

# 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

## INTRODUCTION

Sampling is a musical production practice that has become increasingly common since the 1980s.<sup>1</sup> A producer samples by copying a section of a sound recording and inserting it into the piece of music she is producing.<sup>2</sup> The type of sound recording sampled by producers can vary vastly from piece to piece. Numerous pop and hip hop songs sample from songs of various genres (rock, classical music, or other pop songs, for example).<sup>3</sup> Audio from a film, commercial, or speech may also be inserted into a song. Typically, the purpose of these samples is either to make use of the musical value of the sample or to trigger some sense of familiarity in the listener.<sup>4</sup> Some artists have made a career entirely out of sampling sections of different songs and fusing them into one piece.<sup>5</sup>

Often, samples are somehow altered or adapted to make the sound fit within the new piece.<sup>6</sup> This may include altering pitch, key, or speed, and may require the producer to isolate the sample from other sounds that occur simultaneously in the original work.<sup>7</sup> Samples also tend to be short segments of the original work, no more than a few seconds long.<sup>8</sup> However, while these are the trends in sampling, they are not the rule.<sup>9</sup>

Predictably, sampling creates a copyright issue when the sampled piece is under copyright and the sampling producer does not acquire a license to

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1. Daniel Esannason, Note, *Get a License or Don't Sample: Using Examples from Popular Music to Raise New Questions About the Bridgeport v. Dimension Films Holding*, 29 HARV. J. L. & TECH. 551, 557–58 (2016).

2. *Id.* at 561–64.

3. *See id.* at 561–64.

4. *See* John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV 209, 210–14 (2005).

5. *See* Ryan Lloyd, Note, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 171 (2014) (discussing the sample-heavy DJ known as Girl Talk).

6. Schietinger, *supra* note 4, at 210–14.

7. Esannason, *supra* note 1, at 561–64.

8. *Id.*

9. Lloyd, *supra* note 5, at 171 (discussing the DJ Girl Talk).

use the sampled copyrighted material.<sup>10</sup>

In a number of copyright contexts outside of music sampling, courts have found that there exists a *de minimis* exception to copyright infringement.<sup>11</sup> This exception provides that even where copyrighted material is used without a license, in cases where the use was particularly brief or otherwise insubstantial, the unlicensed use will not constitute copyright infringement, even if all other elements of copyright infringement are met.<sup>12</sup>

Within the context of the music industry, a circuit split has emerged with respect to the recognition of the *de minimis* exception. Specifically, the split revolves around recognition of the exception where a producer of a musical work samples a copyrighted digital sound recording without license to do so.<sup>13</sup> In 2005, the Sixth Circuit held in *Bridgeport Music, Inc. v. Dimension Films* that the *de minimis* exception does not exist in the context of digital sound sampling.<sup>14</sup> Therefore, the court held, all unlicensed sampling of copyrighted digital sound recordings is completely prohibited, no matter how short or minimal the sample.<sup>15</sup>

Eleven years later, in 2016, the Ninth Circuit reached the opposite conclusion, holding that a *de minimis* exception does exist in the context of digital sound sampling.<sup>16</sup> Therefore, unlicensed sampling of copyrighted digital sound recordings does not constitute copyright infringement if the average audience would not recognize the appropriation.<sup>17</sup> While the Ninth Circuit's opinion is persuasive in its legal analysis, which focuses heavily on congressional intent,<sup>18</sup> the average audience test for *de minimis* use that follows from its ruling creates certain significant problems that do not exist under the Sixth Circuit's bright-line rule prohibiting all unlicensed sampling.<sup>19</sup>

Parts I, II, and III of this note will explain the differences between the

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10. Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 94–95 (2007).

11. *Id.* See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998); *Gordon v. Nextel Communications*, 345 F.3d 922 (6th Cir. 2003); *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003).

12. The *de minimis* defense “is applicable when a defendant’s copying was so small and trivial that it should be allowed.” See Lloyd, *supra* note 5, at 152.

13. Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), with *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016).

14. *Bridgeport Music*, 410 F.3d at 798.

15. *See id.*

16. *VMG Salsoul*, 824 F.3d at 880–81.

17. The court held that a use is *de minimis* if the average audience would not recognize the appropriation. *See id.*

18. *See infra* Part II. *See generally VMG Salsoul*, 824 F.3d at 878.

19. *See infra* Part III. *See generally Bridgeport*, 410 F.3d at 792; *VMG Salsoul*, 824 F.3d at 878.

Sixth Circuit’s reasoning in *Bridgeport* and the Ninth Circuit’s reasoning in *VMG Salsoul*. While the focus of these parts is on illustrating the flaws in the Sixth Circuit’s legal analysis, it will also introduce the complications that arise from the Ninth Circuit’s average audience test, which do not exist under the Sixth Circuit’s simpler, bright-line rule. Part IV will introduce scholarly criticism of another test used in copyright contexts—the substantial similarity test—and examine the ways in which the average audience test announced by the Ninth Circuit in *VMG Salsoul* shares the same flaws for which the substantial similarity test has been criticized. Finally, Part V will examine proposals for improving upon the average audience test.

#### I. THE SIXTH CIRCUIT’S ANALYSIS IN *BRIDGEPORT*

In 2003, prior to the *Bridgeport* decision in 2005, the court in *Newton v. Diamond* applied the *de minimis* exception to music sampling.<sup>20</sup> When *Bridgeport* came to the District Court for the Middle District of Tennessee, the court followed the lead of *Newton*. The *Bridgeport* court held that the *de minimis* exception applied to the defendant (the band N.W.A.) in its unlicensed sampling of a four-second guitar riff from a song by plaintiff George Clinton, Jr.<sup>21</sup>

On appeal, however, the Sixth Circuit held that the *de minimis* exception does not exist for the purposes of musical sampling, no matter how short or insubstantial the sample may appear.<sup>22</sup> The court succinctly summarized, “Get a license or do not sample.”<sup>23</sup> The court reached this holding on the theory that not recognizing a *de minimis* exception in cases of sampling comports with a plain-language reading of 17 U.S.C. § 114(b), part of the Copyright Act,<sup>24</sup> and best serves public policy through the implementation of a clear, bright-line rule.<sup>25</sup>

First, the court held that a plain-language reading of the Copyright Act supports the notion that unlicensed sampling should be entirely

20. See *Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2003). In *Newton v. Diamond*, the Beastie Boys and their managers and producers had sampled a three-note sequence plus one background note from a copyrighted recording of a flautist. *Id.* The plaintiff flautist was unsuccessful in his claim of copyright infringement, even though the sequence was admittedly sampled from his own copyrighted recording, on the grounds that the sample was *de minimis*. *Id.*

21. *Bridgeport*, 410 F.3d at 792.

22. *Id.* at 799–805.

23. *Id.* at 801.

24. 17 U.S.C. § 114(b) (2012).

25. *Bridgeport*, 410 F.3d at 799–805.

prohibited.<sup>26</sup> The Copyright Act includes language stating that license holders have the exclusive right to sample their own work. The court interpreted this language to mean that no one other than a license holder has the right to sample licensed sound recordings.<sup>27</sup>

Next, the court held that the congressional intent underlying the Act was not relevant to the case.<sup>28</sup> While the defendants had argued that the legislative history of the Act indicated an intention to prevent the stifling of creativity rather than an intent to protect copyright holders' property rights,<sup>29</sup> the court noted that digital music sampling did not exist when the statute was passed.<sup>30</sup> The court decided that Congress's inability at the time of the statute's passing to contemplate present-day musical sampling rendered the defendants' argument unpersuasive, and made the legislative history documents for the Copyright Act inapplicable to the facts of *Bridgeport*.<sup>31</sup>

Furthermore, the court held that completely prohibiting unlicensed sampling does not actually stifle creativity in any meaningful way.<sup>32</sup> The court noted that alternatives exist to sampling in cases where a producer wishes to mimic a sound from another piece.<sup>33</sup> For example, a producer could simply reproduce the sound in a studio if the producer has access to the same instrument.<sup>34</sup> Since this alternative exists, the prohibition of unlicensed sampling does not, according to the court, prevent producers from following their creative impulses.<sup>35</sup>

Finally, the court noted that a bright-line rule would best promote the important public policy goal of clarity in copyright contexts.<sup>36</sup> The court stated that in copyright cases, clear and easily interpreted rules are particularly important.<sup>37</sup> The court noted that the elimination of the *de minimis* exception in digital sampling cases would provide much greater clarity than recognition of a *de minimis* exception.<sup>38</sup> Producers would know that they cannot sample without a license, and copyright or license

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26. *Id.* at 799–802.

27. *Id.* at 799–805.

28. *Id.* at 805.

29. *Id.* at 795–97.

30. *Id.* at 805.

31. *Bridgeport*, 410 F.3d at 805.

32. *Id.* at 801.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 801–02.

37. *Bridgeport*, 410 F.3d at 802.

38. *Id.*

holders would know that any unlicensed sample is automatically illegal.<sup>39</sup> Recognition of a *de minimis* exception could potentially leave producers and copyright holders unsure as to the legality of a musical piece including sampled material until it had been challenged in court.<sup>40</sup> Thus, the court held that not recognizing a *de minimis* exception better served the public policy goals sought by the judicial system in the area of copyright law.<sup>41</sup>

## II. THE NINTH CIRCUIT'S ANALYSIS IN *VMG SALSOWL*

In 2013, *VMG Salsoul v. Ciccone* arose in the Central District of California. VMG Salsoul, a company that owned the Salsoul record label, sued Warner Brothers and Madonna Louis Ciccone (known in the music industry simply as Madonna) for copyright infringement.<sup>42</sup> Madonna, in her song "Vogue," published by a Warner Brothers-owned record label, had sampled a "horn hit" (a chord played on the horn) from the song "Love Break" by The Salsoul Orchestra.<sup>43</sup> "Love Break" was held under copyright by the Salsoul record label, and VMG Salsoul sued Warner Brothers and Madonna in an attempt to enforce its copyright.<sup>44</sup>

The District Court for the Central District of California held that even if there had been appropriation subject to copyright protection, Madonna's copying of the horn hit was *de minimis*.<sup>45</sup> On these grounds, it granted summary judgment for the defendants.<sup>46</sup> The court noted that the plaintiff had relied on *Bridgeport* in its opposition to the defendants' motion for summary judgment, but found that *Bridgeport* was inapplicable, in part because Sixth Circuit decisions are not binding on the Ninth Circuit, which had not yet adopted the *Bridgeport* decision.<sup>47</sup>

On appeal, the Ninth Circuit affirmed the District Court's holding that any copying, if it existed, was *de minimis*, and thus did not constitute copyright infringement.<sup>48</sup> It therefore affirmed the District Court's grant of summary judgment to the defendants.<sup>49</sup> The Ninth Circuit noted that in

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39. *Id.*

40. *Id.*

41. *Id.*

42. VMG Salsoul, LLC v. Ciccone, No. CV 12-05967 BRO, 2013 WL 8600435, at \*1 (C.D. Cal. 2013).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at \* 9.

48. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 878 n.6 (9th Cir. 2016).

49. *Id.* at 874.

reaching this conclusion it was directly contradicting the Sixth Circuit's decision in *Bridgeport*, creating a circuit split.<sup>50</sup> The court called it an "unusual step" to intentionally create a circuit split and noted that a circuit split would be "particularly troublesome in the realm of copyright,"<sup>51</sup> given the importance of consistent rules in the field.<sup>52</sup> However, the opinion also emphasized that the goal of avoiding circuit splits is subordinate to the duty to interpret congressional intent.<sup>53</sup> Since the court determined that the Sixth Circuit had failed to properly factor congressional intent into its decision, the Ninth Circuit was willing to reach a contradictory ruling.<sup>54</sup>

As noted in Part I, the Sixth Circuit had explicitly decided not to consider legislative history indicating Congress's intent in enacting the Copyright Act.<sup>55</sup> The reasoning behind this decision was that digital sampling did not exist at the time of the passage of the bill, so Congress's intent could not be applied to cases related to digital sampling.<sup>56</sup> The Ninth Circuit wholly rejected this line of reasoning in *VMG Salsoul*.<sup>57</sup> It held that the legislative history indicated that Congress's intent in passing 17 U.S.C. § 114(b) was to promote creativity and protect against overly broad copyright restrictions that would stifle creativity.<sup>58</sup> The Ninth Circuit held that given this intent, it was unreasonable for the Sixth Circuit to interpret the language of the act to prohibit all unlicensed uses of a copyrighted work.<sup>59</sup> Since it had found the Sixth Circuit's interpretation of the Copyright Act in *Bridgeport* to be directly contradictory to clear congressional intent, the court opted not to follow the Sixth Circuit's conclusion that *de minimis* exceptions should not be recognized in cases of digital musical sampling.<sup>60</sup> Instead, it affirmed the decision of the lower court that a *de minimis* analysis was appropriate.<sup>61</sup>

Having decided that a *de minimis* exception should be recognized in digital music copyright cases, the court announced it would employ the average audience test to determine whether the use of an unlicensed

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50. *Id.* at 886.

51. *Id.* (quoting *Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251 (9th Cir. 2013)).

52. *VMG Salsoul*, 824 F.3d at 886.

53. *Id.* at 883–86.

54. *Id.* at 883.

55. *See Bridgeport Music v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

56. *Id.*

57. *VMG Salsoul*, 824 F.3d at 883–87.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 886–87.

sample is considered *de minimis*.<sup>62</sup> If an average audience would be unable to recognize the appropriation, then the unlicensed use was *de minimis* and would not be considered copyright infringement.<sup>63</sup> Otherwise, it was not *de minimis*, and the traditional copyright analysis would apply.<sup>64</sup>

### III. STRENGTHS AND WEAKNESSES OF THE *BRIDGEPORT* DECISION

Criticism of the *Bridgeport* decision is extensive and comes from a variety of sources.<sup>65</sup> Commentators have generally focused on the court's legal analysis.<sup>66</sup> Specifically, their criticism is focused on the decision to avoid considering legislative intent.<sup>67</sup> However, the court's emphasis on seeking a bright-line rule was not unfounded.<sup>68</sup> It emerged from well-established principles in copyright law favoring rules with predictable outcomes.<sup>69</sup> The first subpart of this section will discuss the criticism of the *Bridgeport* opinion and establish that the criticism was generally centered on the court's failure to consider legislative history. The second subpart will analyze the reasons for copyright law's emphasis on predictability and discuss why the *Bridgeport* rule is more successful than the *VMG Salsoul* rule in addressing predictability concerns.

#### A. Criticism of the *Bridgeport* Decision

Almost immediately following the *Bridgeport* decision's promulgation, commentators widely expressed outrage that the Sixth Circuit had read a statute designed to protect creative enterprises in a manner that would instead stifle creativity.<sup>70</sup> The court's decision to completely ignore the legislative history of the Copyright Act was, perhaps, the greatest target of criticism.<sup>71</sup> Commentators viewed the court's stated reasoning—that digital sampling did not exist at the time the statute was enacted—as a deficient justification for its decision not to consider the legislative history.<sup>72</sup>

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62. *VMG Salsoul*, 824 F.3d at 878.

63. *Id.*

64. *Id.*

65. See, e.g., Brandes, *supra* note 10, at 104–06; Schietinger, *supra* note 4, at 230–242; Lloyd, *supra* note 5.

66. See Brandes, *supra* note 10, at 104–06.

67. See *id.*

68. See Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331 (2012).

69. See *id.*

70. See Brandes, *supra* note 10, at 104–06.

71. See *id.*; Schietinger, *supra* note 4, at 230–42.

72. Schietinger, *supra* note 4, at 230–42.

Scholarly commentators were not the only source of criticism of the *Bridgeport* opinion.<sup>73</sup> District courts throughout the country routinely failed to follow the standard set out by the Sixth Circuit.<sup>74</sup> These courts would often cite congressional intent in their reasoning for recognizing the existence of a *de minimis* exception in music copyright contexts.<sup>75</sup>

Given the widespread criticism of the Sixth Circuit's holding in *Bridgeport*<sup>76</sup> and the Ninth Circuit's own history of decisions more favorable to the *de minimis* exception,<sup>77</sup> it seemed likely that a circuit split would eventually occur. Commentator dissatisfaction with *Bridgeport*—and, indeed, the Ninth Circuit's conflicting holding in *VMG Salsoul*—stems from the fact that the Sixth Circuit sidestepped Congress's intent in passing 17 U.S.C. § 114(b) even though this intent appeared to directly contradict the court's holding.

The legislative history that the Sixth Circuit explicitly ignored in its opinion clearly indicates that Congress's intent in passing 17 U.S.C. § 114(b) was to avoid stifling creativity through copyrights.<sup>78</sup> To read language in the statute as restricting the use of sound recordings exclusively to license holders, when Congress's intent in passing the statute was to *limit* the rights of copyright holders, entirely ignores the legislature's goals<sup>79</sup> and was an “unprecedented holding unanticipated . . . by the Copyright Act itself.”<sup>80</sup> It is true that digital sampling did not exist at the time the legislature enacted 17 U.S.C. § 114(b).<sup>81</sup> However, if Congress's intent in passing the bill can be understood as an intent to restrict copyright holders' rights, then it was improper for the Sixth Circuit to interpret language in that statute to achieve precisely the opposite effect.<sup>82</sup>

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73. Lloyd, *supra* note 5, at 159.

74. *Id.* at 165. District courts outside the purview of the Sixth Circuit were not bound by the *Bridgeport* decision. *Id.* See *Saregama India, Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1340; *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 609 (S.D.N.Y. 2013); *Steward v. West*, No. CV1302449BROJCX, 2014 WL 12591933, at \*8 n.8 (C.D. Cal Aug. 14, 2014).

75. Lloyd, *supra* note 5, at 159–61. See also *Saregama*, 687 F. Supp. 2d at 1340 (“[T]he *Bridgeport* court's reading of Section 114(b)'s similar-sounding work provision is more expansive than its text and legislative history suggest.”).

76. See Schietinger, *supra* note 4, at 230–42; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1; Lloyd, *supra* note 5.

77. See generally *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003).

78. See Schietinger, *supra* note 4, at 236–42; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1; Lloyd, *supra* note 5.

79. See Schietinger, *supra* note 4, at 230–42.

80. Lloyd, *supra* note 5, at 164.

81. See Schietinger, *supra* note 4, at 215–16.

82. *Id.* at 210; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1, at 558–60; Lloyd,

### B. Advantages of the Bridgeport Rule

Despite deficiencies in its legal analysis, the Sixth Circuit's argument that a bright-line rule better serves public policy is not without merit. Indeed, it is a well-established tenet of copyright law that unpredictability should be avoided wherever possible.<sup>83</sup> In fact, this is part of the reason for the circuit courts' jurisdiction over copyright issues like the one in *Bridgeport*.<sup>84</sup> The federal system has exclusive jurisdiction over copyright law because the legislature has determined that it is particularly important both for copyright holders and for users of copyrighted material to understand the legality of their actions.<sup>85</sup> Since the federal system is more capable of providing a single, uniform set of rules regarding copyrights, it was deemed preferable to the state system, wherein a patchwork of different state copyright rules might have led to confusion for copyright holders and innovators.<sup>86</sup> Clarity and consistency are prized in the area of copyright law almost above all else.<sup>87</sup>

The benefits of achieving clarity in copyright law have long been advanced by economists.<sup>88</sup> The classical economic theory regarding copyright is that there are tandem benefits both for the holders of copyrights and for users of copyrighted material where rules are clear and court decisions are easy to predict.<sup>89</sup>

The copyright holder generally seeks “(1) a reliable entitlement (2) prohibiting at least literal or close copying of their work, which is (3) protected by remedies sufficient both to deter copying and to compensate for any losses that result from it.”<sup>90</sup> Where any of these three protections is not established, the copyright holder risks a devaluation of the work she holds under license.<sup>91</sup> In particular, the prohibition of copying protected work (the second area) and the existence of remedies for deterrence and

*supra* note 5, at 163–70.

83. See Horowitz, *supra* note 68.

84. See *Sears, Roebuck & Co. v. Stiffel & Co.*, 376 U.S. 225, 228–31 (1964).

85. *Id.*

86. See *Sears*, 376 U.S. at 231 n.7 (noting that “the purpose of Congress to have national uniformity in patent and copyright laws can be inferred” and that this inference arises from “such statutes as that which vests exclusive jurisdiction to hear patent and copyright cases in federal courts . . . and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings.”).

87. *Id.*; Horowitz, *supra* note 68, at 337.

88. Horowitz, *supra* note 68.

89. *Id.*; Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 202 n.2 (1994).

90. Horowitz, *supra* note 68, at 337. See also Lape, *supra* note 89, at 198–206.

91. Horowitz, *supra* note 68, at 337.

compensation (the third area) are relevant in a discussion of digital music sampling.

Traditional economic theory suggests that uncertainty in copyright law can create serious problems for the copyright holder.<sup>92</sup> Any randomness in court decisions would mean that the copyright holder's ability to protect herself against the devaluation of her licensed work is unpredictable.<sup>93</sup> This reduces the expected value of investing in work that the copyright holder intends to hold.<sup>94</sup>

Consider a potential copyright holder who can only correctly predict with eighty percent success which of her licensed works will be protected from infringement, while in the other twenty percent of cases she is wholly unable to extract value from the licensed work. The copyright holder would be less likely to allocate resources toward creating the licensed work than she would in a world where she could predict court decisions with one hundred percent accuracy, because each investment carries a greater risk of devaluation.<sup>95</sup>

Conversely, the user of copyrighted works is generally concerned with "whether his expressive activity will constitute infringement and, if so, whether the remedies for infringement will be proportional to the harm caused."<sup>96</sup> Where either of these concerns is not addressed by copyright law, the user of copyrighted works risks losing the benefits he sought in engaging in his expressive activity, or even risks paying damages in an amount significantly greater than the benefit he gained from engaging in his expressive activity.<sup>97</sup>

Uncertainty in copyright law limits the willingness of users of copyrighted material to engage in expressive activity due to the risk of triggering penalties.<sup>98</sup> Consider a user of copyrighted material who can predict with eighty percent accuracy whether her use of copyrighted material within an artistic endeavor will constitute infringement. This user is less likely to engage in all artistic endeavors than a user who can predict with one hundred percent accuracy whether her use of copyrighted material will constitute infringement.<sup>99</sup> While the perfectly accurate predictor can channel all of her time and energy into work that she knows

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92. Horowitz, *supra* note 68, at 337.

93. See Horowitz, *supra* note 68, at 337–42; see also Lape, *supra* note 89, at 198–206.

94. Horowitz, *supra* note 68, at 337.

95. Horowitz, *supra* note 68, at 337.

96. *Id.* at 342.

97. *Id.*

98. *Id.*

99. See Horowitz, *supra* note 68, at 342.

will not violate copyrights, the eighty percent accurate predictor is less likely to recoup the benefits that she anticipates from engaging in the activity and is more likely to pay penalties as a result of the activity. Thus, the eighty percent accurate predictor runs the risk of paying penalties far out of proportion with what she could have hoped to gain from engaging in the activity. Since “copyright aims to promote maximal expression,”<sup>100</sup> and uncertainty deters users of copyrighted material from engaging in expressive activity due to the risk of paying unanticipated penalties, uncertainty creates incentives that run counter to the goals of copyright law.<sup>101</sup>

In addition to the above-mentioned issues, the prospect of litigation related to copyright infringement increases costs for both holders and users of copyrighted material.<sup>102</sup> This too can be a deterrent to holders’ investment in licensed work and to users’ engaging in expressive activity.<sup>103</sup>

A newer theory has emerged that uncertainty in copyright law does not harm copyright holders as much as users of copyrighted material.<sup>104</sup> This theory suggests that copyright holders are not as sensitive to risk as users of copyrighted material, since holders do not face as stiff penalties from infringement.<sup>105</sup> Furthermore, users of copyrighted material are less likely to be on notice than copyright holders regarding the legality of their actions.<sup>106</sup> While this newer approach runs counter to the traditional economic theory of *why* uncertainty in copyright law is problematic, it nonetheless “confirms the conclusion” that “uncertainty is intolerable.”<sup>107</sup>

It is clear, then, that uncertainty in copyright law, and rules which create “randomness”<sup>108</sup> or unpredictability in potential copyright lawsuits, run counter to the goals of copyright law. While predictability is not the only concern of copyright law, it is a significant one. In some fairly obvious ways, the Ninth Circuit’s solution may lead to less predictable

100. *Id.* at 385.

101. *Id.*

102. *Id.* (“Uncertainty . . . makes users more likely to risk liability . . . for the deterrent effect of liability is reduced where the costs are uncertain for risk-seeking users .”). *See also* Lape, *supra* note 89, at 202 (noting an “advantage” where courts can ensure “prediction of litigation outcomes will be more accurate” in a copyright context.).

103. *See* Horowitz, *supra* note 68, at 337–43 (noting that a copyright user is “concerned with whether his expressive activity will constitute infringement and, if so, whether . . . his liability has a reasonable ceiling”); Lape, *supra* note 89, at 202.

104. Horowitz, *supra* note 68, at 384–85.

105. *Id.*

106. *Id.*

107. *Id.* at 384.

108. *Id.* at 353.

court decisions than the Sixth Circuit's solution.

It is apparent that a bright-line rule promotes clarity and leads to predictable decisions. The Sixth Circuit's holding that all unlicensed sampling, no matter how minor, constitutes infringement,<sup>109</sup> certainly falls within the category of such bright-line rules. Any copyright holder who becomes aware of an unlicensed sampling can, under this rule, know that she has suffered copyright infringement. Any user of copyrighted materials knows that in sampling without a license, she commits copyright infringement and becomes liable for damages. The lack of flexibility helps to move the universe of copyright law toward greater predictability of potential disputes, which, as noted above, is one of the foremost goals of copyright law.<sup>110</sup>

Thus, if the average audience test is less effective than a bright-line test in creating predictable outcomes, it will necessarily be less effective than the Sixth Circuit's rule in promoting this particular goal of copyright law.

#### IV. THE AVERAGE AUDIENCE TEST AS COMPARED TO THE SUBSTANTIAL SIMILARITY TEST

The average audience test is the test adopted by the Ninth Circuit in deciding whether an unlicensed use of a copyrighted sound recording will constitute a *de minimis* use, and therefore not be considered infringement.<sup>111</sup> In *VMG Salsoul*, the Ninth Circuit defined the average audience test as follows: "A 'use is *de minimis* only if the average audience would not recognize the appropriation.'"<sup>112</sup> The horn hit sampled by the defendant was found by the court to fit within the *de minimis* exception because the length of the sample (less than a quarter of a second)<sup>113</sup> and the alterations conducted digitally by the defendant rendered it an appropriation unrecognizable to the average audience.<sup>114</sup>

The substantial similarity test is the test used more broadly (not in *de minimis* cases) to determine whether a defendant's work constitutes infringement upon a plaintiff's copyright.<sup>115</sup> While *de minimis* cases can

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109. See *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

110. See Horowitz, *supra* note 68.

111. See *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003).

112. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016) (quoting *Newton*, 388 F.3d at 1193) (emphasis added).

113. *VMG Salsoul*, 824 F.3d at 878–79.

114. *Id.*

115. See Lape, *supra* note 89, at 185–86; Nicole Lieberman, *Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law*, 6 NYU J. INTELL. PROP. & ENT. L. 91, 105 (2016).

provide exceptions even for clear copying and appropriation of another's copyrighted work, the substantial similarity test is employed where there is a dispute between the parties as to whether a defendant has copied from the plaintiff and whether a defendant's non-*de minimis* copying constitutes infringement.<sup>116</sup>

The first subpart of this section discusses scholarly criticism of the substantial similarity test due to its failure to produce predictable outcomes. The second subpart will examine the similarities between the average audience test and the substantial similarity test, and discuss why the criticisms of the substantial similarity are almost equally applicable to the average audience test. Since the substantial similarity test is criticized for failing to provide predictable outcomes for copyright cases and the average audience test shares the elements of the substantial similarity test which have led to this criticism, it follows that the average audience test should likewise raise questions as to whether it is conducive to predictable outcomes.

#### *A. Criticism of the Substantial Similarity Test*

The average audience test is comparable to the substantial similarity test even though it occurs at a different stage of the copyright infringement analysis because it operates in a fundamentally similar way.<sup>117</sup> The substantial similarity test has been described in a variety of different formulations,<sup>118</sup> but one of the more common methods for determining whether a work is substantially similar to a prior copyrighted work (and therefore constitutes copyright infringement) involves determining the percentage of the defendant's work that is like the plaintiff's work.<sup>119</sup> There is no universally accepted cutoff for what percentage of the two works must be alike to find copyright infringement.<sup>120</sup>

While the average audience test in *de minimis* contexts has not attracted significant scholarly criticism, the substantial similarity test has.<sup>121</sup> One of the primary criticisms of the substantial similarity test is that

116. Lape, *supra* note 89, at 182–85.

117. See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997); *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131 (2d Cir. 1992).

118. See Lape, *supra* note 89, at 191–94.

119. *Id.* at 193–94.

120. *Id.*

121. See Lape, *supra* note 89, at 193–94; Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987); Jason Palmer, “*Blurred Lines*” Means Changing Focus: Juries Composed of Musical Artists Should Decide Copyright Infringement Cases, Not Lay Juries, 18 VAND. J. ENT. & TECH. L. 907 (2016).

it fails to properly account for the basic concept of copying.<sup>122</sup> Copying occurs where the defendant has used the plaintiff's work rather than creating a similar work independently or by using common public domain sources.<sup>123</sup> Traditionally, misappropriation has been defined as occurring where copying goes far enough to constitute improper appropriation.<sup>124</sup> The substantial similarity test essentially only considers whether a work is similar to the copyrighted one—not whether it has actually been copied—and then finds misappropriation (and thus infringement) where the similarity is great enough to arrive at some arbitrary level deemed by the court to be substantial.<sup>125</sup>

An example of this is provided in two district court cases arising from infringement claims in the fabric industry: *Kenbrooke Fabrics v. Holland Fabrics*<sup>126</sup> and *Lauratex Textile Corp. v. Allton Knitting Mills*.<sup>127</sup> In each of these cases, the court found that the defendant's fabric pattern was nearly identical to the plaintiff's copyrighted fabric pattern. Through the substantial similarity test, the courts determined that the plaintiff had infringed upon the defendant's copyright.<sup>128</sup> Both courts found copyright infringement without considering whether the defendants' substantially similar fabric patterns had been designed independently from the plaintiffs' patterns.<sup>129</sup> The courts also both failed to consider whether the defendants' patterns might have been inspired by public domain sources that had also influenced the plaintiffs' design.<sup>130</sup> While similarity between two works may logically lead to a presumption of copying, the substantial similarity test skips this step<sup>131</sup> and automatically makes the inferential

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122. See Cohen, *supra* note 121, at 724–26.

123. *Id.* at 724, 737.

124. *Id.* at 731.

125. See Lape, *supra* note 89, at 190–94.

126. 602 F. Supp. 151, 154 (S.D.N.Y. 1984).

127. 517 F. Supp. 900, 902–03 (S.D.N.Y. 1981).

128. See *Kenbrooke Fabrics, Inc.*, 602 F. Supp. at 154; *Lauratex Textile Corp.*, 517 F. Supp. at 902–03; Cohen, *supra* note 121, at 736–39.

129. See Cohen, *supra* note 121, at 736–39.

130. The issue of common inspiration through non-copyrighted sources is a complicated one for judges to resolve. See Cohen, *supra* note 121, at 725–26. In artistic fields, it is to be expected that copyrighted works might on occasion draw inspiration or borrow in some other way from prior works not under copyright. When a later work is found to be substantially similar to the copyrighted work, this presents an issue—under traditional notions of appropriation, a work inspired by the original, non-copyrighted work has not “taken” anything from the copyrighted work. However, despite this lack of appropriation, it may be remarkably similar to the copyrighted work due to the common source of inspiration, and thus fail the substantial similarity test. This problem highlights the difficulties that a court may face in making the leap from similarity between works to appropriation of one work's intellectual property by the creators of another work. See Cohen, *supra* note 121, at 725–26.

131. *Id.* at 737 n.65.

leap from similarity to misappropriation.<sup>132</sup>

Another common criticism of the substantial similarity test is that it fails to provide guidelines that allow judges or juries to make consistent or reasonable determinations of what constitutes infringement.<sup>133</sup> As noted above, courts have not announced a specific percentage of a defendant's work which may be "like" a plaintiff's copyrighted work before it rises to the level of being "substantially similar" to the plaintiff's work.<sup>134</sup> In *Worth v. Selchow*, a trivia book including roughly one-third of the facts from another copyrighted trivia book was found to be not substantially similar to the copyrighted book.<sup>135</sup> Conversely, in *WPOW, Inc. v. MRLJ Enterprises*, the defendant's broadcasting tower was found to infringe upon the plaintiff's copyright on a design for broadcasting towers<sup>136</sup> because the defendant's tower's antenna—comprising far less than one-third of the overall design—was found to be identical to that in the plaintiff's design.<sup>137</sup> The reasoning for this was that the antenna, while comprising a small percentage of the overall mass of the structure, was "in essence the heart of the work" and therefore constituted a taking of a substantial nature.<sup>138</sup>

These divergent methods of quantifying substantial similarity represent only one of a myriad of examples of incongruity between decisions of

132. *Id.*

133. *Id.* at 741–44.

134. *Id.*

135. See Lape, *supra* note 89, at 193–94 (citing *Worth v. Selchow & Righter Co.*, 827 F.2d 569 (9th Cir. 1987)). *Worth* did not hold that copying one third of another work cannot be infringement. *Worth*, 827 F.2d 569. In fact, the court indicated that its finding did not depend on a quantitative analysis of the copied materials but instead on the particular treatment that factual works, rather than fictional works, receive under copyright law. *Id.* at 573. Lape's criticism of the substantial similarity test is not that it creates an incorrect quantitative standard, but rather that the absence of a meaningful standard for a finding of substantial similarity has led to confusing results. See Lape, *supra* note 89, at 191–94.

136. See Cohen, *supra* note 121, at 741 (citing *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132 (D.D.C. 1984)). The defendant had registered a copyright on a design for broadcast towers used to broadcast radio signals across a local area. *Id.* The copyright included the design of the entire tower, which included a design for the broadcasting antenna. *Id.* The antenna itself represented only a small portion of the tower calculated by total mass. *Id.* at 742. The tower itself was a large structure, and the antenna was a minor fraction of the size of the rest of the tower. *Id.* However, the antenna was the most important part of the design of the tower for the purposes of the broadcast—the structure in general serves to elevate and support the antenna, which actually broadcasts the signal. The technology and the design of the antenna were by far the most sophisticated elements of the design of the structure. *Id.* The plaintiff had built a structure in which the broadcast tower itself, which supports the antenna, was materially different from the copyrighted design, but the antenna was very similar to that in the copyrighted design. *Id.*

137. *Id.*, *supra* note 121, at 742.

138. *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132, 136 (D.D.C. 1984).

different courts.<sup>139</sup> Some courts compare the similarity between part of the defendant's work and part of the plaintiff's work,<sup>140</sup> while some compare the similarity between the entirety of the defendant's work and the entirety of the plaintiff's work.<sup>141</sup> Even when courts agree on whether to focus on the part or the whole, the specific percentage threshold of similarity required for appropriation remains undefined.<sup>142</sup> The result of this vast inconsistency between courts' application of the substantial similarity test is confusion for producers of creative products and over-protection of copyright.<sup>143</sup>

Yet another criticism of the substantial similarity test is that its focus on similarity rather than harm is inconsistent with the purposes of copyright law.<sup>144</sup> The substantial similarity test, by focusing analysis entirely on the characteristics of the defendant's work, does not include any consideration of the harm that a defendant's work may do to the plaintiff.<sup>145</sup> This may lead to cases in which infringement is found "without any injury or harm suffered by the copyright holder."<sup>146</sup> Rather than serving the purposes of protecting property rights, this approach generates a "random windfall to the copyright holder."<sup>147</sup> Furthermore, these findings of infringement without harm stifle creativity, as they needlessly block the production of creative efforts which would otherwise be allowable.<sup>148</sup> If the purposes of copyright law are to protect property rights of copyright holders while promoting creativity, the substantial similarity test's penchant for finding infringement where no harm accrues to the copyright holder is counter to the purposes of copyright law, because it both fails to protect property rights and stifles creativity.<sup>149</sup>

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139. See Lape, *supra* note 89, at 193–94; Cohen, *supra* note 121, at 741–43. Compare *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 618 (7th Cir. 1982) (where alterations made by the defendant to its product in order to differentiate it from the plaintiff's product were found by the court to "emphasize the extent to which it deliberately copied from the plaintiffs' work"), with *Smith v. Weinstein*, 578 F. Supp. 1297, 1304 (S.D.N.Y. 1984) (where differences between the works were found to "undercut substantial similarity") (quoting *Warner Bros., Inc.*, 720 F.2d 231, 40–41 (2d Cir. 1983), *aff'd*, 738 F.2d 419 (2nd Cir. 1984)).

140. Cohen, *supra* note 121, at 742.

141. *Id.* at 742–43.

142. Lape, *supra* note 89, at 193.

143. *Id.* at 182.

144. See *id.*

145. *Id.* at 194–96.

146. *Id.* at 196.

147. *Id.*

148. *Id.* at 197.

149. *Id.* at 193–97.

*B. Characteristics of the Substantial Similarity Test Shared by the Average Audience Test*

The average audience test adopted in *VMG Salsoul* is, in theory, different from the substantial similarity test. While the substantial similarity test involves an analysis of the actual differences between two sound recordings, the average audience test depends upon an analysis of a hypothetical “average” group’s perception of the difference between two sound recordings.<sup>150</sup>

However, despite this conceptual distinction, in practice the average audience test mirrors many of the elements that have been criticized in the substantial similarity test. In the context of the facts of *VMG Salsoul*, it is easy to accept at face value the argument that an average audience would be unable to recognize the appropriation of the sampled material.<sup>151</sup> The “horn hit” in question was less than a second long and had been digitally altered.<sup>152</sup> An actual expert musicologist was unable, upon a preliminary analysis, to properly identify the appropriation.<sup>153</sup> However, it will not always be so clear whether an average audience would recognize a sample as appropriation of the copyrighted recording. Where future *de minimis* cases fall closer to the borderline of appropriation recognizable to the average audience, the test stated by the Ninth Circuit may run into the same problems for which the substantial similarity test has been criticized.

There is one respect in which the average audience test may represent an improvement upon the substantial similarity test: the average audience test does not automatically make the leap from similarity to misappropriation.<sup>154</sup> Specifically, the average audience test as announced by the Ninth Circuit requires, for a finding of copyright infringement, that a sample’s *appropriation* of copyrighted material (not a sample’s similarity to copyrighted material) be recognizable to the average audience.<sup>155</sup> This may allow the trier of fact to make a distinction between similarity and copying. Whether this distinction would have a material effect on the application of the test is unclear, but at least in its definition

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150. Compare *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997), and *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992), with *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003), and *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016).

151. See *VMG Salsoul*, 824 F.3d at 871.

152. *Id.* at 879.

153. *Id.* at 881.

154. *Id.* at 878.

155. *Id.*

the average audience test does not automatically jump from similarity to appropriation without consideration of whether copying has occurred,<sup>156</sup> as the substantial similarity test does.<sup>157</sup>

However, much like the substantial similarity test, the average audience test fails to provide guidelines that allow the trier of fact to make consistent or reasonable determinations about what constitutes infringement.<sup>158</sup> The substantial similarity test suffers from inconsistent understandings between courts of what percentage of a defendant's work must be "like" that of a copyrighted work in order for the defendant's work to constitute copyright infringement.<sup>159</sup> Without guidelines to determine percentages (or some other more meaningful standard of similarity), courts are left to their own devices in determining what they consider "substantial similarity."<sup>160</sup>

At its core, the average audience test announced by the Ninth Circuit similarly requires the factfinder to make a decision regarding the closeness between two works without any objective framework or guidelines to rely on.<sup>161</sup> In future cases using the average audience test, courts will be required to determine on their own whether an appropriation would be recognizable to the average audience.<sup>162</sup> While it has yet to be seen whether courts will be able to produce more consistent decisions under the average audience test than they have under the substantial similarity test, the test exhibits the same lack of guidelines that has led to inconsistency<sup>163</sup> in substantial similarity contexts.

Finally, the average audience test replicates the substantial similarity test's focus on similarity rather than harm. The recognizability of an audio recording's appropriation depends upon the characteristics of the two sound recordings rather than on the context in which the recordings exist. Nowhere in the average audience test is there a component which takes into account the impact of the appropriations upon the parties involved.<sup>164</sup> Since the average audience may well be able to recognize an appropriation in contexts where that appropriation does no harm to the copyright holder, the average audience runs the same risk as the substantial similarity test of

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156. *Id.*

157. *See* Lape, *supra* note 89.

158. *See* *VMG Salsoul*, 824 F.3d at 871.

159. *See* Cohen, *supra* note 121, at 741–44.

160. *See* Lape, *supra* note 89, at 190–94.

161. *See* *VMG Salsoul*, 824 F.3d at 878–89.

162. *Id.*

163. *See* Lape, *supra* note 89, at 190–94.

164. *See* *VMG Salsoul*, 824 F.3d at 878–89.

creating “random windfall” for the copyright holder.<sup>165</sup> If the substantial similarity test’s failure to consider harm to the defendant is inconsistent with the purposes of copyright law,<sup>166</sup> then another test that also fails to consider harm to the defendant must be equally inconsistent with the purposes of copyright law.

Thus, the average audience appears to be as deficient as the substantial similarity test in creating predictability in decisions and in factoring damage to the copyright holder in its punishment of copyright infringers. In fact, the average audience test may be even more likely to yield inconsistent or unreasonable decisions than the substantial similarity test. While the substantial similarity test requires the trier of fact to make a difficult decision based on limited guidelines, the average audience test requires the trier of fact to make functionally the same difficult decision, with the same limited guidelines, while stepping into the shoes of a hypothetical “average” group of people.<sup>167</sup> This additional inferential step is unlikely to provide any of the clarity necessary to improve the consistency or reasonableness of decisions in the lower courts. The question of what constitutes an “average audience” is never defined,<sup>168</sup> and even if it were defined, it seems difficult to imagine that each factfinder would have an identical opinion of what this average audience might think.

#### V. PROPOSALS TO IMPROVE UPON THE NINTH CIRCUIT’S APPROACH

It appears that while the Ninth Circuit’s analysis of congressional intent is proper, the rule that this analysis yields is highly problematic. Conversely, while the Sixth Circuit’s decision to ignore Congress’s intent was widely criticized,<sup>169</sup> the rule resulting from this analysis meshes with certain purposes of copyright law far more easily.<sup>170</sup> This is not an easy circuit split to resolve. Given that many of the serious criticisms of the substantial similarity test seem to apply to the average audience test, it is tempting to say that the Ninth Circuit was wrong to create a split with the Sixth Circuit, and that the average audience test represents a step backwards. However, while the average audience test may run counter to

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165. See Lape, *supra* note 89, at 195–96, 196 n.74.

166. *Id.* at 194–97; Cohen, *supra* note 121, at 740 n.71; Palmer, *supra* note 121.

167. See *VMG Salsoul*, 824 F.3d at 878–89.

168. *Id.*

169. See Schietinger, *supra* note 4, at 210; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1; Lloyd, *supra* note 5.

170. See Horowitz, *supra* note 68.

the goal of creating clarity in copyright law,<sup>171</sup> the bright-line *Bridgeport* rule runs counter to the intent of Congress in passing the Copyright Act to promote creative expression.<sup>172</sup> While *VMG Salsoul* may be improved by altering its adopted test in order to bring it more in line with the Congress's goal to promote clarity in copyright decisions, it is impossible to cure *Bridgeport*'s failure to consider Congress's goal to promote artistic expression without overruling *Bridgeport* completely. For this reason, the *VMG Salsoul* test must be favored over the *Bridgeport* test. The easiest way to bring current law on the issue of *de minimis* exceptions in digital music copyrights more in line with the goals of Congress is to tweak the Ninth Circuit's average audience test rather than to revert to the bright-line *Bridgeport* rule.

There have been a number of suggestions among commentators as to how the substantial similarity test could be changed to bring it more in line with the public policy goals of copyright law.<sup>173</sup> Conceivably, these suggestions could be adapted to the average audience test.

One proposal is to allow musical experts to serve as the trier of fact rather than laypeople or judges not well-versed in the musical industry.<sup>174</sup> However, this proposal applies poorly to the average audience test for multiple reasons. First, the element of selecting a specific set of jurors from a limited pool runs counter to the entire American judicial process.<sup>175</sup> Second, it is difficult to see how the findings of a jury of experts would be an improvement over the findings of a jury of laypeople. A jury of experts might be capable of analyzing an appropriation within the framework of what is considered acceptable within their field,<sup>176</sup> but it is hard to imagine that this would provide significantly greater consistency to users of copyrighted material in the decision-making process. If the criteria through which *de minimis* exceptions are found remains undefined, the subjective decisions of twelve people, whether they be laypeople or experts, will remain unlikely to provide any sort of clarity to an entirely different subset of people (copyright holders and music producers) in their attempt to predict whether a contemplated future instance of sampling is likely to be

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171. *Id.*

172. Brandes, *supra* note 10, at 104–06.

173. See Palmer, *supra* note 121; Cohen, *supra* note 121; Lape, *supra* note 89.

174. See Palmer, *supra* note 121.

175. See Mark Houser, *The Importance of Representative Juries*, 87 JUDICATURE 99, 99 (2003) (“[T]rial by jury is a showcase, a public reminder of our republic’s fundamental principle: Government is of the people, by the people, for the people . . . . Courts have a responsibility to make sure their jury pools represent all citizens.”).

176. See Palmer, *supra* note 121, at 931–33.

legal. In fact, within the confines of the Ninth Circuit's standard, it may be even more difficult for experts than for laypeople to determine what an "average audience" would recognize.

A less experimental solution would be for the courts or the legislature to provide objective criteria by which a musical sampling could be measured in a *de minimis* analysis. This solution has been proposed by numerous commentators with regard to the substantial similarity test.<sup>177</sup> This could be easily applied to the average audience if, for example, the courts specified that a sample less than one second long would automatically fit within the *de minimis* exception for copyright infringement. In such a case, copyright holders, license holders, and producers would be able to consistently determine without a trial whether an instance of sampling would be considered *de minimis*.<sup>178</sup> One issue with this particular solution is that objective criteria may prove to be poor proxies for the recognizability of an instance of sampling. It is difficult to say that an instance of sampling less than a second long cannot be instantly recognizable to the vast majority of listeners.<sup>179</sup> Conversely, a sample more than a second long might be totally unrecognizable to anyone but the original artist. It would be tremendously difficult to ask courts to come up with objective criteria that perfectly capture the magnitude of artistic appropriations.

However, while it may not result in an ideal test, the notion of incorporating some transparent element of objectivity<sup>180</sup> into the average audience test would represent a step forward as long as the test still leaves ultimate discretion to the court as to what appropriation is recognizable to the average audience. As noted above, objective criteria may make a poor proxy for the recognizability of an appropriation, but by leaving a discretionary component for the court to work with, the impact of this problem could be somewhat mitigated.

For example, the Ninth Circuit could have suggested that a sample shorter than one second will always be considered *de minimis* barring exceptional circumstances, that a sample longer than three seconds will not be considered *de minimis* barring exceptional circumstances, and that a sample in between those lengths will be subject to the current average audience test. The incorporation of a modicum of transparent objective

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177. See Cohen, *supra* note 121, at 758–60; Lape, *supra* note 89, at 190–94; Lieberman, *supra* note 115, at 109.

178. See Lape, *supra* note 89, at 98.

179. See Cohen, *supra* note 121.

180. *Id.*

criteria has been suggested by commentators in the area of the substantial similarity test,<sup>181</sup> and it seems that the same suggestions could be equally applicable to the average audience test.

The court could also have specified that beyond length, considerations like the sampled work's critical success, commercial success, or popularity as a source of samples could all factor into the application of the average audience test when it must be applied.<sup>182</sup> If these types of semi-objective criteria were applied in a non-mandatory fashion, district courts would still have discretion to deal with cases where the objective criteria do not adequately represent the type of appropriation that has occurred, but producers and copyright holders would have a better sense of what will generally constitute a *de minimis* appropriation.

Finally, requiring plaintiffs to show financial harm in order to avoid a finding that an appropriation is *de minimis* would improve the Ninth Circuit's test by reducing the chances of "random windfall"<sup>183</sup> to plaintiffs who have not suffered harm in fact through the defendant's use of their work. The average audience test, as it is currently formulated, does not account at any point for a showing of financial harm. By formulating the test so that an appropriation would automatically be considered *de minimis* if the plaintiff does not demonstrate meaningful financial harm, the court could avoid the scenario in which a plaintiff not harmed by the defendant's appropriation receives statutory compensation.<sup>184</sup>

Even a more moderate form of this requirement, where the burden of proof is shifted to the defendant, would improve the Ninth Circuit's test. Under such a formulation, the defendant could be given the opportunity to prove that the plaintiff suffered no harm from the appropriation, in which case the appropriation would be considered *de minimis*. This addition to the test would not eliminate completely the possibility of random windfall to the plaintiff, but it would reduce the likelihood of such windfall occurring.<sup>185</sup>

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181. See Lape, *supra* note 89; Cohen, *supra* note 121, at 758–60; Lieberman, *supra* note 115, at 109.

182. Very few cases exist in which the average audience test is applied, and where it is applied, no court has yet incorporated any objective criteria in its application. The District Court for the Central District of California appeared to come the closest by recognizing that alterations to an original work likely render the work less recognizable to an average audience. See *Steward v. West*, No. CV1302449BROJCX, 2014 WL 12591933 (C.D. Cal Aug. 14, 2014). Even in that case though, no objective criteria were applied to the alterations. *Id.*

183. See Lape, *supra* note 89, at 195–96, 196 n.74.

184. *Id.*

185. *Id.*

## CONCLUSION

The Ninth Circuit's decision in *VMG Salsoul* feels like the product of widespread disapproval of the Sixth Circuit's decision in *Bridgeport*. While it is a step too far to say that commentators directly influenced the opinion of the court, the wealth of scholarly articles criticizing the Sixth Circuit's decision bear witness to the climate of general discontent with the *Bridgeport* decision.<sup>186</sup> In addition to scholarly critiques, decisions of lower courts outside the purview of the Sixth Circuit have run counter to the *Bridgeport* decision, adding judicial weight to the criticisms of the opinion.<sup>187</sup> The *VMG Salsoul* opinion appears to respond to the perceived injustices of the *Bridgeport* decision in knowingly creating a circuit split.<sup>188</sup>

However, while the *Bridgeport* decision was easy to criticize from an academic perspective, its emphasis on a bright-line rule eliminating the *de minimis* exception to infringement made some sense given the priorities of copyright law.<sup>189</sup> United States copyright law has always strived for clarity so that creators of artistic content would not have to live in the shadow of doubt that they may be violating federal law.<sup>190</sup> It would have been difficult to adopt a bright-line rule in a decision contrary to *Bridgeport*, and indeed the Ninth Circuit does not adopt an easily applied test in *VMG Salsoul*. The Sixth Circuit was criticized in scholarly literature for being overly concerned with the practical consequences of its decision rather than delivering an opinion founded on proper legal analysis.<sup>191</sup> While that critique may have merit, the critics of the *Bridgeport* decision seemed to rarely consider the consequences of a contrary decision.<sup>192</sup>

In *VMG Salsoul*, the approach taken by the court was to adopt the average audience test.<sup>193</sup> Since the scholarly work in this area of *de minimis* exceptions has tended to concentrate on the errors of the Sixth Circuit<sup>194</sup> rather than on a test that could alternatively be applied, there are

186. See Schietinger, *supra* note 4, at 210; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1; Lloyd, *supra* note 5.

187. See Lloyd, *supra* note 5, at 159.

188. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).

189. See Horowitz, *supra* note 68.

190. *Id.*

191. See, e.g., Schietinger, *supra* note 4, at 230–42; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1, at 558–60; Lloyd, *supra* note 5.

192. See, e.g., Schietinger, *supra* note 4, at 230–42; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1, at 558–60; Lloyd, *supra* note 5.

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

194. See Schietinger, *supra* note 4, at 230–42; Brandes, *supra* note 10, at 104–06; Esannason,

few articles that discuss the average audience test or its practical deficiencies. However, there is a great deal of literature regarding the substantial similarity test, which is used in other copyright contexts.<sup>195</sup>

Almost universally, the substantial similarity test is criticized for its failure to produce predictable results and for its strict focus on similarity rather than financial harm to the copyright holder, potentially resulting in unwarranted “random windfall” for the copyright holder.<sup>196</sup> Both the unpredictability of the test and the random windfall it generates run counter to well-established tenets of copyright law.<sup>197</sup> Both of these problems seem to apply to the average audience test just as much as the substantial similarity test.

There is no easy resolution to this circuit split. One court’s decision has long been criticized for misreading the statute it applied to the case and ignoring legislative history;<sup>198</sup> the other court’s decision adopts a test that appears likely to run counter to several important goals of copyright law.<sup>199</sup>

Ultimately, while the Ninth Circuit’s decision must be preferred over the Sixth Circuit’s, it is crucial to note the problems likely to result from the adoption of the average audience test.<sup>200</sup> If the average audience test can be improved, potentially through the adoption of transparent objective criteria or an increased emphasis within the test on financial damages resulting to the copyright owner as a basis for damages,<sup>201</sup> the Ninth Circuit’s rule could be tweaked to create greater predictability within the *de minimis* analysis and provide more reasonable penalties for copyright infringers.<sup>202</sup> This would bring the rule closer to fulfilling the goals of copyright law while still remaining true (unlike the Sixth Circuit’s *Bridgeport* rule) to Congress’s goal in passing the Copyright Act of promoting artistic expression.<sup>203</sup>

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*supra* note 1; Lloyd, *supra* note 5.

195. See Lape, *supra* note 89; Cohen, *supra* note 121.

196. See Lape, *supra* note 89, at 195–96.

197. See Lape, *supra* note 89; Horowitz, *supra* note 68.

198. See Schietinger, *supra* note 4, at 210; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1; Lloyd, *supra* note 5.

199. See Lape, *supra* note 89; Horowitz, *supra* note 68.

200. See Brandes, *supra* note 10, at 104–06; Schietinger, *supra* note 4, at 236–42.

201. See Lape, *supra* note 89, at 194–97; Cohen, *supra* note 121, at 758–60.

202. See Lape, *supra* note 89; Cohen, *supra* note 121.

203. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016); see also Schietinger, *supra* note 4, at 210; Brandes, *supra* note 10, at 104–06; Esannason, *supra* note 1; Lloyd, *supra* note 5.

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