I. INTRODUCTION

The Constitution of the United States empowered Congress to give creators exclusive rights in their works of authorship to promote the useful arts.1 In § 106 of the Copyright Act,2 Congress codified the exclusive rights that a copyright afforded to the creators of books, music, and other works of authorship.3 Section 114 of the Copyright Act sets out limitations to the exclusive rights a creator has in a sound recording.4 While copyrights have different limitations and qualifications from other works of authorship, some courts and commenters have differed on whether sound recording copyright infringement cases are subject to the de minimis copying exception.5

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
4. 17 U.S.C. § 114(a). The statute states that “[t]he exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).” Id.
5. See VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880 (9th Cir. 2016) [hereinafter VMG II] (finding summary judgment was proper on the issue of de minimis copying); see also Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801-02 (6th Cir. 2005) (holding no de minimis analysis should be given where factual copying is conceded); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A][2][b] (rev. ed. 2017) (commenting that courts not bound by Bridgeport Music should still examine a sample's substantial similarity to the protected work).
In VMG Salsoul, LLC v. Ciccone, the United States Court of Appeals for the Ninth Circuit found that the de minimis exception applied in a sound recording infringement action. In VMG, a portion of the song Ohh I Love It (Love Break), was sampled in the recording of the hit dance song Vogue. The owners of the Love Break sound recording copyright brought a copyright infringement action against the creators of Vogue. The United States District Court for the Central District of California granted the defendants Pettibone and Lexor’s motion for summary judgment reasoning that the sampling of Love Break was de minimis and, therefore, not actionable. The Ninth Circuit acknowledged that its decision ran contrary to a decision of the United States Court of Appeals for the Sixth Circuit, but affirmed the ruling of the lower court that found that the de minimis exception did, in fact, apply to sound recordings.

This Note will first examine the facts and holding of VMG. Next, this Note will discuss the legislative intent of the Copyright Act and what constitutes copying under the Copyright Act. Then, this Note will detail the Sixth Circuit’s determination that the de minimis exception does not apply to sound recording infringements. The Note will next discuss the United States Courts of Appeal for the Second and Ninth Circuit’s de minimis use precedent. Next, this Note will argue that a copyright for a sound recording was not intended to have more rights than any other work of authorship. Then, this Note will argue that the Copyright Act is meant to protect works that are more than trifles. Further, this Note will argue that a technical infringement is not actionable when the appropriation is not identifiable. Finally, this Note will conclude that the de minimis exception

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6. 824 F.3d 871 (9th Cir. 2016).
7. VMG II, 824 F.3d at 887.
8. Id. at 874. Sampling is “actual physical copying of sounds from an existing sound recording for use in a new recording.” Id.
9. Id.
10. See id. at 876 (stating that the sampled section was not original for copyright purposes, and even if it was original, the copying was de minimis).
11. See id. at 885. The court commented that “sampling” can occur in other works of authorship without a special exception being made; and that the physical taking argument presented in Bridgeport Music was a theory that was already rejected by the United States Supreme Court. Id.
12. See infra notes 20-43 and accompanying text.
13. See infra notes 44-68 and accompanying text.
14. See infra notes 69-82 and accompanying text.
15. See infra notes 83-119 and accompanying text.
16. See infra notes 129-138 and accompanying text.
17. See infra notes 139-149 and accompanying text.
18. See infra notes 150-163 and accompanying text.
applies to sound recording copyrights as it applies to other works of authorship.¹⁹

II. FACTS AND HOLDING

In *VMG Salsoul, LLC v. Ciccone*,²⁰ plaintiff VMG Salsoul (“VMG”), the copyright holder to the song *Ooh I Love it (Love Break)* (“*Love Break*”), brought a copyright suit alleging that the song *Vogue* by Madonna Louise Ciccone (“Madonna”) violated the composition and sound recording copyrights to *Love Break*.²¹ In the early 1980s, Shep Pettibone (“Pettibone”) was hired by the Salsoul Record label to remix master tracks of existing songs to create derivative works.²² *Love Break* was created as a result of the remix efforts; however, Pettibone created the song under a work for hire agreement, which deprived him of any rights in the composition.²³ In 1990, Pettibone recorded the song *Vogue* with Madonna, and the song became a hit after its release.²⁴ Verse Music Group (“Verse”) owns VMG, and its CEO and former vice president were also involved with Pettibone and Madonna in the creation of *Vogue* and its remixes.²⁵ In February 2011, Verse CEO Curt Frasca convinced VMG to acquire the copyrights to the Salsoul works, stating that he believed there was potential to recover money from sample claims.²⁶

Upon acquiring Salsoul’s copyright catalog, VMG alleged that Pettibone sampled a horn hit from *Love Break* and used it in the creation of *Vogue* without permission.²⁷ VMG provided notice of copyright infringement to all parties involved in the creating, publishing, manufacturing, distributing, and selling of copies of *Vogue*.²⁸ VMG filed a complaint against defendants alleging deliberate and unauthorized use of VMG’s sound recording copyright for *Love Break* in the United States District Court for the Central District of California.²⁹ Pettibone and Lexor Music filed an amended motion for summary judg-

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¹⁹. *See infra* notes 164-172 and accompanying text.
²⁰. 824 F.3d 871 (9th Cir. 2016).
²¹. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).
²². VMG Salsoul, LLC v. Ciccone, No. CV 12-05967 BRO (CWx), 2013 U.S. Dist. LEXIS 184127, at *3 (C.D. Cal. Nov. 18, 2013) [hereinafter *VMG I*].
²⁴. *VMG II*, 824 F.3d at 875.
²⁶. Id. at *6.
²⁷. Id. at *6-7. A “horn hit” is the practice of playing horns in a short percussive manner, similar to a hit on a snare drum. Id. at *27.
²⁹. Id. at *9-10. VMG moved for leave to amend their original complaint and subsequently filed an amended complaint on July 12, 2013. Id.
ment, which was subsequently joined by the remaining defendants (Madonna, Warner Music Group, Warner Bros. Records Inc., WB Music Corporation, Blue Disque Music Company, Inc., and WEBO Girl Publishing Inc.). VMG argued that the court should not conduct a substantial similarity analysis because the claim was for infringement of a sound recording. The district court declined to follow the United States Court of Appeals for the Sixth Circuit's opinion advanced by VMG and instead followed the test for substantial similarity discussed by the United States Court of Appeals for the Ninth Circuit. Following Ninth Circuit case law, the district court granted the defendant's motion for summary judgment on two alternative grounds. The district court first held that the horn hit was not sufficiently unique to satisfy the originality element of a copyright action because horn hits were widely used several music genres. The court then found that even if the horn hit were sufficiently unique, the copying was de minimis because the average, or ordinary observer, would not regard the two works as the same.

On appeal, the Ninth Circuit affirmed the lower court's ruling regarding VMG's copyright claims. The court rejected VMG's argument that the lower court erred by conducting a de minimis analysis because no such exception is afforded in sound recording copyrights. Specifically, the Ninth Circuit noted that the Sixth Circuit was the only authority that held that the de minimis exception does not apply

30. Id. at *30. VMG asked the court to follow Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005), which held that no de minimis analysis should be conducted in sound recording copyright cases. See also See Nimmer & Nimmer, supra note 5, at § 13.03[A][1] (defining substantial similarity as a copying where the “fundamental structure of one work is duplicated in another”).

31. VMG I, 2013 U.S. Dist. LEXIS 184127, at *32-33. The court opined that some degree of copying is permitted, but the court must weigh the qualitative and quantitative amount copied in relation to the plaintiff's work to determine if copying had been done to an unfair extent. Id.

32. See VMG II, 824 F.3d at 876 (stating the lower court found that the horn hit was not original for copyright purposes, but in the event it was found to be original, the court also ruled that any sampling of the horn hit was de minimis or trivial”) (internal quotations omitted).

33. VMG I, 2013 U.S. Dist. LEXIS 184127, at *27. The court reasoned that when determining if a work is sufficiently unique, the court must keep in mind that common themes in music will limit those common themes from being considered original in an infringement action. Id. at *18-19.

34. See id. at *38 (finding no reasonable audience could determine that the copying was qualitatively and quantitatively significant and could not recognize the appropriation).

35. VMG II, 824 F.3d. at 880. To support its affirmation, the Ninth Circuit highlighted the fact that the plaintiff's own expert witness misidentified the alleged copying, and if the expert could not identify the appropriation, the average audience would not be able to either. Id.

36. Id. at 880.
to sound recording copyrights.38 The Ninth Circuit pointed out language in the Copyright Act that illustrated Congress did not intend to treat sound recordings different from other works of authorship.39 Further, the court pointed out the logical fallacy in the Sixth Circuit’s interpretation of § 114(b) and noted exclusive rights cannot be generalized to all circumstances.40 While the court acknowledged that declining to follow Bridgeport Music, Inc. v. Dimension Films41 would officially create a circuit split, the court also pointed out that district courts not bound by the decision have declined to follow Bridgeport.42 In affirming the decision, the Ninth Circuit specifically held that the lower court’s granting of summary judgment on the issue of de minimis copying was correct.43

III. BACKGROUND

A. THE COPYRIGHT ACT OF 1976 EXTENDS COPYRIGHT PROTECTIONS TO NEW WORKS OF AUTHORSHIP BUT DOES NOT ADD ANY NEW RIGHTS

The Constitution of the United States empowered Congress to protect the works of authors and inventors by giving them exclusive rights to their works for a limited time.44 Exercising this power, the United States Congress enacted its first Copyright Act in 1790, and

38. Id. at 881.
39. See id at 881-82 (stating that sound recordings are listed with other works of authorship in § 102, suggesting that sound recordings are to be treated like other works of authorship). 17 U.S.C. § 102(a) provides:
   Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed . . . works of authorship include the following categories: 1) literary works; 2) musical works, including any accompanying words; 3) dramatic works, including any accompanying music; 4) pantomimes and choreographic works; 5) pictorial, graphic, and sculptural works; 6) motion pictures and other audiovisual works; and 7) sound recordings.
40. VMG II, 824 F.3d at 884. The court supported its assertion by stating that “exclusive rights . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds . . . .” Id.
41. 410 F.3d 792 (6th Cir. 2005).
43. VMG II, 824 F.3d at 880.
44. U.S. Const. art. I, § 8, cl. 8.
revised it several times throughout the years. When the Copyright Act was revised in 1909, motion picture and sound recordings were new technologies, and other mediums were being introduced and developed. Measures to revise the act were introduced as early as 1924, but no revisions were enacted until 1974. In 1974, Congress approved a limited revision measure out of necessity, although it was still working on a comprehensive revision to the Copyright Act.

In 1976, Congress introduced bills in both houses similar to a 1973 general revision bill that was considered but not passed. Section 106 of the revision bill enumerated the five fundamental rights a copyright affords its owner. House Report 1476 specified that § 106 was meant to list the exclusive rights broadly, while §§ 107 through 118 were meant as limitations that were to be read in conjunction with § 106. Section 114 sets the limitations for the exclusive rights for copyright holders in sound recordings. House Report 1476 states that §114(b) directs that the copyright holder’s protection is limited only to sounds contained within the recording. Additionally, an amendment to the revision bill was adopted in order to clarify that the

46. Id. House Report 1476 states:

During the past half century a wide range of new techniques for capturing and communication printed matter, visual images, and recorded sounds have come into use . . . . The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Id.
47. See id. at 47-49 (extending the renewal time on expiring copyrights and established a limited copyright in sound recordings).
48. See id. at 48 (stating a limited copyright in sound recordings was necessary to stop the widespread unauthorized duplication of sound recordings).
49. Id.
50. Id. at 61. The bundle of rights that are associated with copyright protection include “the exclusive rights of reproduction, adaptation, publication, performance, and display.” Id.
51. Id. In addition to congressional intent, the language in §§ 107-118 indicates that these sections were meant to be read with § 106. See, e.g., 17 U.S.C. § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . . is not an infringement of copyright.”); 17 U.S.C. § 112(a)(1) (“Notwithstanding the provisions of section 106 . . . it is not an infringement of copyright for a transmitting organization entitled to transmit the public a performance or display of a work . . . .”); 17 U.S.C. § 115 (“In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.”).
52. See 17 U.S.C. § 106 (indicating that sound recording rights are limited to rights to reproduce, make derivative works, and distribute copies of the sound recordings to the public).
53. H.R. Rep. No. 94-1476, at 106. The congressional report states “infringement takes place whenever all or any substantial portion of the actual sounds” on the sound recording are reproduced. Id. (emphasis added).
exclusive right to prepare derivative works only extended to the rear-ranging or remixing of the actual sounds fixed in the sound recording.\textsuperscript{54} Since § 114 was meant to be a limit on the general rights conferred by § 106, it follows that the section did not expand sound recording copyrights by eliminating the de minimis exception in actions of infringement.\textsuperscript{55}

\section{Actionable Copyright Infringement Requires Copying that is Substantially Similar}

In \textit{Feist Publications, Inc. v. Rural Telephone Service, Co.},\textsuperscript{56} the United States Supreme Court announced that not all copying is an actionable infringement; rather, the plaintiff must prove it owned a copyright and the original elements of its work were copied.\textsuperscript{57} The Court in \textit{Feist} directed that even where a factual copying has been proven, the Court’s analysis does not stop.\textsuperscript{58} In addition to proving that a defendant factually copied a copyrighted work of authorship, the plaintiff must also prove that there is substantial similarity between the two works.\textsuperscript{59} Although indirect proof to establish that factual copying has occurred is sometimes called substantial similarity, the more accurate use of the term relates to determining whether actionable copying has occurred.\textsuperscript{60}

\begin{itemize}
  \item \textsuperscript{54} \textit{Id.}
  \item \textsuperscript{55} \textit{Compare id.} ("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 . . . .") (emphasis added), with Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004) (finding the sampling of the underlying composition of a song was de minimis because the two works were substantially dissimilar and therefore not sufficient to constitute infringement).
  \item \textsuperscript{56} 499 U.S. 340 (1991).
  \item \textsuperscript{57} \textit{Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.}, 499 U.S. 340, 361 (1991). \textit{See also Nimmer & Nimmer, supra note 5, at § 13.01 (stating the two basic elements in a copyright infringement case are "ownership of a copyright by the plaintiff and copying by the defendant").}
  \item \textsuperscript{58} \textit{See Feist}, 499 U.S. at 344 (stating the issue before the court was not whether \textit{Feist} copied Rural’s compilation, but whether the compilation copied had protected elements).
  \item \textsuperscript{59} \textit{See Selle v. Gibb}, 741 F.2d 896, 900 (7th Cir. 1984) (stating an actionable copyright claim must prove "(3) copying of the work by the defendant, and (4) a substantial degree of similarity between the two works"). \textit{See also Harper & Row, Publrs. v. Nation Enters.}, 471 U.S. 539, 564-65 (1985) (finding the portion of a book that was copied was quantitatively insignificant, but the defendant had appropriated the "heart of the book").
  \item \textsuperscript{60} \textit{See Ringgold v. Black Entm’t Television, Inc.}, 126 F.3d 70, 74 (2d Cir. 1997) ("[S]ubstantial similarity is more properly used . . . as the threshold for determining that the degree of similarity suffices to demonstrate actionable infringement.") (internal quotations omitted). \textit{See also Nimmer & Nimmer, supra note 5, at § 13.01[B] (explaining that where factual copying is proven, “the question remains whether such copying is actionable").
Actionable copyright infringement, or unlawful appropriation, occurs when a substantial degree of similarity exists between the plaintiff’s work and the defendant’s copy after factual copying has been established. The determination of substantial similarity measures both the quantitative and the qualitative amounts of the protected work that were copied in order to determine whether the actionable threshold has been crossed. Determining whether the degree of similarity has crossed into an actionable infringement is not rigid, but instead looks into whether an ordinary observer, sometimes called average audience or lay observer, would recognize the appropriation of a protected work.

Fragmented literal similarity occurs where a copying has been made exactly or near-exactly from the protected work without copying the work’s overall structure. In a fragmented literal similarity case, courts measure the qualitative and quantitative significance of copying against the totality of the plaintiff’s work. Quantitative significance can be determined in a formalistic manner, but the ordinary observer test helps the courts determine the qualitative significance of the copied portion being analyzed. In this assessment of the copying, expressions that are common to a subject matter are not protect-

61. See Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 141 (2d Cir. 1992) (stating the test for unlawful appropriation measures whether there is a substantial similarity of protectable material between the original and alleged infringing work); see also Nimmer & Nimmer, supra note 5, at § 13.03[A] (“Slight or trivial similarities are not substantial and therefore noninfringing.”).

62. Compare Ringgold, 126 F.3d at 77 (finding that the twenty-seven seconds of screen time for a copyrighted painting rose to the level of actionable copyright), with Fisher v. Dees, 794 F.2d 432, 434, 434 n.2 (9th Cir. 1986) (finding the copying was actionable because although only six bars of a song were copied, it was the main theme of the song, making it recognizable).

63. See Laureyssens, 964 F.2d at 142 (finding that an “ordinary observer” would find that two three-dimensional cube puzzles were qualitatively different); see also Ringgold, 126 F.3d at 77 (finding that the use of a painting was quantitatively and qualitatively sufficient for the “average lay observer” to recognize the appropriation); Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004) (stating the admitted copying of a protected word is not actionable if the appropriation would not be recognized by the “average audience”).

64. See Nimmer & Nimmer, supra note 5, at § 13.03[A][2] (defining fragmented literal similarity as an exact or near-exact copying that has not comprehensively copied the overall structure or scheme of the protected work); see also Newton, 388 F.3d at 1195 (stating the degree of similarity in cases involving fragmented literal similarity is so high, the court must examine the quantitative and qualitative significance of the copied portion to determine if the copying was substantial).

65. See Newton, 388 F.3d at 1195 (reasoning that it must be determined whether so much has been taken that the original work is diminished in value).

66. See id. at 1195-96 (stating quantitatively, the three copied notes were only two percent of the protected work, and qualitatively, the ordinary observer would not be able to recognize the copying because the copying was no more significant than any other portion of the protected work).
able and are not considered in a court’s assessment. Once the protectable elements of a copyright are established, the test becomes whether the ordinary observer would be able to recognize the copying as an appropriation of the overall scheme of the copyrighted work.

C. BRIDGEPORT MUSIC, INC. v. DIMENSION FILMS: THE SIXTH CIRCUIT FINDS DE MINIMIS ANALYSIS DOES NOT APPLY TO SOUND RECORDING INFRINGEMENTS

In Bridgeport Music, Inc. v. Dimension Films, the United States Court of Appeals for the Sixth Circuit held that § 114 of the Copyright Act precluded a defendant from asserting a de minimis defense where actual copying was admitted. In Bridgeport Music, Westbound Records (“Westbound”) joined three other plaintiffs in filing an action in the United States District Court for the Middle District of Tennessee against approximately 800 defendants for copyright infringement. Westbound claimed No Limit Films (“No Limit”) infringed on its sound recording copyright in the song “Get Off Your Ass and Jam (“Jam”)” when it included the song “100 Miles and Runnin” in the soundtrack to the movie “I Got the Hook Up.”

No Limit moved for summary judgment and argued that the sample was legally insubstantial for purposes of copyright infringement. The district court found that the copied portion of Jam was original and entitled to copyright protection, but found that the copying did not rise to legally cognizable appropriation regardless of what test was

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67. See Erickson v. Blake, 839 F. Supp. 2d 1132, 1137-38 (D. Or. 2012) (stating that scenes à faire such as a common melodic sequence are not protectable and do not enter into the assessment of actionable infringement).

68. See Newton, 388 F.3d at 1196 (noting that where two works that are “substantially dissimilar in concept and feel” would not cause the ordinary observer to detect an appropriation).

69. 410 F.3d 792 (6th Cir. 2005).

70. See Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801-02 (6th Cir. 2005) (reasoning that § 114(b) gives a copyright holder the exclusive right to sample his or her own work, and therefore any factual copying that is admitted amounts to a physical taking).

71. See Bridgeport Music, 410 F.3d at 795 (noting that Westbound joined with Bridgeport Music, Southfield Music, and Nine Records almost 500 counts of copyright infringement).

72. Id. at 796. The court provided that No Limit copied a two second sample from Jam, lowered the pitch, extended it to sixteen beats per minute, and looped the sample to be used in 100 Miles and Runnin. Id.

73. Id. at 797. No Limit also argued that the sample was not original for purposes of copyright infringement. Id.
The district court granted No Limit’s motion for summary judgment and Westbound appealed the decision to the Sixth Circuit. On appeal, the Sixth Circuit did not address Westbound’s arguments, but it instead examined the language contained in the statutes related to copyrights upon the court’s own volition. The court focused on Congress’s decision to include the word entirely in the sound recording copyright provisions to conclude that sound recording copyright holders have the exclusive right to sample their own recording. Although arriving at this conclusion, the court added that sampling was not a practiced technique when sound recording copyrights were added to the statute. Adopting its interpretation of the Copyright Act, the court established a new bright-line rule regarding how the courts should analyze sound recording infringement cases. The court also equated sampling more to a physical taking than an intellectual taking. Alternatively, the court reasoned that the judiciary is ill equipped to deal with the technical musical analysis that would be involved in a de minimis analysis. The Sixth Circuit reversed the lower court’s ruling and remanded to the district court for further consideration.

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74. See id. (stating whether examining under a qualitative/quantitative de minimis or fragmented literal similarity test, the sample did not rise to actionable infringement); Nimmer & Nimmer, supra note 5, at § 13.03[A][2] (defining fragmented literal similarity as a literal copying that does not copy the fundamental substance, skeleton, or overall scheme of the total work copied from).

75. See Bridgeport Music, 410 F.3d at 98 (considering plaintiff’s argument that no substantial similarity or de minimis analysis should be given where there was no dispute that a copying had occurred).

76. Id. at 799-800. The court reproduced the language of § 106 for general copyright provisions and § 114 for a provision related specifically to sound recordings. Id.

77. See id. at 800. To support the importance of Congress’s inclusion of the word “entirely,” the court noted “rights 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.” Id.

78. Id. at 805. The court looked to the legislative history of the amendments, but noted that it would provide no help because digital sampling was not practiced at the time. Id.

79. Id. at 801. The court emphasized its bright-line rule, “get a license or do not sample,” would ease enforcement. Id.

80. See id. at 802 (stating it is not the song that is copied, but the sounds that are fixed that saves costs and adds value for the new recording).

81. Id. The court stated that when a judge has hundreds of cases involving different samples of music, a bright-line rule would be beneficial. Id.

82. Id. at 805. After finding no infringement in the original case, the court provided that the lower court was free to take up a fair-use defense if raised by the defendant. Id.
D. Ringgold v. Black Entertainment Television, Inc.: The Second Circuit Examines
the Application of the De Minimis Concept in Copyright Law as Applied to Works of
Authorship Other Than Sound Recordings

In Ringgold v. Black Entertainment Television, Inc., the United States Court of
Appeals for the Second Circuit found that an alleged infringement of a painting
crossed the de minimis threshold. In Ringgold, the plaintiff, Faith Ringgold
(“Ringgold”), was a contemporary artist who created a story quilt design called
Church Picnic Story Quilt (“Church Picnic”). Ringgold had retained all rights in
Church Picnic, but granted the High Museum of Art a non-exclusive license to
reproduce and sell Church Picnic in poster form. The alleged infringement occurred
when defendant, Black Entertainment Television, Inc. (“BET”), aired an episode of
the show ROC in October, 1994. The show depicted a Church Picnic poster as a
prop in the set of the scene.

Ringgold brought an action against BET and HBO in the United States District
Court for the Southern District of New York and alleged copyright infringement
and common law unfair competition. BET moved for summary judgment and
argued that the use of the poster was de minimis or, in the alternative, was
allowed by fair use. In review of the record, the court stated “the undisputed
facts established the defendants' fair use defense.” Ringgold appealed from the
district court’s order for summary judgment to the Second Circuit that
versed the lower court’s ruling and remanded back to the district court
for further development of the record.

83. 126 F.3d 70 (2d Cir. 1997).
84. See Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997)
(finding the copied use of the plaintiff's painting was displayed with enough observable
detail for the ordinary observer to recognize the appropriation).
85. Ringgold, 126 F.3d at 72. A story-quilt design consists of a painting, handwritten
text, and quilting fabric. Id.
86. Id.
87. Id. at 72-73. Home Box Office, Inc. (“HBO”) produced ROC and first aired it on
its network in 1992. Id.
88. Id. at 73. At least a portion of the poster was displayed nine times lasting
anywhere from 1.86 seconds to 4.16 seconds for a total of 26.75 seconds. Id.
89. Id.
90. Id. See also 17 U.S.C. § 107 (stating the “fair use of copies of a protected work is
not an infringement”).
91. Ringgold, 126 F.3d at 73. In review of the record, the court stated “the undisputed
facts established the defendants' fair use defense.” Id.
92. Id. at 81. The court reasoned that a further-developed record is needed to properly
assess the fair-use factors. Id.
The Second Circuit first addressed BET’s argument that the use of *Church Picnic* was de minimis. The court started its analysis by defining the de minimis legal maxim as causing insignificant violations that are not actionable. The court viewed de minimis as a trivial violation. The court also discussed the de minimis maxim as applied to the quantitative threshold of substantial similarity as it relates to the third factor of a fair use defense. The court stated that substantial similarity not only relates to copying as a factual matter, but is more accurately a threshold for copying that is actionable.

Addressing the de minimis defense, BET argued that the twenty-six seconds in which portions of *Church Picnic* were visible did not rise to the level of actionable copying. The court recognized that while the poster was observable, it was not in focus. BET argued that because the poster was far away and out of focus, there were no protectable, recognizable elements of the Ringgold’s work. However, the court rejected the BET’s argument by reasoning that although the poster was not in focus, it was observable enough for viewers to discern the African-Americans in Ringgold’s painting. Regarding the defendants’ de minimis argument, the court ruled that in order for an infringement claim to cross the threshold to become actionable, the appropriation must be recognizable to the lay observer.

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93. *See id. at 74* (defining de minimis in this context as falling below a “quantitative threshold of substantial similarity, which is always a required element of actionable copying”).

94. *Id.* The de minimis defense “insulates from liability those who cause insignificant violations of the rights of others.” *Id.*

95. *See id. at 74 n.2* (establishing that if it was not for the de minimis defense, the photocopying of a cartoon would be a copyright violation).

96. *Id.* at 74-76.

97. *See id. at 74* (stating that “probative similarity” is a better term for factual copying and “substantial similarity” should only mean threshold for actionable copying).

98. *See id.* at 76 (contending that the observable quantity of copying fell below the actionable copying threshold).

99. *Id.* at 76 n.5. The focus of the scene was on eight audience members and four standing persons with the poster in between the two groups. *Id.*

100. *Id. at 77.* BET argued that viewers of the show would only notice a vague painting, but would not otherwise notice the distinct features of the painting. *Id.*

101. *Compare id.* (noting that it may be possible for a work to be so unrecognizable it would fall below actionable copying). *with VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880 (9th Cir. 2016)* (noting the sampled sound recording was so obscure that it was misidentified by plaintiff’s own expert).

102. *Ringgold, 126 F.3d at 77.* The court opined that, in relation to visual works, the proper determination for actionable infringement was the observability of the copied portion. *Id.* at 75.
E. **Newton v. Diamond: The Ninth Circuit Compares the Concept and Feel of the Whole Work to Analyze De Minimis Use**

In *Newton v. Diamond*, the United States Court of Appeals for the Ninth Circuit found that a sampled use of an underlying composition was not quantitatively or qualitatively sufficient to constitute an infringement to the copyright holder. In *Newton*, the plaintiff, James Newton, was a jazz musician who composed the song *Choir*. In 1981, Newton recorded a performance of *Choir* and licensed the rights in this sound recording to ECM Records. In 1992, Michael Diamond, Adam Horowitz, and Adam Yauch (collectively “the Beastie Boys”), acquired a license to the *Choir* sound recording and subsequently used samples of the recording on their song *Pass the Mic*.

Newton filed an action against the Beastie Boys in the United States District Court for the Central District of California, alleging that the Beastie Boys’ sampling of *Choir* infringed on the underlying composition of the work. Additionally, various remixes of *Pass the Mic* also used the same sampled segment. The six-second segment sampled from *Choir* consisted of three notes played on a flute. The district court granted summary judgment in favor of the Beastie Boys. The court reasoned that even if the sampled portion of *Choir* was original for copyright purposes, the copying was de minimis.

Newton appealed to the Ninth Circuit, which affirmed the lower court’s ruling before discussing the merits of a de minimis analysis in a sound recording infringement action. The court discussed findings from other circuit court rulings to establish the de minimis

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103. 388 F.3d 1189 (9th Cir. 2003).
104. *Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2003). The copied section lasted only six seconds and was no “more significant than any other section.” *Id.*
105. *Newton*, 388 F.3d at 1191.
106. *Id.* Sound recordings and music compositions are separate works that get separate copyright protections. *Id.*
107. *Id.* The Beastie Boys obtained a license in the sound recording for a fee of $1,000 but never obtained a license in the composition from Newton. *Id.*
108. *Id.* at 1192. The Beastie Boys used six seconds from the opening of *Choir* and then looped the sample in their song *Pass the Mic*. *Id.*
109. *Id.* Two remixes of *Pass the Mic* were created in which the *Choir* sample is used over forty times. *Id.*
110. *Id.* at 1191. The notes C, D flat, and C were played over a background of C, and Newton claimed the composition gave instruction to play in a certain manner. *Id.*
111. *Id.* at 1192.
112. *Id.* The court found that the three notes were not original for purposes of copyright protection. *Id.* The court, assuming *arguendo* that the notes were original, found the use of the notes to be de minimis. *Id.*
113. *Id.* Specifically, the Second Circuit affirmed the lower court’s finding that the Beastie Boys’ use of *Choir* was de minimis. *Id.*
threshold. The court reasoned that where an ordinary observer would not recognize the copying of a work, the appropriation is not sufficiently significant to constitute an infringement. Comparing the two works, the court explained that, while the copying was indeed identical to the original work, the small sample used placed it in a category of copying known as fragmented literal similarity. Recognizing the high degree of similarity involved in such an instance of copying, the court explained that a quantitative and qualitative assessment of the copied portion in relation to the work as a whole was necessary to determine whether the copying was actionable. The court found that the Beastie Boys' copying had not appropriated the overall essence or structure of Choir. Since the Beastie Boys' copying did not appropriate the overall structure of Newton's work, the Ninth Circuit affirmed the lower court's ruling, and specifically found that the copying was de minimis.

IV. ANALYSIS

In VMG Salsoul, LLC v. Ciccone, the United States Court of Appeals for the Ninth Circuit rightfully applied the de minimis exception to a claim of copyright infringement of a sound recording. In VMG, the holder of a sound recording copyright claimed that the copy-

114. See id. at 1193 (noting that factual copying is insufficient without proof that the copying was substantial); see also Laureysens v. Idea Grp. Inc., 964 F.2d 131, 140 (2d Cir. 1992) (stating that conceded copying is not sufficient unless the works are substantially similar); Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (establishing the average audience standard for determining if a use is de minimis).

115. Newton, 388 F.3d at 1193. The Second Circuit stated general test for substantial similarity is the average audience or ordinary observer standard. Id.

116. Id. at 1195. The court reasoned the limited scope, even though the copying was exact, or nearly exact, does not affect the work as a whole. Id. See Nimmer & Nimmer, supra note 5, at § 13.03[A][2] (defining fragmented literal similarity as a literal copying that does not copy “the fundamental substance, or skeleton or overall scheme” of the plaintiff's work).

117. See Newton, 388 F.3d at 1195. Actionable copying, in the context before the court in Newton, occurred when the amount or substantial portion appropriates the overall essence or structure of the protected work. Id.

118. Id. at 1195-96. The court explained “the three-note sequence appears only once in Newton’s composition . . . . Qualitatively, this section of the composition is no more significant than any other section.” Id.

119. Id. at 1196. In comparing the two works, the Second Circuit stated that since the two works were “substantially dissimilar in concept and feel,” the average audience would not be able to recognize the Newton's composition in Pass the Mic. Id.

120. 824 F.3d 871 (9th Cir. 2016).

121. Compare VMG Salsoul LLC v. Ciccone, 824 F.3d 871, 880 (9th Cir. 2016) (stating that the actionable copying only occurs when a substantial portion of a copyrighted work is copied), with Newton v. Diamond 388 F.3d 1189, 1196 (9th Cir. 2004) (finding where a literal copying does not copy the “overall thrust and meaning” of the protected work, the ordinary observer would not notice the appropriation and the de minimis copying is not actionable).
The District Court for the Central District of California found for Madonna, reasoning alternatively that the horn hit was not original for a copyright action and sampling of the horn hit in the work was de minimis. VMG appealed and argued that even if the copying was found to be trivial, sound recording copyrights are not subject to de minimis exceptions. The Ninth Circuit declined to follow the United States Court of Appeals for the Sixth Circuit’s decision in Bridgeport Music, Inc. v. Dimension Films, which interpreted § 114(b) of the Copyright Act as giving a sound recording copyright owner the exclusive right to sample their own recording. By rejecting Bridgeport Music’s interpretation, the Ninth Circuit held that, like other works of authorship, a de minimis analysis for sound recording copyright infringement actions is proper. The holding in VMG created a circuit split with the Sixth Circuit relating to the rights of sound recording copyright holders.

A. SECTION 114 OF THE COPYRIGHT ACT WAS DEVELOPED TO PREVENT THE PIRACY OF ENTIRE SOUND RECORDINGS

The intention of Congress when it amended the Copyright Act was to maintain the de minimis exception, and not to augment the rights of sound recordings. The disputed language of the Copyright Act is in the wording of § 114(b) and the interpretation of Congress’s choice in including the word entirely in the statutory language. Ad-
ding limited protections to sound recordings as a protected work of authorship to the Copyright Act was done in response to unauthorized duplications in the early 1970s. Section 106 of the Copyright Act grants the fundamental rights to copyright owners; however, these fundamental rights are subject to limitations in §§ 107 through 118. The repeated use of the words do not extend in § 114(b) indicates that the section was meant to be an express limitation, rather than an expansion of the copyright holder’s rights listed in § 106. When § 114 was fully codified into the Copyright Act, subsection (b) limited a sound recording’s protections to only the sounds in the recording; the subsection did not prevent a different work where the original sounds are reproduced.

To be in harmony with the other protected works of authorship, an infringement of a sound recording happens when a significant portion of the recorded sounds are reproduced. The topic of compulsory licensing for a sound recording was discussed at length by the congressional committee without any such language being codified into the statute. Further, it is clear that sampling was not a concern of Congress when it added sound recordings to the Copyright Act. Since Congress was not concerned with the practice of sam-

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132. See id. at 61 (giving the copyright holder the exclusive right to do and authorize a work’s reproduction, adaptation, publication, performance, and display). Contra Bridgeport Music, 410 F.3d at 801 (stating the language of § 114(b) gives the copyright holder the exclusive right to sample his or her own work, and therefore a license to sample must be obtained to avoid actionable infringement).
133. See VMG II, 824 F.3d at 883 (“Like all the other sentences in § 114(b) the third sentence imposes an express limitation on the rights of a copyright holder: . . . (first sentence: exclusive rights . . . do not extend to certain circumstances; second sentence: exclusive rights . . . do not extend to certain circumstances; fourth sentence: exclusive rights . . . do not extend to certain circumstances).”) (internal quotations omitted).
134. See H.R. REP. No. 94-1476, at 106 (stating that § 114(b) “makes clear that statutory 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”).
135. Compare id. (stating that infringement occurs when all or any substantial portion of the actual sounds contained on the sound recording are reproduced), with VMG II, 824 F.3d at 884 (stating the “any substantial portion” text in the legislative history indicates that Congress intended sound recordings to be subject to the same de minimis analysis as any other work of authorship).
136. See H.R. REP. No. 94-1476, at 106 (stating that the committee discussed “a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study” from the Register of Copyrights).
137. Compare id. at 48 (stating that duplications of whole sound recordings caused Congress to create a limited copyright in sound recordings), with Bridgeport Music, 410
pling, and § 114 is a limitation on the exclusive rights of sound recording copyright holders, it cannot be said to expand the rights beyond those enumerated in § 106 to include presumptive infringement for sampling. 138

B. Substantial Similarity as a Threshold for Actionable Copyright Infringement

In order to establish a copyright infringement, a plaintiff must not only prove that the defendant copied the original work, but also that there is substantial similarity between the two works. 139 Even where factual copying is conceded, the plaintiff must still prove that the copying was substantial. 140 Substantial similarity is best understood as a way of determining if copying has occurred to such a degree that an actionable infringement would follow. 141 In determining substantial similarity to prove improper appropriation, courts must analyze both the quantitative and qualitative aspects of the alleged copying. 142

Courts have not come up with a rigid test for deciding the quantitative or qualitative threshold of substantial similarity for actionable copying. 143 A case that invokes the fair use exception of the Copyright Act is a helpful guide for determining what it means for a copying to be substantially similar. 144 The amount and substantiality factor in a

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138. See Nimmer & Nimmer, supra note 5, at § 13.03[A][2][b] (commenting that courts should still examine a sample's substantial similarity in regards to the protected work); see H.R. Rep. No. 94-1476, at 61 (stating the §§ 107-118 are intended to be read in conjunction with § 106).

139. See Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997) (stating the element of substantial similarity is always required in an infringement action); see also Selle v. Gibb, 741 F.2d 896, 900 (7th Cir. 1984) ("[P]laintiff must prove (1) ownership of the copyright in the complaining work; (2) originality of the work; (3) copying of the work by the defendant, and (4) a substantial degree of similarity between the two works.").

140. Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2003). See also Laureysens v. Idea Grp., Inc., 964 F.2d 131, 139-40 (2d Cir. 1992) (explaining substantial similarity as a two-pronged process to show actual copying and to prove improper appropriation).

141. See Ringgold, 126 F.3d at 77 (stating that the twenty-six second use of a protected painting was quantitatively substantial for the court to consider an actionable infringement).

142. See id. at 75 (stating that the qualitative component refers to the copying of expression, while the quantitative references the amount of copying that occurred).

143. Nimmer & Nimmer, supra note 5, at § 13.03[A]. Compare Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (setting forth a strict liability for actionable copyright infringement of a sound recording), with Newton, 388 F.3d at 1193 (stating that in order to be actionable the copying must have occurred to an unfair extent).

144. Compare Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539, 564-65 (1985) (finding the portion of a book that was copied was quantitatively insignificant, but the
fair use analysis carries more weight when determining a copyright infringement case. Thus, a finding that copying is not actionable as de minimis would save the courts from an exhaustive examination of the other three factors of a fair use defense in the cases before it. A clear threshold of substantial similarity in amount or substantiality, however, would seem arbitrary, and thus is difficult to determine by the courts. In an attempt at clarifying where a copying has crossed into actionable copying a helpful benchmark for the courts is to ask whether an ordinary observer would notice the appropriation of a copyright. As such, the amount and substantiality aspects of a fair use defense analysis properly guide a court’s determination of whether a copying is de minimis.

C. FRAGMENTED LITERAL SIMILARITY REQUIRES COURTS TO DETERMINE WHETHER FACTUAL COPYING AFFECTED THE PROTECTED WORK AS A WHOLE

The copying that occurred in *VMG Salsoul, LLC v. Ciccone* was a literal copying of .23 seconds of the plaintiff’s work that was further transposed and modified. Even when the two works are found to be factually similar, a court’s analysis should not end there. First, courts are tasked with determining what elements of the copied work defendant had appropriated the “heart of the book”), *with VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 880 (9th Cir. 2016) (stating that the copied horn hit was short and easy to miss in relation to the work as a whole).

145. *See Ringgold*, 126 F.3d at 80 (cautioning that where the amount and substantiality portion of fair use favors a defendant, courts “must be careful not to permit this factor too easily to tip the aggregate fair use assessment”).

146. *See id.* at 76 (“[I]t makes more sense to reject the claim [on a de minimis] basis and find no infringement, rather than undertake an elaborate fair use analysis. . . .”); *see also 17 U.S.C. § 107 (listing that a fair use analysis examines the purpose and character of the use, nature of the copyrighted work, amount and substantiality of the copying in relation to the work as a whole, and the effect on the potential market).*


148. *Compare Ringgold*, 126 F.3d at 77 (finding a painting was sufficiently observable for an ordinary observer to noticeably discern the painting from the rest of the background of a TV show’s set), *with Laurecysens*, 964 F.2d at 141-42 (finding a design change in a flat-to-cube puzzle would not cause the ordinary observer to notice the appropriation).

149. *See Ringgold*, 126 F.3d at 76 (stating that if the copying is slight, the third factor of a fair-use defense will strongly favor the defendant).

150. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 879-80 (9th Cir. 2016).

151. *Compare Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2004) (asking whether the unauthorized use of an underlying composition was substantial enough to be actionable), *with VMG II*, 824 F.3d at 879-80 (conceding factual copying was proven, but further addressing whether it had been done to an actionable level). *See also Nimmer & Nimmer, supra* note 5, at § 13.03[A][2] (asking to what extent does a non-comprehensive literal copying become an actionable infringement).
are original, and thus protectable.\textsuperscript{153} Although expressions are generally protectable, standard or stock elements of art, such as a common melodic sequences or chord progressions, are not original for purposes of an infringement analysis.\textsuperscript{154} Since the horn hit, by itself, is not a protectable element, the sampling of the sound recording must have affected the work, as a whole, from which the sampling came from.\textsuperscript{155}

Considering a single note is an idea merged into an expression, it is safe to say that it does not rise to the level of actionable infringement; however, it is a difficult question to ask where the line should be drawn.\textsuperscript{156} Where even a small portion of a work is literally copied, a court must examine the quality of the portion used in relation to the original work.\textsuperscript{157} In trying to draw a line where the literal copying was not done to an unfair extent, courts have inquired whether a lay observer would recognize the copying.\textsuperscript{158} In finding that an ordinary observer would not recognize the appropriation, courts have factored in such elements as distortion in analyzing a work’s character.\textsuperscript{159} Finding that a copying has not risen to the level where the appropriation would be identifiable, although involving some analysis, would

\textsuperscript{153} VMG II, 824 F.3d at 885. See also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (stating that all copying is not infringement, and that a plaintiff must show possession of a valid copyright, in addition to proving that the elements copied are original).

\textsuperscript{154} Compare Erickson v. Blake, 839 F. Supp. 2d 1132, 1137 (D. Or. 2012) (stating that expressions that are common within a particular medium are not protectable), with VMG Salsoul, LLC v. Ciccone, No. CV 12-05967 BRO (CWx), 2013 U.S. Dist. LEXIS 184127, at *27 (C.D. Cal. Nov. 18, 2013) (finding that horn hits were in wide use in sound recordings).

\textsuperscript{155} Compare Newton, 388 F.3d at 1196 (finding a common three-note sequence that lasts only six seconds did not affect the protected work in its entirety), with VMG II, 824 F.3d at 875 (recounting the copying in question was of a common four-note chord and lasted less than a second).

\textsuperscript{156} Nimmer & Nimmer, supra note 5, at § 13.03[A][2][a]. Compare Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998) (finding copyrighted pictures that were on screen for thirty-six seconds was a de minimis copying), with Newton, 388 F.3d at 1196 (finding copying of three notes from the protected work was de minimis, and therefore not actionable), and Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997) (finding a copyrighted painting that was on screen for twenty-seven seconds was more than a de minimis copying).

\textsuperscript{157} See Newton, 388 F.3d at 1195 (inquiring “whether the copying goes to trivial or substantial elements”); see also Nimmer & Nimmer, supra note 5, at § 13.03[A][2] (defining fragmented literal similarity as a literal copying that does not substantially effect the copied work as a whole).

\textsuperscript{158} See Newton, 388 F.3d at 1193 (reasoning that a use is de minimis if an average audience would notice the similarities).

\textsuperscript{159} See Ringgold, 126 F.3d at 77 (distinguishing between background and featured displays); see also Sandoval, 147 F.3d at 218 (finding that although the copyrighted pictures are seen, they are out of focus and in poor lighting and not identifiable).
ultimately save the courts from examining all of the factors involved in a complete fair use analysis.\textsuperscript{160}

The Ninth Circuit rightfully concluded that no reasonable juror would recognize the alleged copying that occurred; therefore, the lower court's grant of summary judgment in favor of the defendants was proper.\textsuperscript{161} Because the sample at issue was so quantitatively small compared to the work as a whole and did not appropriate the work's overall scheme, no ordinary observer would recognize the appropriation.\textsuperscript{162} A literal copying that is unrecognizable to the ordinary observer is properly classified as de minimis and is in line with Congress's intent to not extend additional protections to sound recordings with its amendments to the Copyright Act.\textsuperscript{163}

V. CONCLUSION

While revising the existing Copyright Act, the United States Congress added sound recordings in an effort to curb the piracy of entire works.\textsuperscript{164} In an action alleging copyright infringement, where factual copying is conceded, the plaintiff must also prove that the copied work was substantially similar.\textsuperscript{165} If the ordinary observer does not recognize an appropriation, the two works are not substantially similar, and the copying is not actionable.\textsuperscript{166} Where an exact copying has occurred, yet has not copied the overall scheme or essence of the pro-

\footnotesize{\textsuperscript{160} Compare Ringgold, 126 F.3d at 76 (reasoning that rejecting a claim as de minimis makes more sense than conducting a complicated fair use analysis), with Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005) (stating that a bright line rule of strict liability for copying would reduce judicial analysis, but ultimately allowed for a fair-use analysis on remand).}

\footnotesize{\textsuperscript{161} Compare VMG II, 824 F.3d at 880 (stating that actionable copying only occurs when a substantial portion of a copyrighted work is copied), with H.R. Rep. No. 94-1476, at 106 (stating "infringement only takes place whenever all or any substantial portion of the actual sounds" on the sound recording are reproduced) (emphasis added).}

\footnotesize{\textsuperscript{162} See VMG II, 824 F.3d at 880 (stating that where a highly trained musician that was seeking to discover the appropriation could not do so, "[a]n average audience would not do a better job"). The plaintiff's own expert misidentified the sample, further supporting the argument that while literal copying occurred, no ordinary observer would recognize the appropriation, thus making the copying de minimis. Id.}

\footnotesize{\textsuperscript{163} Compare id. at 879-80 (stating that the literal copying of .23 seconds of a song rises to the level of actionable copying only when a substantial portion of a copyrighted work is copied), and Newton, 388 F.3d at 1196 (finding a common three-note sequence that lasts only six seconds did not affect the protected work in its entirety), with H.R. Rep. No. 94-1476, at 106 (stating that § 114(b) "makes clear that statutory 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").}

\footnotesize{\textsuperscript{164} See supra notes 129-138 and accompanying text.}

\footnotesize{\textsuperscript{165} See supra notes 139-149 and accompanying text.}

\footnotesize{\textsuperscript{166} See supra notes 150-160 and accompanying text.}
protected work, the threshold of actionable copyright infringement has not been reached. 167

The United States Court of Appeals for the Ninth Circuit’s interpretation of the sound recording provision of the Copyright Act is in harmony with preceding case law regarding copyrights. 168 Copyright protections are in place to ensure that authors have exclusive rights to their works so that the copying does not occur to an unfair extent. 169 In order for a court to find actionable infringement of a copyright, there must be a determination of a mixed question of law and fact as to whether the copying was substantial. 170 If a work has been copied to such a minimal extent that it would not unfairly affect the author’s rights in their work, the granting of summary judgment due to a finding of de minimis copying is entirely proper. 171 Since nothing in the sound recording provision suggests that sound recordings are to be treated differently from all other copyrighted works, a de minimis analysis for alleged sound recording copyright infringement is proper. 172

As currently written, the Copyright Act affords sound recordings the same judicial treatment as any other work of authorship. Whether the medium of expression is a painting, film, book, or composition, the courts have proceeded to analyze the threshold of actionable copying. It is therefore not wholly outside of the judiciary’s expertise to evaluate whether sampling is de minimis in a sound recording. If a sampling of a sound recording could not be recognized by the ordinary observer, the copyright holder has not suffered a harm from the appropriation. A strict liability rule in sound recording sampling would amount to the courts awarding windfalls to copyright owners who have lost no value by the copying of an unrecognizable and insubstantial portion of their work.

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167. See supra notes 157-160 and accompanying text.
168. See supra notes 161-163 and accompanying text.
169. See supra notes 135-138 and accompanying text.
170. See supra notes 139-143 and accompanying text.
171. See supra notes 157-160 and accompanying text.
172. See supra notes 129-138 and accompanying text.