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Newton v. Diamond: When a Composer's Market Is Not the Average Joe: The Inadequacy of the Average-Audience Test

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NOTE

NEWTON v. DIAMOND:

WHEN A COMPOSER'S MARKET IS NOT THE AVERAGE JOE: THE INADEQUACY OF THE AVERAGE-AUDIENCE TEST

INTRODUCTION

In 1978, avant-garde jazz flautist and composer James Newton composed "Choir," a song inspired by his early memory of four women singing gospel church music in rural Arkansas.[1] "Choir" is not a traditional song.[2] In addition to its gospel music influence, "Choir" contains elements of Japanese ceremonial court music, classical music, and African music.[3] The most untraditional sonic characteristics of the song, however, are achieved by playing the flute in a very unorthodox manner.[4] The song requires that the performer play one note on the flute by over-blowing into the instrument while simultaneously singing a pattern of three other notes.[5] The effect of this simultaneous over-blowing and singing is a unique sound that is described as multiphonics.[6]

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[1] Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2004).

[2] *See generally,* Petition For Writ Of Certiorari, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219).

[3] *Id.* at 3-4 (citing Appellant's excerpts of record filed in the Ninth Circuit on September 30, 2002).

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

[5] *Id.* at 1191.

[6] *Id.*

In Newton's "Choir," this effect sounds something like the wind blowing briskly through the trees.

Three years after composing the song, Newton performed and recorded "Choir."[7] At that time, he licensed all rights in that sound recording of "Choir" to ECM Records for $5,000.[8] However, Newton retained the copyright to the underlying composition of "Choir," as embodied in his written score of the song.[9]

In 1992, the Beastie Boys sampled a six-second portion of "Choir" in the recording of their song, "Pass The Mic."[10] At that time, the Beastie Boys obtained a license from ECM Records to use portions of the sound recording of "Choir" for a one-time fee of $1,000.[11] However, the Beastie Boys did not obtain a license from Newton for use of the underlying composition of "Choir."[12] As a result, Newton brought an action against the Beastie Boys in 2000 for copyright infringement of his composition "Choir."[13]

In *Newton v. Diamond*, the Court of Appeals for the Ninth Circuit granted summary judgment in favor of the Beastie Boys.[14] The decision of the court was based on the sole ground that the Beastie Boys' unauthorized use of a sample of Newton's composition was trivial and therefore not significant enough to constitute infringement.[15] The court determined the sample's triviality by concluding that the average audience would not recognize Newton's hand as the composer of the Beastie Boys' sample.[16] This analysis is called the average-audience test, where an unauthorized use will be considered so trivial as to avoid legal consequences if an average audience would not recognize that a

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2004); *See also id.* at 1190 (describing sampling as "the incorporation of a short segment of a musical recording into a new musical recording . . . . "); *See also* Jarvis v. A & M Records, 827 F. Supp. 282, 286 (D.N.J. 1993) (describing sampling as "the conversion of analog sound waves into a digital code. The digital code that describes the sampled music . . . can then be reused, manipulated or combined with other digitalized or recorded sounds using a machine with digital data processing capabilities, such as a . . . computerized synthesizer." (quoting Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, 207 N.Y.L.J. 7, n.3 (May 22, 1992)); *See also* http://en.wikipedia.org/wiki/Beastie_Boys (describing the Beastie Boys as "an American hip-hop group from New York City.").

[11] Newton, 388 F.3d at 1191.

[12] *Id.*

[13] Newton v. Diamond, 204 F.Supp.2d 1244, 1247 (C.D.Cal. 2002).

[14] Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004).

[15] *Id.*

[16] *Id.* at 1196.

copying has occurred.[17]

This Note will discuss how the Ninth Circuit incorrectly adopted the average-audience test because the test has become overbroad in its application, is ill-equipped to deal with the issues of complex modern music, and has drifted from the fundamental purpose of copyright law. The Ninth Circuit should have adopted the intended-audience test, which looks to the reaction of those with the expertise required to understand the language of the work and more truly reflects the fundamental purpose of copyright law: the protection of the creator's market.[18]

Part I of this Note will discuss the relevant background as it relates to the average-audience test.[19] Part II will examine the legal foundation that the *Newton* court relied on in its opinion.[20] Part III will discuss the *Newton* court's analysis of the case in light of the legal foundation it established.[21] Part III will also discuss the dissenting opinion in *Newton*.[22] Part IV will examine a different approach taken by the courts by focusing on the Fourth Circuit's adoption of the more focused intended-audience test.[23] Part V will reconsider the development of the average-audience test in the Ninth Circuit and compare the Ninth Circuit's reasoning to that of the Fourth Circuit.[24] Part VI will consider the benefits and burdens of the intended-audience test as practically applied.[25] Finally, Part VII will conclude that the Ninth Circuit failed to clarify the law by adopting the average-audience test, and should have adopted the intended-audience test.[26]

I. BACKGROUND

Congress's power to grant copyright was founded on an economic incentive theory.[27] Because a musician's financial gain is a direct result of the public's approbation of his or her work, the best way to stimulate the arts for the benefit of the general public is through the encouragement of individual effort through personal financial gain.[28] As a result, courts

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[17] Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986).

[18] *See infra* notes 93-114 and accompanying text.

[19] *See infra* notes 27-38 and accompanying text.

[20] *See infra* notes 39-52 and accompanying text.

[21] *See infra* notes 53-81 and accompanying text.

[22] *See infra* notes 82-92 and accompanying text.

[23] *See infra* notes 93-114 and accompanying text.

[24] *See infra* notes 115-128 and accompanying text.

[25] *See infra* notes 129-146 and accompanying text.

[26] *See infra* notes 147-151 and accompanying text.

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

[28] Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946); *See, e.g.*, Mazer, 347 U.S. at 219.

concluded that the impression of the general public, or lay listener, was the best method to determine infringement of a protected work.[29] This sound foundational logic led to the development of the average-audience test, which looks to the reaction of the ordinary lay listener to determine whether an unauthorized use of a copyrighted musical work is sufficiently substantial to be considered infringement.[30]

The modern musical language is extremely diverse.[31] Today's musical vernacular includes such distinct genres as avant-garde jazz, minimalism, hip-hop, electronica, and microtonal music.[32] Further, concurrent advances in technology have enabled a new generation of musicians to create music in new forms using their home computer.[33] This diversity of musical idioms and advance in technology have created a complexity to the modern musical language that challenges what is defined as popular music.[34] Because popular music is not as easily defined as it once was, some courts have reconsidered the relevance of the average-audience test in light of the logic upon which it was developed.[35] The Fourth Circuit, for example, has chosen to adopt the intended-audience test.[36] This test focuses not on the reaction of the ordinary lay listener, but rather a listener who fairly represents that work's intended audience.[37] While other courts have adopted a more

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[29] Arnstein, 154 F.2d at 473.

[30] *See id.*; *See* Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986).

[31] Motion of Amici Curiae For Leave To File Brief at 12, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219) (arguing "the court should adopt an approach . . . that respects the wide diversity of musical practice.").

[32] Petition For Writ Of Certiorari at 20, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219) (discussing the "breadth and diversity of style and manner among modern artists," e.g., Cecil Taylor, the late works of John Coltrane, Steve Reich, Phillip Glass, Run D.M.C., Dr. Dre, Orbital, Aphex Twin, Charles Ives, Harry Partch).

[33] Motion of Amici Curiae For Leave To File Brief at 9-10, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219) (discussing the development of low-cost music editing software such as Pro-Tools).

[34] *See generally,* Motion of Amici Curiae For Leave To File Brief, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219).

[35] Dawson v. Hinshaw, 905 F.2d 731, 737 (4th Cir. 1990) (holding "'intended audience' should supplant 'ordinary observer' as the label for the appropriate test."); Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1233 (3rd Cir. 1986) (arguing " . . . the ordinary observer test is not useful and potentially misleading when the subjects of the copyright are particularly complex . . . . "); Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003) (holding that "[i]n cases where the target audience possesses specialized expertise, however, the specialist's perception of similarity may be much different from the lay observer's, and it is appropriate in such cases to consider similarity from the specialist's perspective.").

[36] Dawson, 905 F.2d at 736.

[37] *Id.* at 736-737 (holding "Such an inquiry may include . . . testimony from members of the intended audience or, possibly, from those who possess expertise with reference to the tastes and perceptions of the intended audience.").

focused test, the Ninth Circuit has explicitly chosen to uphold the average-audience test in *Newton v. Diamond*.[38]

II. THE MAJORITY OPINION: LAYING THE LEGAL FOUNDATION

In the majority opinion written by Judge Mary M. Schroeder, the Ninth Circuit held that the Beastie Boys' unauthorized use of a sample of Newton's musical composition was trivial and therefore not actionable.[39] The court held that "trivial copying does not constitute actionable infringement."[40] Although the District Court granted summary judgment in favor of the Beastie Boys on two separate grounds,[41] the Ninth Circuit explicitly affirmed solely on the ground that the Beastie Boys' use was trivial.[42] The court affirmed that the test for triviality is whether or not the average audience would recognize the appropriation.[43]

A. *DE MINIMIS NON CURAT LEX*: A TRIVIALITY DEFENSE TO COPYRIGHT INFRINGEMENT

The legal maxim "*de minimis non curat lex*" establishes the broad principle that the law does not concern itself with trifles.[44] In determining the maxim's applicability to copyright law, the *Newton* court relied on *Ringgold v. Black Entertainment Television* to conclude that "[f]or an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement."[45] While the *Ringgold* court provided an extensive analysis of the de minimis maxim as it applied to copyright law,[46] the *Newton* court relied on the decision to support its basic conclusion that even where the issue of copying is not in dispute (i.e., in the case of sampling), "no legal consequences will follow from that fact unless the copying is substantial."[47] In order to

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[38] Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

[39] *Id.* at 1190.

[40] *Id.* at 1193; *See, e.g.*, Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

[41] Newton v. Diamond, 204 F.Supp.2d 1244, 1260 (C.D.Cal. 2002) (holding that the notes in question lacked sufficient originality to warrant copyright protection and, even if the sampled portion was sufficiently original, the use was trivial and therefore not actionable.).

[42] Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004).

[43] *Id.* at 1193 (citing Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986)).

[44] BLACK'S LAW DICTIONARY 464 (8th ed. 2004); *See also* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

[45] Newton v. Diamond, 388 F.3d 1189, 1192-1193 (9th Cir. 2004); *See* Ringgold, 126 F.3d at 74-75.

[46] *See* Ringgold, 126 F.3d at 74-76.

[47] Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).

emphasize that this principle has "long been a part of copyright law," the court quoted Judge Learned Hand's observation from eighty years ago: "[e]ven where there is some copying, that fact is not conclusive of infringement."[48] As a result, the Ninth Circuit firmly established its acceptance of the de minimis doctrine as a triviality defense to a copyright infringement action.[49]

B. THE AVERAGE-AUDIENCE TEST DETERMINES WHEN UNAUTHORIZED COPYING IS DE MINIMIS

To determine when an unauthorized copying is de minimis, the *Newton* Court relied on its own decision in *Fisher v. Dees* to hold that "a use is de minimis only if the average audience would not recognize the appropriation."[50] The court was very explicit in concluding that the de minimis maxim looks to "the response of the average audience, or ordinary observer, to determine whether a use is infringing."[51] Thus, in the Ninth Circuit, a successful de minimis defense to a copyright infringement claim will depend on whether the average audience, or ordinary observer, is able to recognize that a copying has taken place.[52]

III. THE MAJORITY OPINION: THE COURT'S ANALYSIS

After establishing the average-audience test as the proper test for a de minimis analysis, the court turned to the analysis of the facts before it.[53] First, the court analyzed the Beastie Boys' sample by examining the testimony of expert witnesses.[54] After eliminating from consideration those elements that were properly licensed, the court measured the substantiality of the sample.[55] Finally, the court concluded that if the sample is not substantial, then the average audience would not recognize it and the sample is thus de minimis and not actionable.[56] Judge Susan P. Graber's dissent agreed with the legal principles set out in the majority, but disagreed with the majority's analysis of the expert witness

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[48] *Id.* (quoting West Publ'g Co. v. Edward Thomson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909)).

[49] *See id.*

[50] *Id.*; *See* Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986).

[51] Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).

[52] *See id.*

[53] *See id.*

[54] *Id.* at 1194-1196.

[55] *Id.* at 1195-1196.

[56] *Id.* at 1196.

testimony.[57]

A. ANALYZING THE BEASTIE BOYS' SAMPLE

The court recognized that the Beastie Boys had properly licensed the sound recording of Newton's "Choir" from ECM Records but had not licensed the underlying composition to "Choir" from Newton.[58] Thus, the case concerns only the infringement of Newton's actual written score of "Choir" as opposed to the sound recording.[59] As a result, the court began its analysis with the arduous process of filtering out the licensed elements of the sound recording from the unlicensed elements in Newton's score.[60] Because this is a truly complex and challenging task, the court found it must rely on the testimony of expert witnesses in determining which elements of the sample are a result of the performance and which are indicated in the original score.[61]

According to the majority, the expert witness testimony that Newton himself presented revealed that the elements and subtleties of the particular performance of "Choir" that the Beastie Boys sampled were largely the product of particular techniques employed by the performer and not the result of a rendition of the score.[62] Dr. Christopher Dobrian of the University of California, Irvine, declared that "breath control," "portamento," and "emphasis of the upper partials of the flute's complex harmonic tone" are three elements that do not appear in the score of "Choir" but are present in the sampled performance.[63] Because the sampled performance is performed by Newton himself, these elements are referred to collectively as the "Newton Technique."[64] Because the "Newton Technique" did not appear in the score for "Choir," it was accordingly filtered out and removed from consideration in Newton's claim for infringement of his composition.[65]

B. MEASURING THE SUBSTANTIALITY OF THE SAMPLE

With the "Newton Technique" filtered out of consideration, the

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[57] *See* Newton v. Diamond, 388 F.3d 1189, 1197 (9th Cir. 2004) (J. Graber dissenting).

[58] *Id.* at 1193 (majority opinion).

[59] *See id.*

[60] *Id.* at 1193-1194.

[61] *Id.* at 1194.

[62] *Id.*

[63] Newton v. Diamond, 388 F.3d 1189, 1194 (9th Cir. 2004).

[64] *Id.*

[65] *Id.*

court turned to the heart of its inquiry: "whether the Beastie Boys' unauthorized use of the composition, as opposed to their authorized use of the sound recording, was substantial enough to sustain an infringement action."[66] The substantiality of the Beastie Boys' sample was measured "by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."[67] Thus, in determining if a sample is substantial enough to support an infringement action, a court must decide if that sample is a quantitatively and qualitatively significant portion of the original work.[68]

In determining the sample's quantitative significance the court looked at evidence of the length of the sample compared to the length of the original work as a whole.[69] The sampled segment occurred once in the original piece and "[w]hen played . . . the segment lasts six seconds and is roughly two percent of the four-and-a-half minute 'Choir' sound recording . . . ."[70] The court concluded that this was not enough to qualify as a quantitatively significant portion of the original work.[71]

The sample's qualitative significance was not as straightforward.[72] The court therefore relied on the expert testimony of renowned pianist and music theorist Dr. Lawrence Ferrara.[73] Dr. Ferrara testified that "the compositional elements of the sampled section do not represent the heart or the hook of the 'Choir' composition, but rather are 'simple, minimal and insignificant.'"[74] According to the majority, no direct evidence rebutted Dr. Ferrara's conclusion that the sample was not a qualitatively significant portion of the entire work.[75] In the majority's opinion, the other experts gave no information from which a jury could infer that the sample was a qualitatively significant portion of the original composition.[76] By relying on the testimony of Ferrara, the court concluded that the sample the Beastie Boys used was not a quantitatively or qualitatively significant portion of Newton's "Choir."[77]

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[66] *Id.*

[67] *Id.* at 1195.

[68] *See id.*

[69] Newton v. Diamond, 388 F.3d 1189, 1194 (9th Cir. 2004).

[70] *Id.* at 1195-1196.

[71] *Id.* at 1195.

[72] *See id.* at 1196.

[73] *Id.*; *See also* http://education.nyu.edu/music/faculty/ferrara_lawrence.html

[74] Newton, 388 F.3d at 1196 (quoting Beastie Boys' expert Dr. Lawrence Ferrara).

[75] *Id.*

[76] *Id.*

[77] *See id.*

C. IF THE SAMPLE IS NOT SUBSTANTIAL, IT FAILS THE AVERAGE-AUDIENCE TEST

After concluding that the sampled portion of "Choir" was neither a quantitatively nor a qualitatively significant portion of the work, the court returned to its legal foundation: the average-audience test.[78] Based on the expert testimony that the sample is neither a quantitatively nor a qualitatively significant portion of Newton's "Choir", the court concluded "that an average audience would not discern Newton's hand as a composer, apart from his talent as a performer, from Beastie Boys' use of the sample."[79] Therefore, the finding that the sample was neither quantitatively nor qualitatively significant to the original work as a whole is to say the sample is de minimis and an average audience would not recognize the appropriation.[80] In lay terms, because the sample was a "trite, generic three-note sequence," it follows that an average audience would not recognize it.[81]

D. THE DISSENT: SUMMARY JUDGMENT IS INAPPROPRIATE

Circuit Judge Susan P. Graber filed a dissenting opinion concluding, "a finder of fact reasonably could find that Beastie Boys' use of sampled material was not de minimis."[82] It is important here to recognize that Judge Graber agreed with the legal principles that the majority laid out, but disagreed with the court's analysis of the evidence and expert testimony.[83] In accordance with the majority, Judge Graber affirmed the average-audience test as the method for determining whether an unauthorized use is de minimis.[84] However, Judge Graber's analysis of the evidence and expert testimony would lead to a different conclusion, where "the composition, standing alone, is distinctive . . . ."[85]

Judge Graber relied on the testimony of Dr. Christopher Dobrian of the University of California, Irvine, who described the sample used by the Beastie Boys as a direct result of a playing technique indicated in the score.[86] Dr. Dobrian explained that much of this technique is a result of

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[78] *Id.*

[79] *Id.*

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

[81] *Id.* (quoting Beastie Boys' expert Dr. Lawrence Ferrara).

[82] *Id.* at 1197 (Graber, J., dissenting).

[83] *See id.*

[84] *Id.*

[85] *Id.*

[86] Newton v. Diamond, 388 F.3d 1189, 1198 (9th Cir. 2004) (Graber, J., dissenting).

the score itself and not personal performance, and any flautist's rendition of the score would yield the same sonic result.[87] Dr. Dobrian's testimony certainly does seem to contradict the majority's filtering out of the "Newton Technique."[88] Further, Judge Graber complained that the majority had ignored other parts of Dr. Dobrian's relevant testimony that describes the sampled portion of "Choir" as unique and distinctive.[89] In Judge Graber's view, this was evidence that reasonable ears could consider the sampled portion qualitatively significant when compared to the work as a whole.[90] This evidence, in Judge Graber's opinion, created a genuine issue of material fact that should render summary judgment inappropriate.[91]

Although Judge Graber's analysis of the sample of "Choir" differed from the majority, her approach was the same: the sample "is de minimis only if an average audience would not recognize [the] appropriation," where the reaction of the average audience is determined with the assistance of expert witness testimony.[92]

IV. A DIFFERENT APPROACH: THE INTENDED-AUDIENCE TEST

In *Newton*, the Ninth Circuit squarely adopted the average-audience test in de minimis analysis for copyright infringement.[93] Other circuits, however, have held that reliance on the language of the average-audience test caused the rule to become overbroad in practice, departing from the original logic on which the test was based.[94] For example, the Fourth Circuit determined that the intended-audience test better reflects the theory of economic incentive on which copyright law is based.[95]

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[87] *Id.*

[88] *Compare Id.* (indicating Dr. Dobrian's testimony states "that *any* flautist's performance of the sampled segment would be distinctive and recognizable, because the score itself is distinctive and recognizable."), *with* Newton, 388 F.3d at 1194 (majority opinion) (indicating that "the sound recording of 'Choir' is the product of Newton's highly developed performance techniques, rather than the result of a generic rendition of the composition.").

[89] Newton, 388 F.3d at 1198 (Graber, J., dissenting).

[90] *Id.*

[91] *Id.* at 1197; *See also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[E][3][b] (2005).

[92] Newton, 388 F.3d at 1197 (Graber, J., dissenting).

[93] *Id.* at 1196 (majority opinion).

[94] *See, e.g.*, Dawson v. Hinshaw, 905 F.2d 731, 734 (4th Cir. 1990); *See, e.g.*, Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1233 (3rd Cir. 1986); *See, e.g.*, Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003).

[95] Dawson, 905 F.2d at 734.

A. THE THEORY OF ECONOMIC INCENTIVE

The theory that underlies the average-audience test with respect to copyright law is laid out in the seminal case of *Arnstein v. Porter*.[96] Like *Newton*, *Arnstein* involved alleged copyright infringement of a musical composition.[97] The intended purpose of protecting such compositions was stated by the court to be based on a theory of economic incentive, under which "[t]he plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."[98] This economic incentive theory reflects what has long been the purpose behind Congress's grant of copyright: the "encouragement of individual effort by personal gain is the best way to advance public welfare through talents of authors and inventors in Science and useful Arts."[99] Thus, the *Arnstein* court declared, "[t]he question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."[100] The reaction of the lay listener is important to determine the effect of the appropriation on the plaintiff's market.[101] Perhaps as a testament to the soundness of the economic incentive theory, it would be almost forty-five years before this logic would be reexamined and the role of the lay listener reconsidered.[102]

B. THE FOURTH CIRCUIT'S ADOPTION OF THE INTENDED-AUDIENCE TEST

In *Dawson v. Hinshaw*, the Fourth Circuit reexamined the logic of *Arnstein* and the development of the average-audience test in light of the principles of copyright law and the underlying policies.[103] While the *Dawson* court clearly supported the logic of the economic incentive theory as laid out in *Arnstein*, it explained that the reliance upon the lay listener had caused the rule to become too broad, ultimately departing

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[96] Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

[97] *Id.* at 467.

[98] *Id.* at 473.

[99] Mazer v. Stein, 347 U.S. 201, 219 (1954).

[100] Arnstein, 154 F.2d at 473.

[101] Dawson v. Hinshaw, 905 F.2d 731, 734 (4th Cir. 1990).

[102] *See generally,* Dawson v. Hinshaw, 905 F.2d 731 (4th Cir. 1990).

[103] *Id.* at 733.

from the original logic fostered in *Arnstein*.[104]

The distinction between the type of work allegedly infringed upon in *Arnstein* and that in *Dawson* drove the court's conclusion.[105] *Dawson* involved the copyright infringement of a spiritual arrangement,[106] whereas *Arnstein* involved the copyright infringement of a popular composition.[107] The *Dawson* court concluded that, "under the facts before it . . . the *Arnstein* court appropriately perceived 'lay listeners' and the works' 'audience' to be the same."[108] However, the *Dawson* court correctly pointed out that the logic in *Arnstein* was founded upon the protection of the creator's market.[109] Thus, in evaluating the effect of an unauthorized use of a protected work on the creator's market, the lay listener is important only insofar as that listener accurately represents that market.[110] Because *Dawson* involved the copyright infringement of a spiritual arrangement as opposed to a popular recording, the Fourth Circuit determined that the average lay listener might inaccurately reflect the market for that type of work.[111] Thus, an application of the average-audience test to the facts in *Dawson* could potentially look to the reaction of a group other than the creator's market.[112] This result would seem to contradict the economic incentive theory of copyright law as expressed in *Arnstein*.

Based on this interpretation of the economic incentive theory originally laid out in *Arnstein* and supported by the purpose of copyright law generally, the *Dawson* court held that when inquiring into an illicit appropriation, "a district court must consider the nature of the intended audience of the plaintiff's work."[113] The court wisely set forth a more narrowly tailored test because, over time, the average-audience test had become overbroad and had departed from the foundation upon which it stood.[114]

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[104] *Id.* at 734.

[105] *Id.* at 737.

[106] *Id.* at 732.

[107] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[108] Dawson v. Hinshaw, 905 F.2d 731, 734 (4th Cir. 1990).

[109] *Id.*

[110] *Id.*

[111] *See id.* at 737-738 (finding that although "a lay person's reaction may be an accurate indicator of extent to which those in the market for a popular recording will perceive another recording to be substantially similar, a lay person's reaction might not be an accurate indicator of how expert choral directors would compare two spiritual arrangements.").

[112] *See id.* at 735-736.

[113] *Id.* at 736.

[114] Dawson v. Hinshaw, 905 F.2d 731, 734 (4th Cir. 1990).

V. THE NINTH CIRCUIT: REASONING AND PRACTICE

The Fourth Circuit's clear adoption of the intended-audience test based on the sound theory of economic incentive provides a useful perspective in reviewing the history of Ninth Circuit jurisprudence.[115] While the court in *Newton v. Diamond* squarely adopted the average-audience test with respect to de minimis analysis, a closer reading of that and prior Ninth Circuit opinions indicates that perhaps its reasoning is not radically different from that which the Fourth Circuit employed.[116]

A. *SID & MARTY KROFFT V. MCDONALD'S*: FOUNDATION AND LOGIC

Sid & Marty Krofft v. McDonald's is a landmark case in Ninth Circuit copyright jurisprudence.[117] The court concluded that "[t]he test to be applied in determining whether there is substantial similarity in expressions shall be labeled an intrinsic one depending on the response of the ordinary reasonable person."[118] At first blush the court seemed to squarely establish the reaction of the ordinary lay person as the test for the substantiality of a copyright infringement which would, in turn, support the *Newton* court's holding. However, further probing of the opinion suggests otherwise.

First, the court relied upon the logic of *Arnstein* in its application of the aforementioned test by quoting, "[t]he question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the (eyes and) ears of lay (persons), *who comprise the audience for whom such popular (works are) composed . . . .*"[119] In looking to the reaction of the audience for whom the work was composed, the court adopted the economic incentive theory and the importance of the creator's market.[120] Then, in an application of that foundational theory to the facts of its case, the court looked to the reactions of the works' specifically intended audience: children.[121] "The present case demands an even more intrinsic determination because both plaintiff's and defendant's works are directed to an audience of children. This raises the particular factual issue of the

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[115] *See id.* at 736.

[116] *See infra* notes 124-128 and accompanying text.

[117] Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); *See also* Dawson v. Hinshaw, 905 F.2d 731, 734 (4th Cir. 1990).

[118] Sid & Marty Krofft Television, 562 F.2d at 1164.

[119] *Id.* at 1165 (quoting Arnstein v. Porter, 154 F.2d 464, 472-473 (2d Cir. 1946)) (emphasis added).

[120] *See* Sid & Marty Krofft Television, 562 F.2d at 1164.

[121] *Id.* at 1166.

impact of the respective works upon the minds and imaginations of young people."[122] Although the court was establishing the benchmark as the reaction of the ordinary reasonable person, a closer examination of the court's logic reveals that it was in fact looking more toward the reaction of the ordinary, reasonable person who is part of the works' intended audience in an effort to protect the creator's market.[123]

B. *NEWTON V. DIAMOND*: REASONING AND LANGUAGE RECONSIDERED

In *Newton*, a similar inconsistency exists between the language of the test applied and the analysis of the court. In the conclusion of its analysis, the court relied upon the expert opinion of Beastie Boys' expert Dr. Lawrence Ferrara.[124] It was Dr. Ferrara's opinion that the Beastie Boys' sample was not qualitatively significant, which partly provided the court's basis for concluding that an average audience would not recognize Newton's composition from the Beastie Boys' unauthorized use.[125] However, Dr. Ferrara is not representative of an average audience but rather is exactly the type of person that represents the specific intended market of such an avant-garde jazz score.[126] Someone likely to purchase such a work would have expertise in line with that of Dr. Ferrara.[127] Looking to his reaction is similar to looking to the reaction of someone likely to be in a purchasing position for Newton's work.[128] In its reliance on the opinion of the creator's market, the *Newton* court was not looking to the response of the average audience but was really looking to the response of the intended audience.

VI. THE INTENDED-AUDIENCE TEST AND MUSIC SAMPLING: BENEFITS AND BURDENS

Courts and scholars alike have examined the intended-audience test in consideration of its benefits and burdens when practically applied.[129]

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[122] *Id.*

[123] *See id.* at 1164-1166; *See also* Dawson v. Hinshaw, 905 F.2d 731, 734-735 (4th Cir. 1990).

[124] Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

[125] *Id.*

[126] Dawson v. Hinshaw, 905 F.2d 731, 736 (4th Cir. 1990) (noting that "[s]uch an inquiry may include, and in no doubt many cases will require, admission of testimony . . . from those who possess expertise with references to the tastes and perceptions of the intended audience.").

[127] *See id.* at 737.

[128] *See id.*

[129] *See, e.g.*, Dawson v. Hinshaw, 905 F.2d 731, 736 (4th Cir. 1990) (arguing that "the lay observer test spares a court the burden of inquiring into . . . the nature of the works' intended audience."); *See, e.g.*, Paul M. Grinvalsky, Comment, *Idea-Expression in Musical Analysis and the*

It is true that the intended-audience test places a burden on the court in examining the nature of such an audience.[130] However, this burden is outweighed by the benefit of providing more focused guidance which will reduce the possibility of erroneous findings, address the needs of increasingly complex music and media, and properly sustain the true purpose of copyright law.[131]

The courts have recognized that audience tests in general inherently involve issues of fact, and as a result, summary judgment has been disfavored.[132] It follows that an application of the intended-audience test would involve increased issues of fact, requiring increased analysis on the part the courts, and an increased need for such issues of fact to be litigated at trial.[133] Indeed, the *Dawson* court explained the increased burden of shifting from the lay observer test to that of the intended audience: "[t]he lay observer test spares the court the burden of inquiring into, and drawing conclusions from, the nature of the works' intended audience."[134] This burden is very real and should be weighed against the benefits of the test.

Ambiguity and vagueness with respect to the average-audience test have bred inconsistencies among the courts: some courts have defined the test as the response of the ordinary lay listener without the aid of analytic dissection or expert testimony,[135] whereas some courts have looked more narrowly at the specific audience to whom the work is directed,[136] and still other courts have relied upon expert witness testimony to gauge the reaction of an average audience.[137] Such inconsistent application of the law increases the risk of erroneous findings. However, application of the more narrowly tailored language of the intended-audience test will provide more specific guidance to the courts and therefore reduce this risk.[138] For example, in *Newton* the court

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Role of the Intended Audience in Musical Copyright Infringement, 28 Cal. W. L. Rev. 395, 428 (1991-1992) (discussing how "*Hinshaw's* concerns about an unwieldy potential" can be controlled with relatively few safeguards.).

[130] Dawson, 905 F.2d at 736.

[131] *See* Paul M. Grinvalsky, Comment, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Musical Copyright Infringement*, 28 Cal. W. L. Rev. 395, 428 (1991-1992) (arguing that "so long as courts hesitate to apply the intended-audience test . . . courts run the risk of too often finding infringement where none actually exists, or vice versa.").

[132] *See* Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977).

[133] *See id.*

[134] Dawson v. Hinshaw, 905 F.2d 731, 736 (4th Cir. 1990).

[135] Baxter v. MCA, Inc., 812 F.2d 421, 424-425 (9th Cir. 1987).

[136] Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977).

[137] Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

[138] *See* Dawson v. Hinshaw, 905 F.2d 731, 737 (4th Cir. 1990).

looked to the opinions of renowned music theorists in determining whether the appropriation was substantial or de minimis.[139] In doing so the court was essentially looking to the reaction of those with sufficient expertise to understand the language of the work, or the intended audience.[140] Another court faced with a similar factual scenario could just as easily look to the reaction of the ordinary observer under the explicit language of the average-audience test, and thereby inconsistently analyze the similarity of the works in question.[141] However, with the firm guidance of the intended-audience test, any court faced with such a scenario would be guided to the specific reaction of those people who possess the relevant expertise to understand the language of the work in question.[142]

Modern music continues to expand in diversity, scope, and style.[143] Such genres as jazz, avant-garde music, minimalism, microtonal music, electronica, and world music continue to increase the palette of musical form and expression.[144] This expansion of the modern musical idiom will only further expose the inadequacies of the average-audience test in cases of compositional copyright infringement. As seen in *Newton*, application of the average audience standard to a case involving the appropriation of a written score of an avant-garde jazz composition by a sound recording of a popular rap song has the potential to create confusing and inconsistent results.[145] A more narrowly tailored focus on the intended audience of the plaintiff's work founded on a protection of that plaintiff's market would afford the courts increased guidance in an ever-expanding musical landscape.

Perhaps most important, the intended-audience test would signal a return to copyright's fundamental purpose: the protection of the creator's market.[146] Reliance upon the average audience and the lay observer has

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[139] Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004); *See also* http://education.nyu.edu/music/faculty/ferrara_lawrence.html

[140] *Compare* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004) (relying on Beastie Boys' expert Dr. Lawrence Ferrara to determine the substantiality of the sample), *with* Dawson v. Hinshaw, 905 F.2d 731, 737 (4th Cir. 1990) (finding that the Ninth Circuit holding in *Krofft* looked to "the specific audience for which the products were intended.").

[141] *See* Dawson v. Hinshaw, 905 F.2d 731, 737 (4th Cir. 1990) (holding that "a lay person's reaction might not be an accurate indicator of how expert choral directors would compare two spiritual arrangements.").

[142] *See id. at 736* (holding that "the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar.").

[143] Petition For Writ Of Certiorari at 20, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219).

[144] *Id.*

[145] *See generally*, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004).

[146] *See, e.g.*, Dawson v. Hinshaw, 905 F.2d 731, 734 (4th Cir. 1990).

fueled the development of a test that is overbroad and increasingly unable to fulfill the purpose for which it was created.

VII. CONCLUSION

In *Newton v. Diamond*, the Ninth Circuit has chosen explicitly to adopt the average-audience test when determining de minimis copying in copyright infringement actions.[147] However, its reliance upon the testimony of expert witnesses with specific knowledge relevant to the work suggests that the court was looking not to the response of the average audience but to the response of the intended audience for whom the copyrighted work was created. Additionally, other landmark copyright cases decided by the Ninth Circuit have similarly considered the audience to whom the copyrighted work was directed while employing the average audience and lay observer language.[148] Although effectively applying a much narrower test, in *Newton* the Ninth Circuit has chosen to continue to propagate the vagueness and ambiguity that surrounds substantial similarity and de minimis analysis. The court would have been much better served by narrowing the scope of the test to that which it effectively applied: the intended-audience test.

Music is a language that continues to grow and expand.[149] Modern music includes an array of diverse genres that cross-pollinate and inspire new forms of music.[150] The clash of such genres is exemplified in *Newton* by an analysis that must look to the similarities of a written score of an avant-garde jazz flute composition and a sound recording of a popular rap song.[151] In order to better serve the needs of such complex and diverse problems, the Ninth Circuit should have elected to shed the outdated and vague language of the average-audience test and adopted a more focused analysis which remains true to the fundamental purpose of copyright law. The Ninth Circuit should have expressly adopted the intended-audience test.

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

[148] *See* Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977).

[149] *See* Petition For Writ Of Certiorari at 20, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (No. 04-1219).

[150] *See supra* note 32 and accompanying text.

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

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