

## LA Court Sings Different Madonna Copyright Tune Than Nashville

(June 3, 2016) If you are going to sample notes from a sound recording, do it in LA not Nashville to avoid an infringement claim.

The Ninth Circuit found no copyright infringement with Madonna's recording of *Vogue* because the song's use of 0.23 second of a horn hit from a recording of *Ooh I Love It (Love Break)* was *de minimis* and therefore not an infringing use. The ruling by the appellate court is contrary to the finding in the Sixth Circuit that any sampling of a sound recording is actionable copyright infringement.

Shep Pettibone recorded *Love Break* in the early 1980s. In 1990, Pettibone and Madonna recorded *Vogue*. Included in the *Vogue* recording was a quarter-note single horn hit and a full measure containing rests and a double horn hit from *Love Break*. Plaintiff, who holds the copyright for the composition and sound recording of *Love Break*, sued for copyright infringement for the sampling. The trial court granted summary judgement for the defendants and awarded attorneys' fees.

"After listening to the recordings, we conclude that a reasonable jury could *not* conclude that an average audience would recognize the appropriation of the composition," the appellate court said. In fact, the opinion noted that the plaintiff's primary expert originally misidentified the source of the sampled double horn hit. "In other words, a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job."

Plaintiff argued under the Copyright Act that any sampling of a "sound recording" was actionable infringement, citing a Sixth Circuit opinion. The Ninth Circuit refused to follow that opinion, finding instead that the *de minimis* exception to a copyright action applies to sound recordings.

The dissent said the court should have followed the Sixth Circuit because "it has been governing the music industry in Nashville and elsewhere for eleven years. The majority now proposes to introduce a different rule for this circuit, creating a circuit split, and providing a lower level of protection for copyright holders in a different area of the country."

The appellate court reversed the award of attorneys' fees to defendants. The court said it was not "objectively unreasonable" for plaintiffs to have filed the case because of the Sixth Circuit's ruling.

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*VMG Salsoul, LLC v. Madonna Louise Ciccone, Shep Pettibone et al*, Ninth Cir. No. 13-57104 and 14-55837, filed June 2, 2016.

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