

De Minimis Sampling and Copyright

A recent [decision](#) the United States Court of Appeals for the Ninth Circuit found that Madonna's song *Vogue* was not infringing as a result of a horn segment sampled from another song.

The Facts

Madonna's recorded song *Vogue* became a mega-hit dance song after its release on Madonna's albums. The plaintiff asserted that the producer of *Vogue* copied a 0.23-second segment of horns from an earlier song known as *Love Break* and used a modified version of that snippet when recording *Vogue*.

The horn hits in *Love Break* occurred in two forms. First, there was a single horn hit which consists of a quarter-note chord comprised of four notes. The single horn hit lasts for .23 seconds. Second, there were double horn hits consisting of an eighth-note chord of the same notes, followed immediately by a quarter-note chord of the same notes. The instruments were predominately trombones and trumpets.

Vogue contained similar single and double horn hits. The plaintiff alleged that the copyright in its musical work consisting of the musical composition had been infringed, as well as the copyright in its sound recording of the musical work.

The horn hits were easy to miss without careful attention and the district court judge found that the sampling of the horn hits was de minimis or trivial. The district court granted summary judgement dismissing the claim and the plaintiff appealed from this judgement.

The Musical Composition

The plaintiff's evidence consisted primarily of an admission based on evidence given by an assistant of the person responsible for producing Madonna's song as well as reports from musical experts. The alleged sampling was disputed by the defendants. However, for the purposes of the appeal, the court was prepared to assume that copying had occurred.

The court said that when considering a claim of infringement of a musical composition what matters is not how musicians actually played the notes but rather the generic rendition of the composition. The elements unique to the performance were not considered and the point of view of the comparison was the written compositions of the two pieces of music in issue.

The sampling consisting of double and single horn hits. The single horn hits lasted less than a quarter second and the double horn hits lasted less than a second. The horn hits appeared five or six times in the song *Vogue*. The alleged sampling only involved one instrument group out of many. As a result the court agreed with the finding that no infringement had taken place.

The Sound Recording

When considering a claim of infringement of a sound recording the court said that what matters is how the musicians played the notes in the recording. That is, how their rendition distinguished the recording from a generic rendition of the same composition.

The court agreed that a dismissal of this claim was appropriate. The defendants copied one quarter-note of a four-note cord lasting 2.3 seconds. The horns were further isolated by filtering out the instruments playing at the same time; transposed to a different key; truncated and other effects and sounds added to the chord itself. The

producer also overlaid the resulting horn hits with sounds from many other instruments to create the song *Vogue*.

The plaintiff argued that even if the copying was trivial this was irrelevant because there was no de minimis exception that applied to infringement of copyright in a sound recording. In this regard, the plaintiff relied on a decision of the United States Court of Appeal for the Sixth Circuit. The court refused to follow this decision and found that a “de minimis exception” was available in actions alleging infringement of a copyright in a sound recording.

This split between the circuits will likely lead, at some time, to a U.S. Supreme Court decision that clarifies the scope of unauthorized sampling in the U.S.

The Canadian Position

Under the *Copyright Act*, musical works and sound recordings are treated in a slightly different fashion.

A musical work is defined to mean any work of music or musical composition with or without words. The rights available to this type of work are set out in section 3 of the Act and include the sole right to produce or reproduce the work or any substantial part thereof in any material form.

For sound recordings, at least those created after September 1, 1997, the maker of the sound recording has a copyright in the sound recording consisting of the sole right to reproduce the sound recording or any substantial part of it in any material form.

While there is no exception in the *Copyright Act* for de minimis reproduction, the cases of this type are decided on the basis of whether the work or any substantial part thereof has been reproduced. Unless a substantial part of the work is reproduced there is no

viable claim for infringement. We have dealt with the issue of substantiality in a previous comment [here](#).

In substance what constitutes a substantial part of a work or a sound recording is a rather flexible notion. It is a matter of fact and degree and whether a part is substantial must be decided by its quality rather than its quantity. In addition, the Supreme Court of Canada has said that this question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all the relevant aspects of the works in issue.

Comment

In the U.S. it appears that there is some uncertainty concerning the application of a de minimis exception since different results have been reached in different circuits. However, as noted above, this should not be an issue in Canada since infringement will only occur if a substantial part of a work or a sound recording is reproduced.

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These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.