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Taking Bytes: Sound Recordings, Digital Sampling, and the De Minimis Exception

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COMMENT

TAKING BYTES: SOUND RECORDINGS, DIGITAL SAMPLING, AND THE DE MINIMIS EXCEPTION

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INTRODUCTION

Every now and then, a high-profile musical copyright dispute pulls intellectual property law into the spotlight.[1] Recently, the "Blurred Lines" litigation, where the estate of Marvin Gaye sued Pharrell Williams and Robin Thicke for infringement, made headlines all over the world.[2] Taylor Swift made substantial progress in re-recording her first six studio albums because of original audio recording ownership disputes with her former record label.[3] Music copyright law shapes negotiations in the music industry that do not land in the headlines but nonetheless reflect fundamental intellectual property values—such as promoting creativity and respecting the ownership rights of artists.[4]

Currently, courts are split on whether a triviality exception should exist for sound recording copyright infringement in cases where an artist sampled an existing recording without a license.[5] In *Bridgeport Music v. Dimension Films*, the United States

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[1] For example, a Hungarian artist brought a conspicuous copyright action against Ye, the rapper formerly known as Kanye West, over alleged copying in the song "New Slaves" which appeared on his number one album *Yeezus*. The lawsuit settled on undisclosed terms. Jonathan Stempel, *Kanye West Settles with Hungarian Singer over Alleged Song Theft*, REUTERS (Mar. 24, 2017, 12:11 PM), https://www.reuters.com/article/us-music-kanyewest-idUSKBN16V26V [https://perma.cc/Q2JR-869Y]. For a discussion of high-profile music copyright disputes, see *infra* notes 2–3.

[2] See, e.g., Ben Kesslen, *Robin Thicke, Pharrell Williams to Pay $5 Million to Marvin Gaye Estate for 'Blurred Lines'*, NBC NEWS (Dec. 13, 2018, 3:24 PM), https://www.nbcnews.com/pop-culture/music/robin-thicke-pharrell-williams-pay-5-million-marvin-gaye-estate-n947666 [https://perma.cc/F3VL-UJAR]; Mark Savage, *Blurred Lines: Robin Thicke and Pharrell Williams to Pay $5m in Final Verdict*, BBC (Dec. 13, 2018), https://www.bbc.com/news/entertainment-arts-46550714 [https://perma.cc/2SAQ-XQW3].

[3] *See* Travis M. Andrews, *Can Taylor Swift Really Rerecord Her Entire Music Catalog?*, WASH. POST (Aug. 22, 2019), https://www.washingtonpost.com/arts-entertainment/2019/08/22/can-taylor-swift-really-rerecord-her-entire-music-catalogue/ [https://perma.cc/BXW3-PHE2].

[4] *See* Jessica Mauceri, Note, *Why the Bridgeport Rule for Infringement of Sound Recordings is No Longer "Vogue"*, 26 CARDOZO ARTS & ENT. L.J. 541, 547, 555 (2018) (discussing the purposes of copyright law as applied to music and the effects of sound recording copyright on license negotiations in the industry, including the promotion of creativity and respect for artists' ownership rights).

[5] *Compare* Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (holding there is no triviality exception in sound recording copyright), *with* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016) (holding that a *de minimis* exception exists in sound recording copyright law). This triviality exception requires a copyright plaintiff to establish that the defendant's copying of protected material was substantial. *See VMG Salsoul, LLC*, 824 F.3d at 877. "Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition

Court of Appeals for the Sixth Circuit held that any unlicensed sampling, no matter how small, was infringement.[6] Eleven years later, the United States Court of Appeals for the Ninth Circuit split from the *Bridgeport* decision in *VMG Salsoul, LLC v. Ciccone*.[7] In *VMG Saloul, LLC*, the Ninth Circuit held that certain trivial instances of sampling fall short of copyright infringement.[8]

This Comment discusses the development of the triviality exception in music copyright infringement and the current circuit split. Part I describes the statutory and jurisprudential foundation of sound recording copyright law. Next, Part II describes the Sixth and Ninth Circuit opinions that diverge in their recognition of a *de minimis* exception for sound recording copyright infringement, as well as the recent Fifth Circuit opinion which addresses the circuit split. Part III analyzes the current decisions and evaluates possible solutions to reconcile the circuit split. Finally, Part V of this Comment concludes that a *de minimis* exception should exist in sound recording copyright law and argues that the intended audience test is the best solution to the circuit split.

I. PUTTING THE "COPY" IN COPYRIGHT: MUSIC COPYRIGHT LAW, DIGITAL SAMPLING, AND SUBSTANTIAL SIMILARITY

Courts have failed to clearly define what protections apply to sound recording copyright holders.[9] This section explores historic copyright protections for sound recordings, discusses the elements of a copyright infringement claim, and describes relevant defenses for such a claim. In particular, this section focuses on the *de minimis* doctrine and how it relates to sound recording copyright.

A. *Copyright Law and Music*

Copyright law aims to balance two competing goals: protecting artists' original works and encouraging innovation and creativity to benefit the public.[10] In music copyright law, two types of works can be protected: (1) compositions, which are notes, melodies, and lyrics, often in the form of sheet music; and (2) sound recordings, which are the actual sounds captured in a medium like a record, tape, or digital

to copying, it must be shown that this has been done to an unfair extent." West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909).

[6] 410 F.3d 792, 800 (6th Cir. 2005) (holding that lifting or sampling any part of a copyrighted sound recording is infringement).

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

[8] *See id.* at 886 (holding that a *de minimis* exception exists for claims of sound recording copyright infringement).

[9] For a discussion of the inconsistencies in interpretation of copyright protections for sound recordings, see *infra* note 41 and accompanying text.

[10] *See, e.g.*, Bridgeport, 410 F.3d at 800 (citing compulsory licenses as an example of copyright law allowing creators to enjoy the benefits of their work while preventing them from fencing off their creations from the world at large).

file.[11] Creators of these types of works retain exclusive rights to reproduction, preparation of derivative works, and distribution of protected material.[12]

Generally, "copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner."[13] "Derivative works" are new creations that are based on or adapted from a prior copyrighted work, such as a movie sequel or a song remix.[14] For a claim of copyright infringement, a copyright holder must establish their ownership of a valid copyright and the defendant's actionable copying of original, integral elements of the protected work.[15] Certain copyright doctrines, including fair use, the *de minimis* exception, and the Sound Recording Amendment of 1971, limit which instances of copying are "actionable.[16]

1. *Fair Use*

The fair use doctrine provides an affirmative defense to a copyright infringement claim.[17] Fair use recognizes there are certain circumstances where unlicensed use of copyrighted material should be permitted.[18] For example, the doctrine ensures that using copyrighted work for education, news reporting, or research does not always require a license.[19] Courts use the fair use doctrine to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[20] Section 107 of the Copyright Act provides the framework for determining whether a use or activity qualifies as a "fair use" and identifies certain types of uses, like criticism, comment, news reporting, teaching,

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[11] *See* Amanda Jenkins, *Copyright Breakdown: The Music Modernization Act*, LIBRARY OF CONGRESS: NOW SEE HEAR! (Feb. 5, 2019), https://blogs.loc.gov/now-see-hear/2019/02/copyright-breakdown-the-music-modernization-act/ [https://perma.cc/6LXP-LXF3] (describing the differences between music composition copyrights and sound recording copyrights, both in content and in the legal protections for the copyrighted work).

[12] *See* 17 U.S.C. § 106 (2002) (enumerating the exclusive rights of the owners of copyrighted works).

[13] *Definitions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq-definitions.html [https://perma.cc/5BYS-TXW5] (last visited Sept. 4, 2021).

[14] *See* U.S. COPYRIGHT OFF., CIRCULAR 14: COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (2020), https://www.copyright.gov/circs/circ14.pdf [https://perma.cc/B54Y-297B].

[15] *See, e.g.,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (citing Harper & Row, Publ'ns, Inc. v. Nation Enters., 471 U.S. 539, 548 (1985)) (describing the necessary elements for a claim of copyright infringement).

[16] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2019) (describing the use of the *de minimis* exception in copyright law as an accepted doctrine among courts when the similarity between two works is clearly not substantial).

[17] *See id.* at § 13.05 ("In determining whether given conduct constitutes copyright infringement, the courts have long recognized that certain acts of copying are defensible as 'fair use.'").

[18] *See More Information on Fair Use*, U.S. COPYRIGHT OFF. (May 2021), http://www.copyright.gov/fair-use/more-info.html [https://perma.cc/UAD7-9MP6] (introducing the fair use doctrine as a legal doctrine which permits the use of copyrighted material to promote freedom of expression).

[19] *See id.*

[20] *Id.* (quoting Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)). The Copyright Act of 1976 was the first statute to recognize the fair use defense. *Id.*

and research, that do not constitute infringement.[21] In a fair use analysis, courts consider "whether the new work is transformative—i.e., does the new work alter the original with new expression, meaning, and message."[22] In this way, the fair use doctrine furthers one important goal of copyright law: promoting freedom of expression.[23]

2. *The De Minimis Exception*

De minimis non curat lex (often abbreviated as "*de minimis*") is a legal maxim meaning that the law does not concern itself with trifles.[24] This doctrine allows marginal violations in various areas of the law.[25] In addition to applications in tort, civil, and criminal matters, the *de minimis* exception has been applied in copyright law in situations when the use or reproduction of the copyrighted work is so minimal it does not constitute actionable infringement.[26] Like the fair use doctrine, the *de minimis* exception can be used as an affirmative defense.[27] That is, an alleged infringer may

[21] *See* 17 U.S.C. § 107 (enumerating the four relevant factors in a fair use analysis: (1) "the purpose and character of the use," (2) "the nature of the copyrighted work," (3) the "substantiality of the portion used in relation to the copyrighted work as a whole," and (4) "the effect of the use upon the potential market for or value of" the original work).

[22] Loren E. Mulraine, *A Global Perspective on Digital Sampling*, 52 AKRON L. REV. 697, 719 (2018).

[23] *See More Information on Fair Use*, *supra* note 18 (explaining that fair use analysis involves a fact-specific inquiry that considers each of the four factors with the aim of allowing unlicensed use of copyright law in ways that further the public interest).

[24] *De minimis non curat lex*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[25] *See* Andrew Inesi, *A Theory of De Minimis and A Proposal For Its Application in Copyright*, 21 BERKELEY TECH. L.J. 946, 948–49 (2006). In applying the *de minimis* doctrine, courts often consider "the size and type of the harm, the cost of adjudication, the purpose of the rule or statute in question, the effect of adjudication on the rights of third parties, and the intent of the infringer." *Id.* at 951.

[26] *See* Gayle v. Home Box Off. Inc., No 17-CV-5867, 2018 WL 2059657, at *4 (S.D.N.Y. May 1, 2018) (dismissing a graffiti artist's copyright infringement claim as *de minimis* where a film production company used "a fleeting shot of barely visible graffiti" because no lay observer would be able to pick out the trademark); Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004), *aff'd*, 388 F.3d 1189 (9th Cir. 2004) (dismissing a music composition copyright owner's claim of infringement as *de minimis* because "an average audience would not discern" the original composer from the copying artist's use of the composition); Gordon v. Nextel Communs. and Mullen Advert., Inc., 345 F.3d 922, 924–25, 928 (6th Cir. 2003) (affirming a determination that use of a copyrighted image in a television commercial because the illustration "appear[ed] fleetingly and [was] primarily out of focus"); Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315, 323 (2002) ("The function of the 'de minimis' doctrine (as it is frequently cited) is to place 'outside of the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society.'"). Three applications of the *de minimis* doctrine exist: the first involves a technical violation so trivial that the law will not impose consequences, the second involves copying to such a trivial extent that it does not constitute actionable copying, and the third occurs in a fair use analysis when a court must examine "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." The second of these is the application referenced by courts and commentators in the context of copyright infringement generally, and is "a seamless fit for digital sampling cases where the use is qualitatively and quantitatively miniscule." Mulraine, *supra* note 22, at 711.

[27] NIMMER & NIMMER, *supra* note 16, at § 13.05 (explaining that the de minimis exception applies in cases where the use of copyrighted material is so unimportant that it does not justify a finding of substantial similarity).

admit to copying but argue that, because the copying was *de minimis*, they are not liable for copyright infringement. The *de minimis* exception can also act as a negative defense, where an alleged infringer argues that they did not copy at all because they did not use integral, substantial portions of the plaintiff's protected work.[28]

3. *Sound Recording Amendment of 1971*

The Sound Recording Amendment of 1971 (the Amendment) and its subsequent incorporation into the Copyright Act of 1976 first recognized sound recording as a federally protected medium and defined the rights of sound recording copyright holders.[29] All sound recordings created after January 1, 1978, are automatically protected by copyright.[30] Sections 102, 106, and 114(b) of the Amendment impact the *de minimis* exception.[31]

Section 102 of the Amendment lists the mediums protected by copyright law. These include sound recordings, literary works, dramatic works, motion pictures, musical compositions, and others.[32] Section 106 of the Amendment lists the exclusive rights of a copyright owner, including the right to create derivative works. This allows the copyright holder to prohibit adaptations, sequels, and other works based on the original copyrighted material.[33]

Section 114(b) of the Amendment also lists limitations on the rights of sound recording copyright owners.[34] This provision clarifies that the rights of a copyright holder under Section 106 of the Amendment do not extend to the imitation of a sound recording through "an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[35] Accordingly, other artists can perform and record renditions of a recorded song without infringing on the sound recording copyright as long as the new creation does not contain *actual sounds* from the original recording.[36] For example, an eighties cover band playing its own version of "Livin' on a Prayer" is not infringing the original Jon Bon Jovi sound recording copyright because the cover band is not using the original sounds that Bon Jovi himself recorded.

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[28] *See Newton*, 388 F.3d at 1193 (discussing the relationship between the *de minimis* exception and the general inquiry for substantial similarity required for a claim of copyright infringement).

[29] Sound Recording Amendment of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

[30] *Copyright Registration for Sound Recordings*, U.S. COPYRIGHT OFF. (Mar. 2021), https://www.copyright.gov/circs/circ56.pdf [https://perma.cc/MUG8-9G82].

[31] For a description of the relevant statutory sections and a discussion of their relationship to the *de minimis* exception, see *infra* notes 32–41 and accompanying text.

[32] 17 U.S.C. § 102 (listing literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and audiovisual works; sound recordings; and architectural works as protected copyright material).

[33] 17 U.S.C. § 106.

[34] 17 U.S.C. § 114(b) (stating that the rights of sound recording copyright holders are limited to duplication in certain forms, do not extend to any sound recording that consists entirely of an independent fixation of sounds, and do not extend to sound recordings used in educational programs).

[35] *Id.*

[36] *See* Tim Schaefer, Comment, *Sampling and the De Minimis Exception: Balancing the Competing Interests of Copyright Law in Sound Recordings*, 55 TULSA L. REV. 339, 343 (2020).

4. *Music Sampling and the De Minimis Exception*

In the context of sound recording copyright, the *de minimis* exception is applied to claims of infringement based on music sampling.[37] Sampling is a technique whereby a musician copies part of an existing sound recording and incorporates it into a new sound recording.[38] For example, Vanilla Ice sampled sounds from Queen's "Under Pressure" in "Ice Ice Baby."[39] In some instances of sampling, an artist simply copies and pastes part of an existing sound recording into a new sound recording, but the creator of the new work will alter the sampled recording in some way, changing its speed or pitch.[40] The question then remains: if the sample is sufficiently altered to the point it is unrecognizable, can a defendant employ the *de minimis* exception to defeat a claim of copyright infringement? Currently, there is little uniformity among courts over whether and how a *de minimis* exception applies to sound recording copyright; some jurisdictions do not recognize the exception at all, and those jurisdictions that do recognize the *de minimis* exception do not employ a uniform test to determine whether and when a use qualifies as *de minimis*.[41]

B. *Pre-Circuit Split Jurisprudence*

The United States Court of Appeals for the Sixth Circuit in *Bridgeport* was the first court to provide a straightforward *de minimis* analysis in the sound recording context.[42] However, the question of whether a *de minimis* exception exists for sound

[37] *See*, *e.g.*, Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001) (finding copied portion of song fell short of substantiality requirement of the plaintiff's infringement claim for both the composition and sound recording copyrights); Tuff 'N' Rumble Mgmt., Inc. v. Profile Rec., Inc., No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *15 (S.D.N.Y. Apr. 2, 1997) (granting defendants' motion for summary judgment for a claim of sound recording copyright infringement where the copied works were not found to be substantially similar to the copyrighted recording).

[38] *See, e.g.*, Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 POPULAR MUSIC 41, 41 (2003) (defining sampling as "a digital process in which pre-recorded sounds are incorporated into the sonic fabric of a new song").

[39] *See* Sarah Murphy, *Vanilla Ice Apparently Owns the Rights to "Under Pressure"*, EXCLAIM! (Jul. 13, 2017), https://exclaim.ca/music/article/apparently_vanilla_ice_owns_the_rights_to_under_pressure [https://perma.cc/H75J-QDCX]. Interestingly, Vanilla Ice "apparently" bought the publishing rights to the song that he sampled, claiming that purchasing the rights was cheaper than litigating a potential copyright infringement claim against Queen and David Bowie in court. *Id.*

[40] *See* Alexander Stewart, *"Been Caught Stealing": A Musicologist's Perspective on Unlicensed Sampling Disputes*, 83 UMKC L. REV. 339, 342 (2014) (explaining that samples "are rarely used unaltered" because many producers value transforming the sound recording, cleverly altering and re-contextualizing the prior work to distinguish themselves and exhibit creativity).

[41] The Sixth Circuit has held that no *de minimis* exception exists for sound recording copyright. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005). The Ninth Circuit has held that a *de minimis* exception exists, and that the test for the exception is whether the "average audience" would recognize the appropriation. *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 878 (9th Cir. 2016) (citing Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004), *aff'd*, 388 F.3d 1189 (9th Cir. 2004)). The Southern District of New York, in contrast, looks to whether the similarity relates to matter that constitutes a substantial portion of the allegedly infringing work. *Williams*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (quoting NIMMER & NIMMER, *supra* note 16, at § 13.03[A]).

[42] *See* Lesley Grossberg, *A Circuit Split at Last: De Minimis Exception*, AM. BAR ASS'N (June 21, 2016), https://www.americanbar.org/groups/litigation/committees/intellectual-

recording copyright infringement harkens back to several earlier cases that laid a foundation for the current jurisprudence by analyzing the substantiality or triviality of the similarities between musical works.

1. *Substantially Similar or De Minimis*

In the seminal musical copyright infringement case *Arnstein v. Porter*[43], the United States Court of Appeals for the Second Circuit provided the modern "average audience" test.[44] *Arnstein* involved alleged infringement of a musical composition.[45] The court first explained the plaintiff's interest protected by copyright law was not his reputation as a musical artist; rather, copyright law protected the plaintiff's financial interests by preserving the uniqueness of the artist's work and the resulting public recognition.[46] In evaluating whether the defendant's work was substantially similar to the plaintiff's, the court focused its inquiry on "whether defendant took from plaintiff's works so much of what is pleasing to the ears of *lay listeners*, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to plaintiff."[47] Thus, under *Arnstein*, the test for substantial similarity hinges on the reaction of the "lay listener" because the plaintiff's protected interest depends on the recognition of the general public.[48]

The United States Court of Appeals for the Fourth Circuit continued the Second Circuit's progress by developing the "lay listener" approach in *Dawson v. Hinshaw Music*.[49] The *Dawson* court recognized that *Arnstein*'s "lay listener" approach operated on the assumption that the ordinary listener was the intended audience of the protected work, meaning the measure of the average audience's reaction was relevant because it gauges the impact of the defendant's work on the plaintiff's market.[50]

property/practice/2016/circuit-split-at-last-de-minimis-exception/ [https://perma.cc/4XFC-KGNX] (explaining that, for ten years after the Sixth Circuit's *Bridgeport* opinion, the court was the only court to have addressed head-on the issue of whether a *de minimis* exception exists in the context of sound recording copyright infringement until the Ninth Circuit opined in *Ciccone*).

[43] 154 F.2d 464 (2d Cir. 1946).

[44] *Id.*

[45] *See id.* at 469 (comparing the musical compositions of the plaintiff and defendant to evaluate the works' similarity on the issue of factual copying).

[46] *See id.* at 473 (explaining that a claim for actionable copying arises from any economic damages that the plaintiff may have incurred as a result of the appropriation).

[47] *Id.* (emphasis added).

[48] *See id.* (detailing that parties may assist juries in assessing the inquiry of actionable copying by playing the two works for the jury, calling witnesses to testify to the response of a lay audience, or presenting expert testimony to assist in determining the reactions of lay auditors, but that parties may not present testimony on the reaction of musical experts).

[49] Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 733–34 (4th Cir. 1990) (explaining that, under *Arnstein*, a court should assess the reaction of lay listeners because they comprise the audience of the plaintiff's work but asserting that lay listeners are only relevant to the inquiry because they comprise the relevant audience for the protected work).

[50] *See id.* at 734 (citing Susan A. Dunn, Note, *Defining the Scope of Copyright Protection for Computer Software*, 38 STAN. L. REV. 497, 514 (1986)). The total concept and feel of ordinary literary works is relevant because it is the basis on which potential purchasers of the work identify and choose them. If one work appears similar to another in the eyes of the ordinary lay observer, it is likely to appear the same to most consumers, and its adverse effect on demand for the protected work is cause to proscribe it. *Id.*

According to the *Dawson* court, lay listeners are relevant to the substantial similarity inquiry "only [if] they comprise the relevant audience."[51] The court held that, in considering whether two works are substantially similar, a court must consider the nature of the intended audience of the plaintiff's work.[52] If, as will usually be the case, the lay public accurately represents the intended audience, the court should apply the lay listener approach to the average audience test. However, if the intended audience consists of persons with a certain expertise that lay people lack, the court stressed focusing the inquiry on "whether a member of the intended audience would find the two works to be substantially similar."[53]

2. *Can Sampling Be De Minimis?*

In *Grand Upright Music, Ltd. v. Warner Bros. Rec.*[54], the United States District Court for the Southern District of New York addressed sound recording infringement in the context of music sampling. The *Grand Upright* decision altered the legal and commercial landscape of the increasingly popular practice.[55] When rapper Biz Markie tried and failed to clear a sample with sound recording copyright holder Gilbert O'Sullivan, the latter sued for infringement over the unlicensed sample.[56] The *Grand Upright* court not only awarded O'Sullivan damages and injunctive relief, but also asserted that Biz Markie was liable for theft and referred the case to criminal court.[57] While making clear its disdain for hip-hop music, the court also created a bright-line rule: unauthorized digital sampling is *per se* infringement.[58]

In *Newton v. Diamond*, the United States Court of Appeals for the Ninth Circuit issued an opinion in favor of a *de minimis* exception for music copyright infringement

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[51] *Id.* ("[W]ith a popular composition at issue, the *Arnstein* court appropriately perceived 'lay listeners' and the works' 'audience' to be the same.").

[52] *See id.* (explaining that, consistent with the logic of *Arnstein* and the purpose of copyright law to protect a creator's market, a court must consider the works' intended audience rather than apply too broadly *Arnstein*'s "lay listener" rule).

[53] *Id.* at 736. The Fourth Circuit explained that its "intended audience" test should not often alter courts' inquiries of substantial similarity in practice. *Id.* In fact, courts should be hesitant to find that the ordinary observer is *not* the intended audience of a protected work. *Id.* at 736–37. Rather, changing the label of the inquiry from the "lay listener" or "ordinary observer" test to the "intended audience" test should make application of the rule more precise in practice by discouraging courts from assessing the reaction of a lay audience where the reaction of a specialized audience is appropriate. *Id.* at 737.

[54] 780 F. Supp. 182 (S.D.N.Y. 1991).

[55] *Id.*; *see* Oliver Wang, *20 Years Ago Biz Markie Got the Last Laugh*, NAT'L PUB. RADIO (May 6, 2013, 12:50 PM), https://www.npr.org/sections/therecord/2013/05/01/180375856/20-years-ago-biz-markie-got-the-last-laugh [https://perma.cc/7ES3-4T9T] (describing the effects of the *Grand Upright* opinion in the music industry, including the dedication of music label staff and resources toward "scouring releases to make sure all samples had proper clearance[,]" a catalog of unreleased music that never went public because it did not get clearance, and the practice of artists to alter any recognizable samples and seek out obscure sound recordings in attempts to avoid unlicensed sampling detection in a "zero tolerance" environment).

[56] *See Grand Upright*, 780 F. Supp. at 183–85 (explaining that Biz Markie sent a tape of the song with a letter requesting O'Sullivan's consent to incorporate portions of the copyrighted work).

[57] *See id.* at 185 ("This case is respectfully referred to the United States Attorney for the Southern District of New York for consideration of prosecution of these defendants . . . .").

[58] *See id.* at 183 ("The conduct of the defendants . . . violates not only the Seventh Commandment, but also the copyright laws of this country.").

claims.[59] Importantly, although the defendant sampled the copyrighted sound recording and appropriated the underlying composition, the court ruled only on the musical composition copyright claim because the defendants obtained a license to use the sound recording.[60] The artist sampled a six-second jazz flute segment, but the court held that the use of the composition was *de minimis* and therefore did not constitute actionable infringement.[61] The *Newton* decision was the first time a United States court of appeals applied the *de minimis* doctrine to a case of copyright infringement in music sampling.[62]

II. A BRIGHT-LINE HOLDING WITH HAZY EFFECTS: THE CIRCUITS SPLIT ON A *DE MINIMIS* EXCEPTION

The United States Courts of Appeals for the Sixth Circuit and Ninth Circuit have issued conflicting opinions on whether a *de minimis* exception should exist for sound recording copyright.[63] This circuit split remains unresolved, leaving open questions in this area of copyright law.[64] This Part explores the reasoning and conclusions of the Sixth and Ninth Circuit opinions, as well as the effects of each holding on sound recording copyright law.

A. *The Sixth Circuit's Bright-Line* Bridgeport *Rule*

In 2005, the United States Court of Appeals for the Sixth Circuit issued a controversial opinion addressing the scope of copyright protection for sound recordings in *Bridgeport Music Inc. v. Dimension Films*.[65] The soundtrack for the movie *I Got the*

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[59] *See* Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2003), *aff'd*, 388 F.3d 1189 (9th Cir. 2004) (citing Ringgold v. Black Enter. TV, 126 F.3d 70, 74–75 (2d Cir. 1997)) ("For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.").

[60] *See id.* at 1191 ("In 1992, Beastie Boys obtained a license to use portions of the sound recording . . . . Beastie Boys did not obtain a license from Newton to use the underlying composition.").

[61] *See id.* at 1192, 1196–97 (holding that the Beastie Boys' use of a short segment of the composition was "not sufficient to sustain a claim for infringement of Newton's copyright of the composition").

[62] *See* Jeremy Scott Sykes, *Copyright - The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 765 (2006) ("The Ninth Circuit became the first appellate court to address specifically the question of the de minimis defense's applicability to copyright infringement involving sampling in the 2003 case *Newton v. Diamond*."). Not only did the Ninth Circuit in *Newton* apply a *de minimis* analysis to a claim of infringement by music sampling, but the court also implied in dicta that use of the sound recording would be subject to the "average audience" test if it were at issue. *See* Newton, 388 F.3d at 1194.

[63] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) (holding that lifting or sampling any part of a copyrighted sound recording is infringement); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) (holding that a *de minimis* exception exists for claims of sound recording copyright infringement).

[64] *See* Schaefer, *supra* note 36, at 340 (noting that the Sixth and Ninth Circuit opinions have created uncertainty by varying the level of protection for sound recording copyright in different jurisdictions).

[65] For a discussion of criticisms of the *Bridgeport* decision, see *infra* note 81 and accompanying text.

Hook-Up was at the center of the *Bridgeport Music* case.[66] The movie included in its soundtrack a rap song called "100 Miles and Runnin,"' which contained an unlicensed sample of the song "Get Off Your Ass and Jam."[67] The record companies which owned the copyright to the sound recording of "Get Off Your Ass and Jam" sued the *I Got the Hook-Up* film production companies for copyright infringement over the unlicensed sample.[68]

In examining Sections 106 and 114(b) of the Amendment, the Sixth Circuit reasoned that the word "entirely" supported its conclusion that "a sound recording owner has the exclusive right to 'sample' his own recording."[69] Put plainly, the court interpreted the statute to mean that any unlicensed sampling of a copyrighted sound recording constitutes infringement.[70] In addressing the policy reasons in favor of its holding, the court argued that even small parts of sound recordings should be valued and emphasized the ease of enforcement of this bright-line rule.[71]

The Sixth Circuit anticipated and opposed arguments that its holding would stifle creativity.[72] The court had a simple instruction for artists who might view its holding as limiting: get a license.[73] The court also recommended that artists looking to sample check out the wealth of sounds in the public domain.[74]

B. *Reactions to* Bridgeport

The Sixth Circuit's bright-line rule has been widely criticized—courts and commentators, as well as a leading copyright treatise, have taken issue with the statutory interpretation on which the Sixth Circuit heavily relied.[75] The relevant statutory provision, Section 114(b), states:

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[66] *Bridgeport*, 410 F.3d at 795.

[67] *Id.*; *I Got the Hook-Up* (Dimension Films 1998); N.W.A., *100 Miles and Runnin'*, *on* 100 MILES AND RUNNIN' (Ruthless 1990); FUNKADELIC, *Get Off Your Ass and Jam*, *on* LET'S TAKE IT TO THE STAGE (George Clinton 1975).

[68] *See Get Off Your Ass and Jam*.

[69] *Bridgeport*, 410 F.3d at 800–01; 17 U.S.C. § 114(b) ("The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.").

[70] *See Bridgeport*, 410 F.3d at 801 n.10 (citing Susan J. Latham, Newton v. Diamond*: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003)).

> [I]t does not matter how much the digital sampler alters the actual sounds or whether the ordinary lay observer cannot recognize the song or the artist's performance of it. Since the exclusive right encompasses rearranging, remixing, or otherwise altering the actual sounds, the statute by its own terms precludes the use of a substantial similarity test.

Id.

[71] *See id.* at 801–02 ("[E]ven when a small part of a sound recording is sampled, the part taken is something of value.").

[72] *See id.* at 804 ("[M]any of the hip hop artists may view this rule as stifling creativity.").

[73] *See id.* (addressing the argument that a bright-line rule outlawing all unlicensed sampling would stifle creativity by arguing that "many artists and record companies have sought licenses as a matter of course").

[74] *Id.* ("Also there is a large body of pre-1972 sound recordings that is not subject to federal copyright protection.").

[75] *See, e.g.*, Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009) (criticizing and declining to follow *Bridgeport*'s "per se infringement" approach); NIMMER &

> The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 *do not extend* to the making or duplication of another sound recording that *consists entirely of an independent fixation of other sounds*, even though such sounds imitate or simulate those in the copyrighted sound recording.[76]

The Sixth Circuit concluded that exclusive rights *do* extend to the making of another sound recording that *does not consist entirely* of an independent fixation of other sounds.[77] The court reached this conclusion based on the statute's statement that an owner's rights *do not extend* to the making or duplication of another's sound recording that *consists entirely* of other sounds.[78] Such a conclusion, however, seems a logical fallacy; the statute states a limitation of sound recording copyright ownership but does not address the owner's rights when a sound recording is sampled.[79] The Ninth Circuit would diametrically oppose this reasoning eleven years later in *VMG Salsoul, LLC*: "[a] statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances."[80]

Commentators have also taken issue with the Sixth Circuit's bright-line rule because of the limitations that it places on artists and the consequences of those limitations on the industry.[81] Requiring a license for any sampling, regardless of the

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NIMMER, *supra* note 16, at § 13.03[A][2][b] (2007); Michael Jude Galvin, *Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in* Bridgeport Music v. Dimension Films, 9 VAND. J. ENT. & TECH. L. 529, 538–39 (2007); Alexander C. Krueger-Wyman, Note, *Mashing Up the Copyright Act: How to Mitigate the Deadweight Loss Created by the Audio Mashup*, 14 U. DENV. SPORTS & ENT. L.J. 117, 121–22 (2013); Matthew R. Brodin, Comment, Bridgeport Music, Inc. v. Dimension Films*: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims—The Sixth Circuit's Flawed Attempt at a Bright-Line Rule*, 6 MINN. J.L. SCI. & TECH. 825, 860–61 (2005). *But see* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 387–92 (2008) (defending *Bridgeport*'s analysis).

[76] 17 U.S.C. § 114(b) (emphasis added).

[77] *See Bridgeport*, 410 F.3d at 800–01.

[78] *See id.*

[79] *See* NIMMER & NIMMER, *supra* note 16, at § 13.03[A][2][b] ("By validating entire sound-alike recordings, the quoted sentence contains no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law—which . . . include[s] the requirement of substantial similarity.").

[80] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 884 (9th Cir. 2016).

[81] *See, e.g.*, David M. Morrison, Bridgeport *Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 133–35 (2008) (arguing that the bright-line *Bridgeport* rule negatively affected artists who sample by increasing transaction costs beyond the ultimate costs associated with getting a license, including negotiation costs and transactional practices necessary to locate rights holders and secure licenses for obscure, often unlicensable sound recordings); Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 273–74, 313 (2009) (discussing the incentives created under *Bridgeport* for artists to minimize the use of samples and for litigious copyright holders to "troll" for suspected sampling and initiate frivolous lawsuits against individual artists). One commentator has specifically noted that, because digital sampling was first popularized in hip hop, a music genre dominated by black artists, "the law's unfair treatment of this issue has been disproportionately harmful to Black creators." Vincent R. Johnson III, M.S., Comment,

extent of the copying, puts more power in the hands of sound recording copyright holders.[82] Because of this, sampling costs would increase across the board.[83] In turn, artists who choose to sample would be encouraged to use fewer samples "and use them in ways that are quantitatively and qualitatively significant[.]"[84] In its attempt to strike a balance between the competing interests of copyright law, the *Bridgeport* court leaned heavily toward protecting the rights of original creators at the expense of promoting innovation and creativity.

Finally, critics of the *Bridgeport* rule have noted that the court ignored prior persuasive opinions in its ruling.[85] The *Bridgeport* court justified this decision by stating that it chose not to "address[] several of the cases frequently cited in music copyright cases because in the main they involve[d] infringement of the composition copyright and not the sound recording copyright . . . ."[86] However, this decision broke with a trend of prior courts, including the Second Circuit, that have indeed addressed a threshold issue of sound recording copyright infringement and applied a substantial similarity or average audience test.[87]

C. *The Ninth Circuit Splits in VMG Salsoul, LLC*

In 2016, the United States Court of Appeals for the Ninth Circuit addressed the issue of a *de minimis* exception in sound recording copyright law.[88] When Madonna released her song "Vogue," which contained an unlicensed sample of a 0.23-second horn segment from another song "Love Break," the owner of the sound recording copyright brought suit for infringement.[89] The Ninth Circuit reached a different conclusion than the Sixth Circuit in regard to the marginal use of a sample, thus creating a split.

Sampling As Transformation: Reevaluating Copyright's Treatment of Sampling to End its Disproportionate Harm on Black Artists, 70 AM. U. L. REV. F. 227, 259 (2021).

[82] Morrison, *supra* note 81, at 133–34 ("Extension of the *Bridgeport* holding will undoubtedly place more leverage in the hands of artists whose work is being sampled, and thus the cost of individual samples, even under a flat rate, perpetual fee, could increase significantly.").

[83] *See id.*

[84] *Id.* at 132 (explaining that the tendency of artists to use fewer samples in ways that are more significant pose a probability of increasing costs while also foreclosing benefits for third parties in the derivative works sampling paradigm).

[85] Brodin, *supra* note 75, at 857 ("The Sixth Circuit Court of Appeals decided to ignore all persuasive decisions from other circuits in favor of a few academic and business articles supporting the strict rule announced by the court of appeals"); *see also* John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 244 (2005) (citing Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002)) (arguing that, although these prior decisions were not binding on the Sixth Circuit in *Bridgeport*, they "demonstrate that a de minimis analysis is still applied in most sampling cases").

[86] *Bridgeport*, 410 F.3d at 803 n.17.

[87] *See* Tuff 'N' Rumble Mgmt., Inc. v. Profile Rec., Inc., No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *13–14 (S.D.N.Y. Apr. 2, 1997) (inquiring whether, in a claim of sound recording copyright infringement, the allegedly infringing work is substantially similar to the protected work).

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

[89] *See id.* at 875.

In contrast to the Sixth Circuit, the Ninth Circuit held that claims of sound recording copyright infringement are subject to a *de minimis* analysis.[90] The Ninth Circuit focused its analysis on the legislative history of Section 114(b) and found a House Report persuasive in concluding that sound recordings should be treated similarly to other copyrighted material, like literary works and photographs, for which the *de minimis* exception is a widely accepted defense.[91] The Ninth Circuit also found unconvincing the Sixth Circuit's argument that sound recording copyrights should be subject to increased protections because the second artist takes something expressive from the original artist because that is true of any copyright infringement claim, regardless of the nature of the work, thus the *de minimis* exception should nevertheless apply.[92] Accordingly, the court held that only substantial copying creates actionable infringement.[93]

D. *Post-Circuit Split*

The issue of sound recording copyright infringement in music sampling arose recently in a decision from the United States Court of Appeals for the Fifth Circui—*Batiste v. Lewis*.[94] In *Batiste*, a jazz musician brought suit against the rap duo Macklemore & Ryan Lewis, claiming the duo sampled eleven of his copyrighted sound recordings in their songs "Thrift Shop," "Can't Hold Us," "Same Love," "Neon Cathedral," and "Need to Know."[95] The plaintiff argued that, under *Bridgeport*, any unauthorized sampling of a sound recording, no matter how trivial, is actionable infringement.[96] In its holding, the *Batiste* court did not adopt either the Sixth or Ninth Circuit's approach to the *de minimis* exception because the plaintiff's claim failed on other counts.[97]

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[90] *See VMG Salsoul, LLC*, 824 F.3d at 887.

[91] *See id.* at 883–85 (arguing that there is no basis to support expansion of the rights of sound recording copyright holders through a bright-line rule against all unlicensed sampling); H.R. REP. NO. 94-1476, at 106 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5721.

> [S]tatutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all or *any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work.

Id. (emphasis added).

[92] *See VMG Salsoul, LLC*, 824 F.3d at 885 ("We are aware of no copyright case carving out an exception to the de minimis requirement in [the context of digitally copying photography], and we can think of no principled reason to differentiate one kind of 'physical taking' from another.").

[93] *See id.* at 887 ("We hold that the 'de minimis' exception applies to actions alleging infringement of a copyright to sound recordings.").

[94] 976 F.3d 493 (5th Cir. 2020).

[95] *See id.* (describing plaintiff's claim).

[96] *See id.* at 505 (citing Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–01 (6th Cir. 2005)).

[97] *See id.* at 506 (finding that the plaintiff failed to satisfy the threshold issue that the defendants factually copied the protected work, so even if substantial similarity existed the plaintiff's claim would still fail on the factual copying element).

Despite not addressing the merits of the plaintiff's claims, the *Batiste* court echoed criticisms of the *Bridgeport* holding in its discussion of the circuit split, citing district court decisions that explicitly refused to adopt the rule and commentators' criticisms of the opinion.[98] The court also referenced *VMG Salsoul, LLC* to explain the underlying principles of sound recording copyright law.[99] The court ultimately granted the defendants' motion for summary judgment and awarded attorney's fees and costs to the defendant, indicating that the claim was objectively unreasonable and dubiously motivated.[100] The Fifth Circuit did not formally adopt the *de minimis* exception, but *Batiste* signals the court's disagreement with the Sixth Circuit and willingness to adopt the *de minimis* exception in the future.[101] *Batiste* also suggests that, unless resolved by the Supreme Court, the circuit split will magnify and result in different application copyright law between circuits.

III. A STANDARD STANDARD: THE INTENDED AUDIENCE TEST AS A SOLUTION

By diverging from *Bridgeport* and creating a workable standard instead of a bright-line rule, the Ninth Circuit's holding avoided the pitfalls and criticisms that befell the Sixth Circuit.[102] However, the Sixth Circuit's bright-line rule has certain advantages; it creates uniformity in decisions and is straightforward in application.[103] As a result, the Ninth Circuit's adoption of a *de minimis* exception necessarily falls short in ways that *Bridgeport*'s bright-line rule did not.[104] Based on the Sixth and

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[98] *See id.* (first citing VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880–87 (9th Cir. 2016); then citing Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1341 (S.D. Fla. 2009), *aff'd,* 635 F.3d 1284 (11th Cir. 2011); and then citing NIMMER & NIMMER, *supra* note 16, § 13.03[A][2][b]) (explaining that courts and commentators have criticized the *Bridgeport* opinion for its statutory interpretation).

[99] *See id.* at 505–06 (citing to the *VMG Salsoul, LLC* opinion to explain what digital sampling is, how it implicates copyright protections, and how *Bridgeport* differed factually from the case at hand).

[100] *See id.* at 499, 506–08 (evaluating the lower court's decision to award the attorney's fees to the defendants based on the objective unreasonableness of the plaintiff's claims, the plaintiff's conduct throughout litigation, and concerns of a good faith factual basis for the claims).

[101] *See id.* at 506 ("*Bridgeport* has been widely criticized . . . . We need not decide whether to adopt *Bridgeport*'s rule here, however, because that rule doesn't relieve plaintiffs of proving factual copying.").

[102] *See* Francesco Di Cosmo, Note, *Return of the De Minimis Exception in Digital Music Sampling: The Ninth Circuit's Recent Holding in* VMG Salsoul *Improves Upon the Sixth Circuit's Holding in* Bridgeport, *but Raises Questions of Its Own*, 95 WASH. U. L. REV. 227, 231–34 (2017) (reviewing criticisms of the *Bridgeport* bright-line rule and explaining that courts and commentators largely found disagreement with the Sixth Circuit's failure to consider legislative history in its analysis, ignoring the intent of Congress behind the relevant Copyright Act provision and describing the Ninth Circuit's review of legislative history in its analysis).

[103] *See id.* at 235–38 (explaining that the Sixth Circuit's bright-line rule creates uniformity in decisions, promotes predictability in copyright law, and furthers certain policy interests of copyright law).

[104] *See id.* at 240–43 (discussing drawbacks of the substantial similarity test that apply to the average audience test); *see also* Ryan Beeck, Note, *Creativity or Copyright Infringement?: Evaluating the De Minimis Exception in Digital Sampling Through* VMG Salsoul, LLC *and* Bridgeport Music, Inc., 70 RUTGERS L. REV. 521, 531–32 (2018) (describing the Sixth Circuit's rationale in implementing a bright-line rule that would be easily enforced); Schaefer, *supra* note 36, at 351–55 (arguing that the Sixth Circuit opinion in *Bridgeport* is supported by legislative history, aligns best with the purposes of copyright law, and gives appropriate protection to sound recordings).

Ninth Circuit opinions, their effects on music copyright, and the purposes of copyright law generally, this section suggests that courts should adopt the intended audience test as the standard for applying the *de minimis* exception in copyright law.[105]

A. *Ninth Circuit Improvements to* Bridgeport

As critics of *Bridgeport* have noted, the court rested its opinion on an illogical interpretation of Section 114(b).[106] Unlike the Sixth Circuit, the Ninth Circuit looked not only to the language of the statute, but to legislative history.[107] The Ninth Circuit's reasoning was particularly influenced by a House Report that stated sound recordings should be treated similarly to other copyrighted material, like literary works and photographs, for which the *de minimis* exception is a widely accepted defense.[108] The court also cited another House Report to support its contention that, for sound recordings specifically, infringement exists where "all or *any substantial portion*" of the recording is reproduced.[109] Overall, the Ninth Circuit in *VMG Salsoul, LLC* considered a more robust view of the relevant statutory provision than the Sixth Circuit in *Bridgeport*.[110]

The Ninth Circuit also struck a different balance between the competing goals of copyright law and the decision's impact on the industry.[111] Unlike *Bridgeport*, where the court favored protection of the copyright owner at the inevitable expense of artists who sample sound recordings, the Ninth Circuit's ruling furthers another

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[105] See *infra* notes 106–16 for a discussion of the benefits of the *de minimis* exception. See *infra* notes 116–24 for a discussion of the drawbacks of the *de minimis* exception. See *infra* notes 134–47 for a discussion of possible solutions to the circuit split.

[106] *See, e.g.*, Johnson, *supra* note 81, at 248–50 (explaining that the legislative history of 17 U.S.C. § 114(b) indicates that Congress intended for the provision to limit the rights of copyright holders rather than expand them as the Sixth Circuit interpreted in *Bridgeport*); NIMMER & NIMMER, *supra* note 16, § 13.03[A][2][b] (explaining the logical fallacy underlying the Sixth Circuit's statutory interpretation); Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 AM. U. L. REV. 139, 148–49 (2018) ("[T]he legislative history confirms that the purpose of § 114 was simply to limit the scope of sound recording copyright and even contains an implied recognition of the application of improper appropriation.").

[107] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 883–84 (9th Cir. 2016) (turning to legislative history to support the conclusion that Congress did not intend to statutorily bar a *de minimis* exception in sound recording copyright law).

[108] *See id.* ("[W]hen enacting this specific statutory provision, Congress clearly understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works.").

[109] *Id.* (emphasis in original) (citing H.R. REP. NO. 94-1476, at 106 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5721).

[110] *Compare id.* (examining a House Report in addition to the statutory language to interpret the impact of §114(b) on the existence of a *de minimis* exception in sound recording copyright law), *with* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005) (arguing that "legislative history is of little help" in interpreting the relevant statutory provision because the practice of sound recording digital sampling did not exist when the statute was enacted).

[111] *See, e.g.*, Elyssa E. Abuhoff, Note, *Circuit Rift Sends Sound Waves: An Interpretation of the Copyright Act's Scope of Protection for Digital Sampling of Sound Recordings*, 83 BROOK. L. REV. 405, 426–27 (2017) (arguing that, in jurisdictions governed by the Ninth Circuit's ruling in *VMG Salsoul, LLC* the existence of a *de minimis* exception may encourage artists to continue the practice of sampling and risk litigation in light of the high transaction costs incurred to obtain a license).

important goal of copyright law: to promote creativity in the arts.[112] The Ninth Circuit's standard discourages the petty litigation the bright-line *Bridgeport* rule incentivized.[113]

Further, *VMG Salsoul, LLC* is consistent with prior district court cases that considered issues of sound recording copyright and indicated that substantial similarity should be required for infringement.[114] Although these district court cases are not binding precedent for any federal appellate court, they show that Ninth Circuit's "average audience" test is consistent with the tests applied by other courts that previously adjudicated copyright issues.[115] *VMG Salsoul, LLC*, unlike *Bridgeport*, interpreted the relevant statutory authority in a way that is also consistent with common law rules.[116] Overall, the Ninth Circuit's conclusion aligns with prior copyright law rather than diverging from it.

B. *Downsides of* VMG Salsoul, LLC

Despite the above referenced advantages of the *VMG Salsoul, LLC* standard, the *Bridgeport* rule has merit and the Ninth Circuit's divergent holding falls short in certain ways.[117] Unlike the bright-line rule from *Bridgeport*, the *de minimis* standard in *VMG Salsoul, LLC* requires a fact-intensive, case-by-case application of the "average audience" test.[118] The *VMG Salsoul, LLC* opinion minimally addresses the Sixth Circuit's inquiry into whether an "average audience" would be able to recognize the appropriation.[119] While the Ninth Circuit provided quantitative details about the

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[112] *See* David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 820–22 (2019) (arguing that *Bridgeport*'s bright-line rule prohibiting sampling has "potentially debilitating effects" on artists, particularly hip-hop artists, but *VMG Salsoul*'s acknowledgement that "not all property infringements are created equal" affirms the rights of copyright holders while accommodating the public interest in dynamism in the arts).

[113] *See* Ashtar, *supra* note 81, at 313 (arguing that *Bridgeport*'s bright-line rule encouraged "sample trolls" to "opportunistically extort users of minimal or nearly nonexistent sampling").

[114] *See, e.g.*, Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003), *aff'd*, 388 F.3d 1189 (9th Cir. 2004) (finding the copying of three notes with a background note from a musical score *de minimis*); Tuff 'N' Rumble Mgmt., Inc. v. Profile Records, Inc., No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *5 (S.D.N.Y. April 2, 1997) (discussing in dicta that the sound sample, when examined in relation to the work as a whole, failed to rise to the level of substantial similarity); Jarvis v. A&M Rec., 827 F. Supp. 282, 292 (D.N.J. 1993) (setting out a copyright infringement test requiring two works to be substantially similar for actionable infringement and making no distinction between the test for composition copyright infringement and that for sound recording copyright infringement).

[115] *See, e.g.*, *Newton*, 349 F.3d at 592; *Tuff 'N' Rumble Mgmt., Inc.*, 1997 WL 158364, at *4 ("The test for determining whether substantial similarity is present is 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'").

[116] *See* Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 106–13 (2007) (arguing that the Sixth Circuit's bright-line rule in *Bridgeport* diverged from the common law rule that substantial similarity is necessary for actionable copying, did not account for prior persuasive cases that applied a *de minimis* analysis in digital sampling cases, and "thwarted the purpose of copyright law" by expanding copyright protections for sound recording copyright holders).

[117] *See* Di Cosmo, *supra* note 102, at 235 (discussing advantages of the *Bridgeport* rule).

[118] *See id.* at 244 (noting that the average audience test mirrors certain elements of the substantial similarity test which have been the subject of critique, such as a lack of guidelines that would allow triers of fact to make consistent determinations about what constitutes infringement).

[119] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 879 (9th Cir. 2016).

copying, it did not list specific criteria for applying the average audience test.[120] Because the opinion provides no insight into how the Ninth Circuit arrived at its conclusion, lower courts are left with little guidance on how to analyze similar cases in the future.[121] How can courts fairly and consistently apply a test that has no specific criteria?

Standards like the "average audience" test necessarily lead to less predictable outcomes than bright-line rules.[122] Unpredictability and uncertainty in copyright law can discourage the free expression of artists because the risk of copyright infringement liability is heightened.[123] Because an artist may not know whether their sampling constitutes actionable infringement until they undergo costly litigation, artists are deterred from sampling altogether.[124] Further, from the copyright owner's perspective, unpredictability in the law can disincentivize investment in the creation of copyrighted material because protection against infringement is not guaranteed.[125]

C. *Need for a Clear Rule Going Forward*

Because so many music copyright infringement cases settle, the dearth of relevant case law does not reflect the importance of a *de minimis* exception in sound recording copyright.[126] Settlements and license negotiations occur in the shadow of

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[120] *See id.* at 878–89 (describing in detail the two passages that the defendant copied from the plaintiff's sound recording).

[121] *See id.* at 880 ("'[T]he test is the response of the ordinary lay hearer . . . .' If the public does not recognize the appropriation, then the copier has not benefitted from the original artist's expressive content. Accordingly, there is no infringement." (quoting Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977)); Sean M Corrado, Note, *Care for a Sample? De Minimis, Fair Use, Blockchain, and an Approach to an Affordable Music Sampling System for Independent Artists*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 211–12 (2018) (noting that, after *VMG Salsoul*, record companies largely still require all samples to be cleared because it is unclear what specific criteria defines a *de minimis* sample).

[122] *See* Di Cosmo, *supra* note 102, at 235 (explaining that the Sixth Circuit's implementation of a bright-line rule in *Bridgeport* was founded in the "well-established tenet of copyright law that unpredictability should be avoided wherever possible").

[123] *See id.* at 236–37 (discussing the importance of predictability in copyright law).

[124] *See* Ryan C. Grelecki, Comment, *Can Law and Economics Bring the Funk . . . or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U. L. REV. 297, 317–18 (2005) (noting that a "hard-and-fast rule" results in "speedier and more predictable litigation").

[125] *See* Di Cosmo, *supra* note 102, at 236 (arguing that unpredictable litigation outcomes deter copyright owners from "allocating resources toward creating [a] licensed work" because of the risk that a court might not enforce the copyright owner's rights).

[126] *See* Susan Latham, Note, Newton v. Diamond*: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 124 (2003) (explaining that the impression of a *per se* bar to unlicensed digital sampling has created an environment of extreme caution and caused parties to dispose of most cases in settlement agreements). In a recent ongoing example of out-of-court dealing to avoid copyright infringement litigation, Olivia Rodrigo has retroactively added a number of songwriting credits to hit songs on her album *Sour*, which debuted as the number one album in the United States and stayed there for weeks. Rodrigo credited Hayley Williams and Josh Farro of the band Paramore in an acknowledgment that her song "Good 4 U" was an interpolation of Paramore's "Misery Business." Rodrigo also credited Taylor Swift and Jack Antonoff on her tracks "Deja Vu" and "1 step forward, 3 steps back." News reports have estimated that Paramore could be pocketing about $1.2 million from the success of "Good 4 U" and that Swift and Antonoff have received hundreds of thousands in royalties. Kara Weisenstein, *Doling Out Songwriting Credits is Costing Olivia Rodrigo Millions*, MIC (Sept.

the law, where participants attempt to predict the outcome of a trial.[127] Accordingly, the existence or absence of a *de minimis* exception for sound recording copyright determines the consequences for artists who sample sound recordings, and in turn affects the art that they create.[128]

The recent Fifth Circuit opinion in *Batiste* evidences the need for a clear, consistent rule in sound recording copyright infringement.[129] The current circuit split leaves an open question in other courts as to whether a *de minimis* exception applies in the context of sound recording copyright and, if so, how to determine what qualifies as *de minimis*.[130] This uncertainty can spur unfounded and unreasonable litigation—like in *Batiste* where the Fifth Circuit found the plaintiff's suit for copyright infringement was without merit.[131] The plaintiff in *Batiste* had previously filed at least *five* similar copyright infringement actions, and the trial court expressed "serious concern of a good faith factual basis" for his current claims.[132] Although the Batiste defendants were vindicated in a court of law, most artists in similar situations are outside a judge's purview and left to negotiate in the shadow of a very uncertain area of the law.[133]

D. *Improvements on* VMG Salsoul, LLC *and Proposed Solutions to the Circuit Split*

As discussed above, resolving the circuit split will increase predictability and certainty. To effectively further the purposes of copyright law, though, the resolution must appropriately answer an important question: What is the test for

2, 2021), https://www.mic.com/p/doling-out-songwriting-credits-is-costing-olivia-rodrigo-millions-84241317; Mackenzie Cummings-Grady, *Olivia Rodrigo's 'Sour' Hits No. 1 on Billboard 200 for Fourth Week*, COMPLEX (July 18, 2021), https://www.complex.com/music/olivia-rodrigo-sour-no-1-billboard-200-fourth-non-consecutive-week [https://perma.cc/62X7-B3ET].

[127] *See, e.g.,* Thomas P. Wolf, *Toward a "New School" Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through*, 2011 STAN. TECH. L. REV. N1, at 3 (2011) (describing artists' decisions between risking prosecution for copyright infringement and undertaking great expenses to negotiate a license agreement in the wake of holdings that have eroded *de minimis* and fair use exceptions for sampling).

[128] *See* Abuhoff, *supra* note 111, at 426–27 (arguing that, in jurisdictions governed by the Sixth Circuit holding in *Bridgeport*, artists are strongly disincentivized from attempting a rogue sample that could land them in costly litigation, but in jurisdictions governed by the Ninth Circuit's holding in *VMG Salsoul, LLC* artists are at least more likely to take the risk because of the high transaction costs involved in obtaining a license).

[129] *See* Batiste v. Lewis, 976 F.3d 493, 505–06 (5th Cir. 2020) (evaluating the plaintiff's argument, which relied on *Bridgeport*, that a claim for sound recording copyright infringement should but subject to a different analysis than a claim for musical composition copyright infringement).

[130] *See Batiste*, 976 F.3d at 506 (acknowledging that the circuit split poses the question to other courts of whether or not to adopt the *Bridgeport* bright-line rule).

[131] *See id.* at 508 (describing the plaintiff's claims as overaggressive and objectively unreasonable).

[132] Batiste v. Najm, 28 F. Supp. 3d 595, 625–26 (E.D. La. 2014). In one of the plaintiff's actions, he sued dozens of defendants, claiming sixty-three instances of infringement on forty-five of his songs. *Id.* at 597–98. The district court dismissed all but three claims and chastised the plaintiff for "loading his complaint with over a hundred claims that had no realistic chance of success." *Id.* at 626.

[133] *See supra* notes 127–29 and accompanying text (discussing the effects of copyright infringement holdings on negotiations in the music industry).

determining whether a use is *de minimis*? This section explores possible solutions to the circuit split and tests for applying a *de minimis* exception.

1. *Create a Fair Use Exception for Music*

One proposed solution is to create a new fair use exception for sampling to replace the current system of determining whether something is a "transformative work."[134] This solution recognizes that music is different from other forms of art, so it necessarily requires a different and more tailored analysis to determine whether copying is actionable or *de minimis*.[135] This solution addresses an important flaw in the Ninth Circuit's "average audience" test—realistic feasibility of application. Acknowledging that lay juries are ill-equipped to determine when sampling is fair use, this solution would codify music-specific considerations and emphasize the importance of expert musicologist witnesses to identify and evaluate subtle distinctions between original and allegedly infringing works.[136]

2. *Construct Juries from Musical Experts*

Similarly, an adaptation of the "average audience" test poses a possible solution to the current circuit split.[137] Instead of a jury of laypeople, this adaptation uses musical experts as the triers of fact.[138] Because the jury is then composed of other creators, as opposed to potential members of the "average" audience, this solution emphasizes the importance of understanding and balancing the goals of copyright law and the realities of the music industry.[139]

3. *Enact Specific Guidelines*

Another solution requires creating clear, quantifiable criteria for what is and is not *de minimis*.[140] This criteria might include a minimum temporal length of the sample or a threshold level of transformation between the original recording and the

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[134] *See* Kristin Bateman, Comment, *"Distinctive Sounds": A Critique of the Transformative Fair Use Test in Practice and the Need for a New Music Fair Use Exception*, 41 SEATTLE U. L. REV. 1169, 1184–87 (2018) (suggesting that a fair use exception for music works will allow courts to accurately and consistently determine whether a work is transformative).

[135] *See id.* at 1188 (commenting on how absurd it is to believe that a uniform analysis can be used across all art forms to determine copyright infringement); Bateman, *supra* note 134, at 1185 (arguing for a tailored fair use exception for music because "[i]t is [] patently ridiculous to assume that the same [legislation] and set of analytical tools can be applied to works of literature, photography, painting, film, and many other art forms as are applied to music").

[136] *See id.* at 1184 ("There must be an expanded role for the expert witness in cases of music copyright infringement or transformative use defenses.").

[137] *See, e.g.*, Jason Palmer, Note, *"Blurred Lines" Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries*, 18 VAND. J. ENT. & TECH. L. 907, 931–33 (2020).

[138] *See id.* at 931.

[139] *See id.* at 931, 933–34 ("Only with the proper incentive structure will the public benefit from the progression of the useful art of music.").

[140] *See* Di Cosmo, *supra* note 102, at 247 (noting that commentators have suggested the creation of objective criteria to clarify the line between *de minimis* and infringement as a solution for the "substantial similarity" test).

reproduced work.[141] Although this solution creates uniformity, it is likely to be over-inclusive or underinclusive depending on the specific facts at issue, like the length of the sample or level of transformation.[142] The comparison of two musical works is necessarily a fact-specific inquiry that does not lend well to bright-line criteria.[143]

4. *Use the Intended Audience Test*

While the proposed solutions remedy some shortcomings of the "average audience" test, it is important to note that any of these changes would fundamentally alter the nature of the factual inquiry.[144] The aim of the "average audience" test is not to determine whether an expert musicologist or other artist surmises the work is transformative or exceeds certain quantitative limitations. Rather, the impression of the ordinary listener is a determinative factor.[145]

Perhaps the best way to improve the Ninth Circuit's rule in *VMG Salsoul, LLC* is to reframe its inquiry in the context of copyright infringement claims at large.[146] Instead of measuring the response of a lay listener for every sound recording *de minimis* analysis, the more appropriate inquiry would look to whether the appropriation is such that the work's intended audience would recognize the sampled sound.[147] Adopting the intended audience test as the standard by which *de minimis* use is determined will increase consistency among courts in evaluating whether a sound recording use is *de minimis*, align sound recording copyright rules with those for other forms of copyrightable material, and further the goals of copyright law.

IV. LOOKING FORWARD: THE FUTURE OF THE *DE MINIMIS* EXCEPTION

The Fifth Circuit's decision in *Batiste* evidences the need for clarity in sound recording copyright law and a resolution of the current circuit split on the existence

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[141] *See id.*

[142] *See id.* ("It would be tremendously difficult to ask courts to come up with objective criteria that perfectly capture the magnitude of artistic appropriations.").

[143] *See* Johnson, *supra* note 81, at 245 ("[O]ne problem with the bright-line rule created in *Bridgeport Music* is that it eliminates judicial discretion in favor of a stringent guideline that unfairly targets sampling artists by prohibiting them from using a defense that is regularly employed by other accused infringers.").

[144] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 878 (9th Cir. 2016) (emphasis added) ("A 'use is de minimis only if the *average audience* would not recognize the appropriation.'" (citing Newton v. Diamond, 388 F.3d 1189, 1193, 1196 (9th Cir. 2004), *aff'd*, 388 F.3d 1189 (9th Cir. 2004))).

[145] *See id.* (explaining that the established test for whether a use is *de minimis* is whether an ordinary listener would recognize the appropriation). *But see* Palmer, *supra* note 137, at 929–30 (suggesting that juries in cases involving claims of music copyright infringement should consist of persons occupationally engaged in the music industry, rather than lay juries, because specialized juries are better equipped to assess accurate copyright infringement findings).

[146] *Compare* Baxter v. MCA, Inc., 812 F.2d 421, 424 (9th Cir. 1987) (limiting the application of the average audience test to measure an audience's ability to recognize the appropriation without any analytic dissection or expert testimony); *with Newton*, 388 F.3d at 1196 (relying on expert testimony to determine the discernability of the appropriation to an average audience).

[147] *See* Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 734 (4th Cir. 1990) (arguing that, consistent with the goals of copyright law, courts should look to the intended audience of the work when evaluating a claim for copyright infringement).

of a *de minimis* exception.[148] While the current circuit split has created unpredictability and uncertainty in copyright law, it presents an opportunity to resolve the split in a way that aligns with other areas of copyright law and creates consistency and predictability for protections of copyrighted subject matter.[149]

The intended audience test will increase predictability in courts' applications of the *de minimis* inquiry—which, in turn, will enable artistic expression without fear of copyright infringement liability.[150] One proponent of the intended audience test used *Newton* as a key example of how the intended audience test would lead to more consistent applications than with the average audience test.[151] In *Newton*, the court relied on the opinions of musical theorists to determine whether the copying was substantial or *de minimis* because the theorists, as opposed to lay jurists, had sufficient expertise to understand the nature of the work.[152] Although the court's inquiry focused on whether an "average audience" would recognize appropriation, the court recognized that experts were most qualified to identify and compare the unique elements of both works.[153] This same commentator argues that another court following the average audience test literally is as likely to gauge the reaction of an ordinary observer without the aid of experts, thereby creating more inconsistency in the analysis of the substantiality of the copying.[154] Under the guidance of the intended audience test, courts would narrow and standardize their inquiries to gauge "the specific reaction of those people who *possess the relevant expertise* to understand the language of the work in question."[155]

Further, the adoption of the intended audience test also creates an opportunity to align the treatment of sound recordings with that of other copyrighted subject matters. The Fourth Circuit opted to streamline copyright law and adopted the intended audience test for the *de minimis* analysis in musical composition copyright cases.[156] The Seventh Circuit has also hinted its willingness to adopt the intended audience test as the appropriate standard by which to measure substantial similarity in copyright infringement.[157] Because courts must consider the nature of the

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[148] For a discussion of how the recent Fifth Circuit decision impacts the discussion of sound recording copyright law, see *supra* notes 129–33 and accompanying text.

[149] *See supra* notes 144–47 and accompanying text.

[150] *See* Reid Miller, Note, Newton v. Diamond*: When a Composer's Market is Not the Average Joe: The Inadequacy of the Average-Audience Test*, 36 GOLDEN GATE U. L. REV. *1, *15–16 (2006) (arguing that the intended audience test would improve upon the average audience test in *de minimis* inquiries of musical copyright infringement claims).

[151] *See id.*; *Newton v. Diamond*, 388 F.3d 1189, 1194, 1196 (9th Cir. 2004).

[152] *Newton*, 388 F.3d at 1194, 1196.

[153] *Id.* at 1194.

[154] Miller, *supra* note 150, at *16 (citing *Dawson*, 905 F.2d at 737) ("[A] lay person's reaction might not be an accurate indicator of how expert choral directors would compare two spiritual arrangements.").

[155] *Id.* (citing Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 736 (4th Cir. 1990))) (emphasis added) (arguing that the narrowly-tailored language of the intended audience test will lead to more accurate, predictable litigation outcomes than the overbroad average audience test).

[156] *See Dawson*, 905 F.2d at 738 ("The facts of this case present a particularly inviting context in which to refine the ordinary observer test by requiring that the ordinary observer be the intended audience.").

[157] *See* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 619 (7th Cir. 1982).

> To assess the impact of certain differences, one factor to consider is the nature of the protected material and the setting in which it appears. Video games, unlike an artist's painting or

audience of the plaintiff's work and direct the substantial similarity inquiry toward said audience, the test is apt to evaluate substantial similarity for various types of copyrighted material.[158] If—as will often be the case in sound recording copyright claims—the lay public in fact fairly represents the work's intended audience, the inquiry will look very similar to the average audience test applied in *VMG Salsoul, LLC*.[159] If, however, the intended audience for the work is narrower and consists of persons with specific expertise, courts are free to rely on the opinions of experts to determine whether the two works are substantially similar or if the copying is *de minimis*.[160]

The intended audience test, if adopted uniformly for *de minimis* analyses, is supported by the Ninth Circuit's reasoning in *VMG Salsoul, LLC*.[161] Based on its examination of legislative history, the court concluded that a *de minimis* exception should exist for sound recording copyright because there was no indication that Congress intended for sound recordings to be treated differently from other copyrighted subject matters.[162] Because the intended audience test examines the similarity between two works from the perspective of the appropriate audience for the copyrighted material, courts can properly tailor the similarity inquiry for the protected material at hand, whether that material is film, music, or literary work.[163] The same test can appropriately be applied to the *de minimis* inquiry for different types of copyrightable subject matter, which would create uniformity in *de minimis* exception rules across copyright law.[164]

Adopting the intended audience test for the *de minimis* exception would also further the goals of copyright law. Preserving original creators' intended audiences

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> even other audiovisual works, appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression . . . . A person who is entranced by the play of the game 'would be disposed to overlook' many of the [two games'] minor differences in detail and 'regard their aesthetic appeal as the same.'

Id. (first citing Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 908 (3d Cir. 1975); then quoting Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1166–67 (9th Cir. 1977)).

[158] *See* Miller, *supra* note 150, at *12.

[159] *See Dawson*, 905 F.2d at 736 ("If, as will most often be the case, the lay public fairly represents the intended audience, the court should apply the lay observer formulation of the ordinary observer test."); *see also* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 878 (9th Cir. 2016) (describing the *de minimis* inquiry as whether the "average audience" would recognize the appropriation).

[160] *See id.*

> However, if the intended audience . . . possesses specialized expertise, relevant to the purchasing decision, that lay people would lack, the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar. Such an inquiry . . . in many cases will require[] admission of testimony from members of the in tended audience . . . .

Id.

[161] *See VMG Salsoul, LLC*, 824 F.3d at 880–81 (applying the *de minimis* exception to the sound recording copyright infringement claim at hand).

[162] *Id.* at 881–82 ("[Section 114(b)] treats sound recordings identically to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works.").

[163] *See* Miller, *supra* note 150, at *12 (describing the adaptability of the average audience test to appropriately evaluate similarity for a spiritual arrangement and a popular recording).

[164] For a discussion of applicability of the *de minimis* exception to various copyrightable subject matter, see *supra* note 26 and accompanying text.

is one of the fundamental purposes of copyright law.[165] The *Arnstein* court emphasized the importance of economic incentive in copyright law, asserting that the plaintiff's real interest in protecting copyrighted work lay in the potential financial returns from the plaintiff's efforts.[166] This economic incentive theory aligns with the purpose of copyright law to reward innovators, which, in turn, encourages the efforts of authors and inventors to advance the public welfare.[167] It follows that "the ultimate test for infringement should consider specifically the response of the market from which those returns would derive."[168]

By directing courts to consider the nature of the protected work's intended audience, the intended audience test enables courts to appropriately evaluate *de minimis* exceptions for various types of copyrighted material.[169] Adopting the intended audience test for *de minimis* inquiries for sound recording, music, and film copyrights would increase uniformity and predictability in a currently uncertain area of the law.[170] This would also decrease frivolous, overly-aggressive litigation and promote fairness in licensing and settlement negotiations regarding music sampling.[171] In addition to promoting uniformity in copyright law, the intended audience test would further fundamental goals of copyright law, including protection of the creator's market.[172] The Ninth Circuit ruling in *VMG Salsoul, LLC* appropriately recognized the existence of a *de minimis* exception; in the wake of the circuit split, the intended audience test best addresses the issues facing creators and copyright owners today.

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[165] *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).

> The plaintiff's legally protected interest is . . . the potential financial returns from his compositions . . . . The question, therefore, is whether defendant took from plaintiff's work so much of what is pleasing to the ears of lay listeners, who comprise *the audience for whom such popular music is composed* . . . .

Id. (emphasis added).

[166] *See id.*

[167] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954).

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Id.

[168] Dawson v. Hinshaw Music Inc., 905 F.2d 731, 736 (4th Cir. 1990) (quoting Michael Der Manuellan, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 144–45 (1998)).

[169] *See* Miller, *supra* note 150, at *12 (describing the adaptability of the average audience test).

[170] *See supra* notes 150–55 and accompanying text.

[171] *See supra* note 81 (discussing incentives for copyright holders to initiate frivolous litigation under the *Bridgeport* bright-line rule).

[172] *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (emphasizing the importance of economic incentive in copyright law).