Media and Communication Research (2023)
Clausius Scientific Press, Canada

DOI: 10.23977/mediacr.2023.040705
ISSN 2523-2584 Vol. 4 Num. 7

Research on the de minimis rule for digital music sampling in China

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Keywords: Digital music; Infringement identification; Substantial similarity; De minimis

Abstract: The judgment of American court against pop singers Taylor Swift, Led Zeppelin and Katy Perry has led to another deep exploration of digital music sampling. The case of the song of the new five rings and the live platform of fighting fish once again put the infringement of music copyright into the public opinion. This paper analyzes the causes of the divergence of de minimis rules from the perspective of substantive similarity and de minimis rules, and points out that the root cause of de minimis rules is the fact that they are not in line with the copyright law. This paper analyzes the causes of the divergence of de minimis rules from the perspective of substantive similarity and de minimis rules, and points out that the root cause of the differences is still the balance of interests of all parties from the perspective of property rights. To give full play to the role of de minimis rule to balance the interests of all parties, we must recognize the de minimis rule unilaterally from its rationality, nature and foreign experience. It is in the time of the vigorous development of music industry in China, in order to bring enlightenment to the relevant legislative and judicial work in China. It is in the time of the vigorous development of music industry in China, in order to bring enlightenment to the relevant legislative and judicial work in China.

1. Introduction

The so-called de minimis rule, which refers to "the minimum," falls under the category of "trivia" in the "law of trivia," and is centered on conserving judicial resources. de minimis is applied to copyright law, i.e., the "minimum" of copyright infringement, when unauthorized use of a portion of a protected work is deemed "trivial" by the court. de minimis, as applied to copyright law, is the "de minimis" of copyright infringement, whereby a court recognizes an exception to copyright infringement when the unauthorized use of a portion of a protected work is deemed to be "de minimis".

In recent years, with the accelerated popularization of the mobile Internet, the rapid implementation of the policy of speeding up and lowering fees on the network, the traffic economy has risen in a big way, and online movie watching, reading and listening to songs have become fashionable for the whole nation, which has boosted the development of digital technology. Against this backdrop, the music industry has become another powerful growth point for the national economy. As early as in the outline of the 13th Five-Year Plan, the state has included the

"development of music industry" in the "major cultural industry projects" [1], which makes clear the importance of the music industry as an emerging strategic cultural industry from the top-level design of the state. As an emerging strategic cultural industry, the music industry has been clearly recognized as an important position in the national top-level design [2]. It is of great practical significance to promote the construction of music copyright infringement standards and to solve the current digital music copyright problems. de minimis rule, as a defense against copyright infringement, can well balance the interests of all parties that need to be faced by the copyright law, and realize the promotion of innovation while meeting the people's growing cultural needs.

The six beats sampled in Dark Horse, the unauthorized 0.2-second music sample in Kraftwerk, the 0.3-second hip hop sample in Newton, and the 0.23-second horn sample in VMG……Does the extremely short nature of the sampling time mean that there is absolutely no possibility that it could constitute substantial similarity? Does it mean that the de minimis rule applies absolutely? The disagreement between European and American courts on the application of the de minimis rule is essentially due to the uneven balance of interests between the parties. In order to better utilize the de minimis rule to improve the function of the copyright law, in what aspects should the rule be deeply interpreted? This paper combines the latest jurisprudence on digital music copyright in Europe and the United States, analyzes and explores whether the de minimis principle applies to music copyright infringement in the digital environment and countermeasures, with a view to providing strong copyright protection for China's booming digital music industry [3].

2. Digital Music "Substantial similarity" and the de minimis rule in infringement determinations

China's current Copyright Law of the People's Republic of China has not made explicit provisions on the rules for determining infringement, but judicial practice has established a rule: "contact" + "substantial similarity", of which "substantial similarity" is the most difficult to determine, in practice, the court on the substantial similarity of this very subjective rules of determination of the definition of the "general public standard", to meet the standard of copying infringement requires the copying of the entire work or the main part of the work. The determination of whether a work constitutes a major portion requires a comparison of the accused infringing work with the infringed work after removing the part of the author's idea and the public part [4].

Although this principle was established in the era of traditional media, it is still the basis for court decisions in the streaming media environment.

The recent decision in the copyright dispute over the Song of the Five Rings followed the "contact + substantial similarity" standard. On August 20, 2019, the Tianjin Third Intermediate People's Court, in its second instance final trial, held that the Song of the Five Rings did not utilize the basic elements of the theme and original expression of the lyrics of the Peony Song, and did not constitute an adaptation of the lyrics of the Peony Song. And the appellees did not infringe the right to adapt the lyrics of the Peony Song. The first instance judgment was correct in determining that the Song of the Five Rings did not constitute an adaptation of the lyrics of the Peony Song. The appeal was thus dismissed and the original judgment was upheld. The Beijing Haidian District People's Court, in the trial of the Song of the New Five Rings, had organized the plaintiff and defendant to compare the song in question with the Peony Song, and found that the song in question used the word "ah" from the lyrics of the Peony Song as well as the main melody of the song. The Court held that the four lines of the advertisement in question were neither identical nor similar to the corresponding lyrics of the "Peony Song", except for the word "ah", which was a non-original auxiliary of tone, and that they did not utilize the basic expression of the lyrics, which was original,

and expressed completely different thoughts, feelings and themes, and therefore did not infringe on the right of Zhongde to adapt the lyrics of the song. Therefore, it did not infringe the right of adaptation of the lyrics of the song. Since the defendant has obtained the permission of the copyright holder of the song score, this case does not involve the determination of the use of the song score of "Peony Song", but if the defendant needs to determine whether the song in question is an adaptation or a copy of the original song score, the judgment should follow the standard of "contact + substantial similarity".

Not coincidentally, similar cases have recently been heard in European and American courts.

The Dark Horse and Shake It Off cases in U.S. courts followed the "originality" standard. 2014, FLAME sued Katy Perry for the 2013 release of the song Dark Horse for plagiarizing the basic beat from a Christian rap song he released in 2007 "Joyful Noise", July 29, 2019 After five years, the U.S. District Court for the District of California ruled that the song Dark Horse constituted copyright infringement and awarded $28,000 in damages.

Can an ordinary musical phrase be the subject of copyright law protection? The defendant's lawyers argued that a musical phrase is a basic building block of music, like letters of the alphabet are to language, and can be used by anyone. The jury found that Joyful Noise, which consists of a cyclical rhythm, was sufficiently original to be protected by copyright. In an appellate decision in this case on March 16, 2020, the court reversed its previous decision and held that none of the six beat patterns for which the plaintiffs claimed infringement were original, and that their combinations were not protected by copyright law because of the arbitrary nature of their selection and arrangement. This means that U.S. courts have held that even musical phrases with only six beats are entitled to protection under copyright law as long as they are original. This conclusion is supported by the decision of the Ninth Circuit Court of the United States in the case of Taylor Swift's popular song Shake It Off, which ruled that a phrase in a song may also be the object of copyright protection.

European Union jurisprudence shows a similar line of decision-making as the U.S. courts, adopting a "recognizable" standard: on July 19, 2009, the CJEU ruled in Infopaq Int'l A/S v. Danske Dagblades Forening that an expression is copyrightable even if it consists of only eleven words as long as it is created by the author's intellect. Kraftwerk, et al. v.Moses Pelham, et al. [5], after 20 years of cases on whether "unauthorized 0.2-second music samples are infringing", the Court of Justice of the European Union (CJEU) ruled on July 23, 2019, that regardless of the quality and quantity of the samples, if they are recognizable to the general public, they infringe.

In determining whether the digital music work in question constitutes infringement, China's "contact + substantial similarity" standard, the United States' "originality" standard, and the European Union's "identifiability" standard. In fact, they all follow the same idea: if the defendant only uses the part of the plaintiff's work that is not protected by copyright, then he should not be liable for infringement; only after the plaintiff proves that the defendant has used the copyrighted material in his work, then he needs to further examine the substantial similarity between the works in question. In practice, in the absence of direct evidence to prove the copying behavior, the establishment of infringement can only rely on specific facts: the defendant has access to the plaintiff's works and the plaintiff and defendant's works are "substantially similar", i.e., our country's "contact + substantial similarity", but in fact, in the case of the Three Boys Music Company in 2001, the U.S. courts have also taken the practice of the same criteria. Insofar as musical works are concerned, what we call "substantial similarity", or what is commonly referred to as "striking similarity", is not only in terms of how many identical syllables there are in the two musical works. To analyze the degree of similarity between two pieces of music, one very important fact needs to be taken into account: the specificity of the pieces of music that are considered to be similar, and therefore, to make a finding of "substantial similarity" requires that the

similarity between the musical compositions be sufficiently specific or complex to preclude the possibility that both the plaintiffs and the defendants created the same result and obtained the same result independently of each other. The degree of similarity must be sufficient to exclude the possibility that both the plaintiff and the defendant created their works independently and obtained the same result, and that both works reproduced a pre-existing common source. As can be seen, "substantial similarity" has never required a ratio of similarity as an absolute value.

Should the de minimis rule, which is a measure of "quantity", be excluded? To answer this question, we first need to understand the origins and development of the de minimis rule.

3. De minimis rule

The core essence of de minimis, or "the minimum", derived from "the law does not care about minutiae", or the "minutiae exception", is the conservation of judicial resources. In copyright law, the rule is not a separate defense, but an extension of the elements of copyright infringement. Under copyright law, proof of copyright infringement requires proof of "copying". Because it is difficult to prove directly that an act of plagiarism has occurred, this is usually accomplished by proving that there is a "substantial similarity" between the copyrighted work and the allegedly infringing work. When similarities do exist between the two works, but if such similarity is so trivial that it does not constitute a "substantial similarity" between the two works, then the "plagiarism" is minimal and negligible, and is recognized by the law as a non-actionable act. In the judicial field of copyright law, defendants often use de minimis as a defense to defend their own legal rights and interests, such as Gayle v. Home Box Office, Inc. Gayle v. Home Box Office, Inc., 1997, Ringgold v; Black Entertainment Television, Inc., 1998, Sandoval v. New Line Camera Corp., 2003; Gordon V. Nextel Communications, and 2004, Newton v. Diamond, all utilized de minimis as an exception to copyright infringement.

In 1997, the Second Circuit made clear in Ringgold [6] that the exceptions covered by the de minimis doctrine actually involve the phenomenon of copyright infringement, except that the infringement is so trivial that the law will not impose any consequences.

In the 2004 Ninth Circuit case of Newton, which involved the use of a three-second musical sample from a hip hop track of a copyrighted musical recording, the court held that the "use" that triggers de minimis needs to be such that "an ordinary viewer would not be able to recognize the appropriation" and therefore not infringing unless the unauthorized use is obvious. On the basis that the "use" that triggers de minimis needs to be "such that an ordinary viewer would not be able to identify the misappropriation" and therefore not infringing unless the unauthorized use is obvious, the Ninth Circuit held that the de minimis exception applied in this case. This conclusion is diametrically opposed to the result of the Sixth Circuit's 2005 decision in Bridgeport Music, Inc. v. Dimension Films - in which the Sixth Circuit ruled that a 2-second sample of a sound recording would infringe copyright. No matter how short a sample is, it constitutes copyright infringement unless it is authorized by a license. The Sixth Circuit used this case to establish a strict and clear "license it or don't sample it" (bright-line test) for three reasons: first, it removes uncertainty from the law and makes it easier to enforce; second, the invisible hand of the marketplace keeps licensing fees within reasonable limits; and third, all music is subject to the same rules of copyright infringement. Second, the invisible hand of the market will keep licensing fees within reasonable limits; and third, all music sampling is never accidental, but intentional. In light of these three points, the Sixth Circuit held that even if a very small portion of a song is sampled, it means that the value embedded in that portion has been unlawfully extracted, and the sampling should be characterized as theft.

These two cases focused on two different aspects of the application of copyright law to music,

namely musical works and sound recordings. Namely, the Ninth Circuit based its decision on the allegedly infringing musical work, which was not infringed as long as the sampled portion was not recognizable to the average viewer, while the Sixth Circuit focused on the interests of the sampled phonorecord party, which was considered to be an unlawful taking of the legitimate interests of the phonorecord right holder, even if the sampled portion was negligible.

In light of the Bridgeport decision, there was near unanimity in the academic and industry community that the de minimis rule was precluded from application in the field of sound recording sampling. However, in 2016, the Ninth Circuit, in VMG Salsoul, LLC v. Ciccone, made it clear that this court was using de minimis in the field of sound recordings - a 0.23-second sample of a horn sound from an existing musical work falls within the scope of "use" recognized by de minimis. The Court adopted de minimis in light of Congress's legislative intent. The court applied the Average Audience Test to Congress's legislative intent and held that as long as the average listener could not identify the unauthorized sampling/appropriation of a copyrighted digital sound recording, the sampling did not constitute copyright infringement. It concluded that the sampling of sound recordings is so subtle as to be insufficient to trigger copyright protection.

As a result, two camps have formed in the U.S. on the issue of "whether a producer of a musical work who samples a copyrighted digital sound recording without permission may use the de minimis rule as a defense".

4. Reasons for disagreement

4.1. Specificity of U.S. law copyright law

U.S. copyright law is unique. Unlike other copyrighted works, the United States Copyright Act of 1976 provides two separate sets of copyright protection for musical sound recordings. One set protects the score itself, including the lyrics and written additions to the score, i.e. the musical work referred to above; and one set protects the actual sound recording, i.e. the sound that is added to a tangible device, such as a laserdisc, i.e. the sound recording work referred to above. Unauthorized sampling may trigger both types of copyright protection. In addition, copyright infringement claims primarily prove the three elements of ownership, copying, and unlawful appropriation. In many cases of unauthorized sampling, it is difficult to determine whether plagiarism exists unless the sampled portion is the main or highly identifiable part of the sampled song. In addition, many producers choose to modify the pitch and rhythm of the sampled part to further avoid legal disputes, making it even more difficult to determine whether "plagiarism" exists. At the level of unlawful appropriation analysis, it is important to determine whether there is substantial similarity between the infringing work and the original work, however, there is still no clear and authoritative standard for what constitutes substantial similarity.

Legislative ambiguity leads directly to judicial uncertainty, and the Sixth and Ninth Circuits initially diverged in that each focused on a different aspect of the application of copyright law to musical works and sound recordings, two areas of music.

4.2. Differences in the interpretation of key words of the law

In 2016, the Ninth Circuit used the VMG case to bring the battlefield back to "sound recordings," making it clear that the de minimis rule applies to the sampling of sound recordings, and I believe that the reason for the disagreement between the two courts at this point was a difference in interpretation of the word "entirely" in U.S. Copyright Law § 114(b). entirely" in Section 114(b) of the U.S. Copyright Act. The Sixth Circuit held that this provision should be read to mean that Section 114(b) limits the rights of the copyright owner of a sound recording only if the infringing

sound recording is independently made or independently imitated, i.e., no part of the sound recording is reproduced by the copyright owner, and that otherwise the conduct is actionable. The Ninth Circuit found a logical paradox in the Sixth Circuit's reading of the provision: the fact that Section 114(b) is intended to create a safe harbor for sound recordings does not mean that sound recordings outside of the safe harbor are automatically infringed, because the fair use doctrine and the de minimis doctrine are still available as defenses to non-infringement in addition to the safe harbor established by this section. In addition, while Sections 107-118 of the U.S. Copyright Act are designed to limit the rights of copyright holders according to legislative precedent, the Sixth Circuit's interpretation of Section 114(b) actually expands the rights of copyright holders of sound recordings because this is a type of copyright that is exempted under the de minimis rule and thus not enjoyed by authors of other types of works, and therefore the Sixth Circuit's expanded interpretation of Section 114(b) does not mean that a sound recording is automatically infringed outside of the safe harbor. The Sixth Circuit's expansive interpretation was therefore erroneous.

4.3. Analysis of the root causes of disagreement

In the author's view, the controversy over whether the de minimis rule applies to the defense in the field of digital music sampling in the courts of the United States, for example, is still a discussion on the balance of interests in intellectual property law.

Intellectual property law, including copyright law, aims to maximize the net social gain from the conduct it regulates. The net social gain is the difference between the gain, which takes the form of newly created outputs, and the social loss, which is usually the loss of consumer welfare when the property rights to those outputs are sold at a price higher than the marginal cost of their production. Intellectual property policy is about comparing and weighing the above aspects in order to strike a balance - just enough to maximize the quantity and quality of newly created outcomes without making them more costly to society [7]. The advent of digital sampling techniques has exacerbated the difficulty of balancing control.

Sampling is the act of digitally reproducing a portion of an existing recording and inserting that portion of the "sample" into a new recording. Sampling was introduced to the market by an Australian company in 1979, and since then the sampling industry has been attracting attention with the rise in popularity of music styles such as Breaking, Break Beat, Jungle, Drumn & Bass, etc. At this time, the interests of recordings as sound recordings were high, and the sampling industry had become a major player in the music industry. At this time, records as sound recordings were lucrative, and thanks to the development of sampling technology, the cost of piracy was greatly reduced, and piracy was prevalent. While digital music sampling has increased consumer welfare in terms of quality, quantity and even price, it has also fundamentally dampened the creativity and enthusiasm of music creators and record companies. In order to rectify the market chaos and safeguard vested interests, capital needs to seek legal protection, and copyright law is one of the most direct and effective ways to solve the problem. The question of how to balance the interests of all parties naturally surfaces. The discussion of "whether to apply the de minimis rule for defense" is just a dispute point exposed when exploring how to balance the interests of all parties in the solution. The author believes that to better balance the interests of the parties should apply de minimis rule, only in the specific application, must clarify the following aspects.

5. Solutions

5.1. Nature of the de minimis rule

In the author's view, de minimis is not a separate defense in copyright law, but an extension of

the elements of copyright infringement. As we all know, in order to prove copyright infringement, it is necessary to prove the existence of copying, and in practice, copying is usually difficult to be proved directly, so generally through the proof of copyrighted works and allegedly infringing works there is a "substantial similarity" to achieve. Substantial similarity includes both quality and quantity, which are closely related, mutually constrained, and inseparable. The de minimis rule, which relates to quantity, should also be governed by this interrelationship. In August 2017, in Hirsch v. CBS Broadcasting, Inc. which involved the infringement of a 2-second clip, the SDNY court wrote that the length of the sample is one factor in measuring whether it is substantially similar, but other factors easily and often make it a factor of "substantial similarity". Factors easily and often render it immaterial. That is, the court did not find that a short period of time would defeat a finding of substantial similarity, i.e., if a short sample contains a substantial portion of the exact content of the copyrighted work (i.e., it is substantially similar in terms of "quality"), it is substantially similar despite the shortness of the sampled copy. Therefore, when applying the de minimis rule in judicial practice, it is not possible to unilaterally determine infringement from the length of the sampling alone, which is a measure of "quantity" in the principle of "substantial similarity" and should be examined in conjunction with "quality" to determine infringement. The de minimis rule has a dual nature, not only requires the quantity of "less", but also to achieve the "quality" of "less". "The rule of de minimis has a dual character.

5.2. Rationalization of the de minimis rule

In jurisprudence, there are three things that the law does not care about, and one of them is "triviality". Absolutely not because of the event "small" will be called "trivial", the reason why trivial, because it will not have much infringement on the rights of people, as for human feelings or interests are hurt and detracted, is not the focus of the law and the core of concern [8]. Courts in practice determine whether it constitutes de minimis de minimis, the use of general audience test, as long as the average listener cannot identify the sampling part, the sampling behavior does not constitute copyright infringement. The use of this test, so that the sampling behavior will not allow listeners to locate the specific copyright holder, and therefore will not reduce the copyright holder's sales revenue and licensing income, the copyright holder's personal and property rights will not be affected, therefore, in line with the de minimis rule of sampling behavior that is the law of the three irrational "trivia". The role and significance of triviality is relatively small, the impact on the whole thing is not great, in addition, the judicial resources are public and limited, the justice should not and cannot be too much entangled in trivial matters.

In terms of industry development, the de minimis rule can promote innovation in the industry. The German Federal Constitutional Court passed on a similar idea in the Kraftwerk case, which involved a reproduction of only two seconds in length, and held that the freedom of the artistic act of sampling a sound recording should be legally protected when it does not harm the economic gain of the right holder, and that sampling of copyrighted sound recordings should become a constitutional right.

5.3. Factors to be Considered in Applying the de minimis Rule in the Field of Digital Music Sampling in China

India, as an Asian country with a high rate of development in digital technology and information technology, is of great reference value to our country in many aspects. The High Court of Delhi in India has recently determined the factors to be considered in applying the de minimis rule, such as the subjective intent of the infringer, the impact on the legal rights of the third party, the type and scope of the damage caused, and the cost of justice, etc. These factors are added to the scope of

consideration, which can broaden the horizon of judgment and synthesize the claims of stakeholders. The addition of these factors to the scope of consideration will broaden the horizon of judgment, integrate the claims of stakeholders, and rationalize the final judgment.

6. Conclusion

China's judicial practice in the application of de minimis rule should also uphold the purpose of balancing the interests of all parties, based on the actual situation in China, the dialectical application, in order to maximize the de minimis rule to protect the rights of the function of promoting innovation.

Acknowledgements

This article is one of the research results of "Innovation of Integrated Education Mode Based on 'Fussion Media Operation Practice' Curriculum in the Context of AIGC", 2023 School-level Educational Reform Project, Sichuan University of Media and Communications.

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