-get-tossed-off-twitter-for-nfl-gifs/>.

²⁷⁰ *Id.*

²⁷¹ See Michael McGregor, *Sports, GIFs and Copyright: Is It a Draw Between Content Owners and Consumers in the Web 2.0 Era?*, 23 UCLA ENT. L. REV. 1, 1–3 (2016).

²⁷² Bilton, *supra* note 268.

²⁷³ Caitlin Dewey, *This Is Why You Can't Post GIFS of the World Cup*, WASH. POST (July 1, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/07/01/this-is-why-you-cant-post-gifs-of-the-world-cup/>.

²⁷⁴ *Id.*

²⁷⁵ Panzironi, *supra* note 96.

²⁷⁶ Chris Plante, *The International Olympics Committee prohibits press from making GIFs*, THE VERGE (Aug. 4, 2016, 3:22 PM), <https://www.theverge.com/2016/8/4/12379224/olympics-rio-2016-gifs-rules-policy>.

²⁷⁷ See Griffin, *supra* note 211.

²⁷⁸ *Id.*

passed that has increased protections for copyright holders. For example, the Digital Millennium Copyright Act (“DMCA”)²⁷⁹ was signed into law in 1998 to govern copyrighted works on the internet.²⁸⁰ The DMCA, in addition to having a controversial “anti-circumvention” provision,²⁸¹ has been described as “jeopardiz[ing] fair use, imped[ing] competition and innovation, and chil[ling] free expression.”²⁸² Moreover, the resources necessary to get a license in the first place should not be forgotten,²⁸³ especially because few people are deriving any commercial benefit from using memes and GIFs to communicate with one another.²⁸⁴ The costs of tracking down the creator of an image before sharing a meme or GIF would also create a tremendous burden on users because memes and GIFs are constantly shared and re-shared by people who did not create the images or even the meme itself.²⁸⁵ Ultimately, having to get a license would likely shut down these online communication tools because users would not find the cost worth the use.

We should expect that further changes in how we communicate will continue to occur, and thus similar issues regarding copyright infringement will continue to arise.²⁸⁶ As with any free market system, the faster technology spreads and creates competition in the marketplace, the more innovation there will be.²⁸⁷ Because technology continues to shape, change, and evolve the ways we communicate, copyright infringement should not follow a strict liability framework that prevents this type of innovation. For these reasons, the Ninth Circuit’s analysis should apply to communication tools, such as GIFs and memes, to prevent the unnecessary stifling of creativity.

IV. FUTURE IMPLICATIONS OF THE DE MINIMIS DOCTRINE FOR ONLINE COMMUNICATION TOOLS

With new ways to communicate and share information on the internet come new legal complications. Specifically, new technologies make

²⁷⁹ Pub. L. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 and 28 U.S.C. § 4001 (2012)).

²⁸⁰ THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf>.

²⁸¹ *Digital Millennium Copyright Act*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/issues/dmca> (last visited Feb. 1, 2018) (describing the anti-circumvention provision as ultimately barring circumvention of technical protection measures of copyrighted work).

²⁸² *Id.*

²⁸³ Griffin, *supra* note 211.

²⁸⁴ See Friedman, *supra* note 267.

²⁸⁵ See Tan, *supra* note 82.

²⁸⁶ Hayley Eastman, *Communication Changes with Technology, Social Media*, DAILY UNIVERSE (July 7, 2013), <http://universe.byu.edu/2013/07/07/1communication-changes-with-technology-social-media/>.

²⁸⁷ Griffin, *supra* note 211.

copyright infringement easier and more frequent.²⁸⁸ Yet technological advances also provide for the ability to easily “detect infringements that are potentially infinitesimal.”²⁸⁹ While a copyright infringement suit regarding GIFs or memes has yet to be fully litigated, numerous notices have been filed and litigation has been settled regarding the sharing of copyrighted images through GIFs and memes on the internet.²⁹⁰ As a result, many legal scholars, technology journalists, and internet bloggers have acknowledged the current and potential copyright issues that these internet communication tools present.²⁹¹

Although many commentators in this area agree that GIFs and memes should be included under a fair use analysis, some are unsure at what level and to what extent GIFs and memes should be considered *de minimis*.²⁹² For example, Sherwin Siy of Public Knowledge noted that the copyrightable material used in most GIFs would likely be considered immaterial and, therefore, *de minimis*.²⁹³ To support this contention, Siy explained that GIFs are soundless, last only a few seconds at most (out of an entire TV show, movie, or video), and in most circumstances have a positive impact (if there is an impact) on the owner of the full copyrighted material.²⁹⁴ Regarding memes, *Washington Post* journalist Caitlin Dewey expressed her concern with the recent Getty Images copyright suit over the “Socially Awkward Penguin” meme.²⁹⁵ Dewey commented on the absurdity of the suit as the underlying penguin image had not only been widely circulated on the internet for six years prior to the suit, but by that time, multiple authors had transformed the image to look different than the original photo.²⁹⁶ However, Andy Sellars, from the Berkman Center of internet and Society at Harvard University, takes a stronger approach to the copyright infringement issue of GIFs and memes.²⁹⁷ He states that any GIF creation, no matter how insubstantial (or *de minimis*), runs the risk of being considered copyright infringement.²⁹⁸

Because the *de minimis* doctrine should always be applied as a threshold question under the Ninth Circuit’s framework, it is important to consider

²⁸⁸ Inesi, *supra* note 4, at 978.

²⁸⁹ Cromer, *supra* note 21, at 261.

²⁹⁰ See, e.g., Dewey, *supra* note 262; see also Dewey, *supra* note 273 (describing a copyright infringement suit settled between FIFA [Fédération Internationale de Football Association] and a Twitter user).

²⁹¹ See Friedman, *supra* note 267; Laird, *supra* note 3; Sherwin Siy, *Fair Use vs. “Tolerated Uses”*: *Protection Only for the Powerful?*, PUBLIC KNOWLEDGE (Mar. 31, 2015), <https://www.publicknowledge.org/news-blog/blogs/fair-use-vs-tolerated-uses-protection-only-for-the-powerful>.

²⁹² See *id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Dewey, *supra* note 262.

²⁹⁶ *Id.*

²⁹⁷ Friedman, *supra* note 267.

²⁹⁸ *Id.*

which aspects of the de minimis analysis will be important in future litigation involving online communication tools. As illustrated in *VMG Salsoul* and *Newton*, the Ninth Circuit considered several factors when determining whether or not a sampled sound recording or musical composition was de minimis.²⁹⁹ In both cases, the Ninth Circuit focused on the subjective element of whether “the average audience would not recognize the appropriation.”³⁰⁰ If an average user did not notice the appropriation, then the quantitative amount of the work taken was clearly not the “qualitatively significant amount” needed to constitute copyright infringement.³⁰¹ Although the subjective approach is key to the Ninth Circuit’s analysis for musical compositions and sound recordings,³⁰² the court has not used this subjective analysis for all works of authorship.³⁰³ In *Design Data Corp. v. Unigate Enterprise, Inc.*,³⁰⁴ the U.S. District Court for the Northern District of California noted that the subjective analysis used in cases involving sampling and musical compositions was “inapposite” to an analysis of copyright infringement involving the downloading of a copy of the plaintiff’s software.³⁰⁵ In other words, the court in *Design Data Corp.* reasoned that the subjective analysis was useful to determine copyright infringement of musical works of authorship, but was inappropriate for other works of authorship that do not focus on music, such as computer software.³⁰⁶ While precedent does not indicate what type of analysis would be applied to GIFs or memes, the court’s reasoning in *Design Data Corp.* indicates that the subjective analysis would not be considered a determining factor in a copyright infringement suit involving GIFs or a memes. Because an average audience would likely recognize the copied image in a GIF or meme, this portion of the Ninth Circuit’s analysis should probably be considered “inapposite,” as it was in *Design Data Corp.*³⁰⁷

Furthermore, the subjective analysis is not the only factor in the Ninth Circuit’s analysis.³⁰⁸ While the de minimis analysis in *VMG Salsoul* focused specifically on how the musician played the sampled notes, and the de minimis analysis in *Newton* compared the written musical compositions of the original and newly created musical compositions, both analyses shared an important similarity.³⁰⁹ In particular, the underlying factor in both was to observe whether the defendant’s use constituted a substantial portion in the

²⁹⁹ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016).

³⁰⁰ *Id.*

³⁰¹ Cromer, *supra* note 21, at 273.

³⁰² *See VMG Salsoul*, 824 F.3d at 878.

³⁰³ *See, e.g., Design Data Corp. v. Unigate Enter., Inc.*, 63 F. Supp. 3d 1062, 1069–70 (N.D. Cal. 2014), *aff’d and rev’d in part*, 847 F.3d 1169 (9th Cir. 2017).

³⁰⁴ 63 F. Supp. 3d 1062 (N.D. Cal. 2014).

³⁰⁵ *Id.* at 1069–70.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878–79 (9th Cir. 2016).

³⁰⁹ *Id.*

original author's work, rather than focusing on the prominence of the original author's work in the defendant's work.³¹⁰ Other jurisdictions that apply the Ninth Circuit's de minimis analysis in combination with the substantial similarity test have also focused on whether the defendant's use constituted a substantial portion in the original author's work.³¹¹ For example, in *Neal Publications*, the court held that the defendant's use of a variety of phrases found in the plaintiff's copyrighted employment manual was de minimis because the various phrases constituted only a small portion of the plaintiff's manual overall.³¹² Such holdings indicate that it is likely that small portions of copyrighted motion pictures and audiovisual works or pictorial, graphic, and sculptural works used in GIFs and memes would be considered de minimis if the copyrighted material formed only a small portion of a much larger work. As an illustration of this, imagine a one-second-long GIF that displays a snippet of a three-hour movie. Then imagine a meme that copies one character, changes the color of the background, and adds text from an original photograph containing several different people, animals, and scenery. In both of these examples, it would likely be questionable whether the GIF or meme is substantially similar to the original author's work to merit copyright infringement because the GIF or meme includes only a small fraction of the original work.

Due to the many unique aspects of GIFs and memes, courts analyzing copyright infringement claims should engage in a de minimis analysis on a case-by-case basis. Although the Ninth Circuit's analysis of new copyright infringement suits involving online communications tools has yet to be applied, precedent will help determine which factors are relevant to the courts' determinations. Overall, the Ninth Circuit's analysis will help recognize minimal copyright infringements as de minimis, while subjecting other GIFs and memes that do pass the threshold analysis to a further fair use analysis.

CONCLUSION

In conclusion, the de minimis doctrine is an important legal doctrine to uphold in copyright law, regardless of the type of copyrighted work in question. Since the 1880s, the United States legal system has held that copyright infringement only occurs when the amount copied is substantial. Therefore, the Sixth Circuit's application of a strict liability, bright-line test in copyright infringement cases for the sampling of sound recordings threatens to circumvent hundreds of years of judicial economy through the de minimis doctrine.

Furthermore, the Sixth Circuit's bright-line test will only stifle creativity, prohibit new innovations, and harm economic growth. While the doctrine has been unevenly applied by various jurisdictions, the Ninth Circuit's

³¹⁰ Inesi, *supra* note 4, at 962–63.

³¹¹ See, e.g., *Neal Publ'ns v. F & W Publ'ns, Inc.*, 307 F. Supp. 2d. 928, 930–32 (N.D. Ohio 2004).

³¹² *Id.*

analysis provides future courts with a clear and beneficial analysis for any copyright infringement case regardless of the work of authorship. Future courts should follow the Ninth Circuit's analysis because it not only makes the de minimis doctrine a first step in the threshold question of copyright infringement, but also provides the courts with a workable test in order to determine infringement cases that have not yet been litigated, including those involving online communication tools, as well as future technologies and innovations. The Ninth Circuit's de minimis analysis should be applied in copyright infringement cases involving GIFs and memes because precedent shows that the de minimis doctrine applies so long as some form of actual copying occurred, as the Copyright Act does not differ the analysis based on the work of authorship.

Finally, applying the Ninth Circuit's de minimis analysis to GIFs and memes will ensure that future courts dismiss petty infringement cases and subject stronger incidents of copying to fair use analysis. Because of the increasing popularity of online communication tools and the current copyright takedown requests for GIFs and memes, this issue is only beginning to come to the forefront of copyright law. While some copying goes too far to be considered de minimis, the Ninth Circuit's analysis would ensure protection of petty copying in GIFs and memes used solely for communication between users.