

April 2004

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Repository Citation

David S. Blessing, *Who Speaks Latin Anymore? Translating De Minimis Use for Application To Music Copyright Infringement and Sampling*, 45 Wm. & Mary L. Rev. 2399 (2004), <https://scholarship.law.wm.edu/wmlr/vol45/iss5/8>

NOTES

WHO SPEAKS LATIN ANYMORE?: TRANSLATING DE MINIMIS USE FOR APPLICATION TO MUSIC COPYRIGHT INFRINGEMENT AND SAMPLING

INTRODUCTION

James Newton¹ discovered that he was featured on the Beastie Boys' "Pass the Mic"² eight years after the song's release.³ In fact, he learned of his music's unauthorized use and widespread distribution from a student in a class he taught at California State University, Los Angeles.⁴ Newton's plunge into popular hip-hop music was limited to a six-second snippet of his song "Choir,"⁵ which the Beastie Boys looped over forty times to create the background for "Pass the Mic."⁶ Newton composed and performed "Choir" on his 1982 album *Axum*.⁷ The sample used by the Beastie Boys is a six-second segment in which Newton "fingers a 'C' above middle 'C' on the flute, while singing the same 'C,' ascending one-

1. James Newton is a renowned flautist, composer, conductor, and professor at California State University, Los Angeles. He currently serves as director of the Luckman Jazz Orchestra and director of music programming and research at the Luckman Fine Arts Complex. His compositions encompass jazz as well as chamber, symphonic, dance, and electronic music. See The Los Angeles Jazz Society Jazz Educator Award, at <http://www.lajazzsociety.org/LAJS/Programs/Tribute/Honorees/JamesNewton.htm> (last visited Mar. 3, 2004).

2. BEASTIE BOYS, *Pass the Mic*, on CHECK YOUR HEAD (Capitol Records 1992).

3. See Teresa Wiltz, *The Flute Case That Fell Apart*, WASH. POST, Aug. 22, 2002, at C1.

4. See *id.*

5. JAMES NEWTON, *Choir*, on AXUM (ECM 1982).

6. BEASTIE BOYS, *Pass the Mic*, on CHECK YOUR HEAD (Capitol Records 1992); see Wiltz, *supra* note 3.

7. JAMES NEWTON, *Choir*, on AXUM (ECM 1982).

half step to a 'D-flat,' and descending again to the 'C.'"⁸ Upon Newton's discovery of this use without consent, he sued the Beastie Boys, claiming that the use of this three-note sample amounted to an infringement of the copyright in his work.⁹

Although prior to using the sample the Beastie Boys secured a license from ECM, the recording company that possessed the rights to Newton's recording,¹⁰ they did not notify Newton of their intended use or obtain a license in the composition from him.¹¹ The U.S. District Court for the Central District of California, in May 2002, ruled in favor of the Beastie Boys, granting their motion for summary judgment.¹² The court reasoned that the Beastie Boys possessed a license for the sound recording, giving them a right to use it.¹³ The court separately considered whether the Beastie Boys needed to obtain a license in the underlying composition.¹⁴ The court only looked at the musical qualities actually represented in the written composition, and concluded that, in this case, the composition was qualitatively different from the sound recording.¹⁵ The written composition did not note the "Newton technique' [or] ... mention ... overblowing the 'C' note," both techniques that made the recording distinct.¹⁶ Thus, the copyright in the composition did not cover these added effects.¹⁷ Here, the court found the use of the musical notes in the underlying composition to be *de minimis* because the sample was "so trivial" that it did not break the

8. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1246 (C.D. Cal. 2002).

9. *Id.*

10. Possessory copyright interests exist separately in the recording of music and in the written composition of the music. See 17 U.S.C. § 114(b) (2000); discussion *infra* Part II.D. In this case, ECM owned the copyright in the recording and Newton owned the copyright in the written composition. See *Newton*, 204 F. Supp. 2d at 1246.

11. See *Newton*, 204 F. Supp. 2d at 1246.

12. *Id.* at 1260.

13. *Id.* at 1246.

14. *Id.* at 1249.

15. See *id.* at 1251.

16. *Id.*

17. See *id.* at 1252. Of course, there are serious questions whether music notation can ever accurately and completely represent a sound recording. The technique of the performer is a crucial element in the final sound of the music and can employ effects that are impossible to re-create in the musical composition.

“quantitative threshold of substantial similarity.”¹⁸ Breaking this threshold is necessary for a finding that the defendant infringed the copyright in the composition.¹⁹ Here, even though Newton controlled the rights in the composition, there was no “actionable copying” on which his suit could stand.²⁰

This Note analyzes this finding of de minimis infringement and the tests courts use to make this determination. To begin, Part I of this Note describes the process of music sampling. Part II provides a background on copyright law. Part III discusses de minimis use and the tests courts apply to find de minimis use. This Part also describes how modern copyright law addresses music sampling by looking at the tests courts employ to rule on de minimis infringement. This analysis focuses on the determinations of substantial similarity used in the Second and Ninth Circuits. Specifically, this analysis includes the recent application of these tests in the *Ringgold v. Black Entertainment Television*²¹ and *Sandoval v. New Line Cinema Corp.*²² cases from the Second Circuit, and the *McCulloch v. Albert E. Price, Inc.*²³ case from the Ninth Circuit. Other tests exist, but are used infrequently by courts and are more difficult to apply to sampling due to the peculiarities of music.²⁴ Even translating the “abstractions” test of the Second Circuit²⁵ and “total concept and feel” test of the Ninth Circuit²⁶ into the arena of music sampling poses many problems. The vague nature of these tests allows them to be applied more readily to music than other tests, but that nature also means the standard for defining de minimis infringement is weak and wavering. Finally, Part IV of this Note addresses these problems and suggests a new test that

18. *Id.* at 1256 (quoting *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998)).

19. *See id.*

20. *See id.* (emphasis added).

21. 126 F.3d 70 (2d Cir. 1997).

22. 147 F.3d 215 (2d Cir. 1998).

23. 823 F.2d 316 (9th Cir. 1987).

24. *See discussion infra* Part III.C.3.

25. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][a] (2003).

26. *See id.* § 13.03[A][1][c].

is intended to achieve more accurately the goals of copyright law and to offer a better-defined standard for its practical application.²⁷

Because the issue is bound to arise again, this Note asks and proposes to answer what would have happened had the Beastie Boys not secured a license in the recording of the work, so that the question of copyrighting the recording would have remained in *Newton*. This Note applies each of the tests to this hypothetical situation and determines the most effective method of handling music sampling infringement cases. Because, as this Note concludes, that none of the current tests furthers the purposes of copyright law, the courts should formulate a new test that furthers the purpose of copyright law and can be clearly applied.

27. Many scholars have recently addressed music sampling and copyright law. However, no one has adequately spelled out how to determine whether a sample is more than de minimis use. A few articles mention de minimis use in surveys of recent copyright law problems. See, e.g., Alicia Morris Groos, *Developments in U.S. Copyright Law 2000-2001: From Revising the Old South to Redefining the Digital Millennium*, 10 TEX. INTELL. PROP. L.J. 111 (2001). Other works discuss de minimis use only in passing. See, e.g., Ronald Gaither, *The Chillin' Effect of Section 506: The Battle Over Digital Sampling in Rap Music*, 3 VAND. J. ENT. L. & PRAC. 195 (2001) (discussing the mens rea element in criminal infringement music sampling cases); Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879 (1992) (providing an overview of American copyright law as applied to digital music sampling); Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (1993) (arguing that Congress should create more specific rules for digital music sampling because the Copyright Act of 1976 did not foresee this problem); Ronald M. Wells, Comment, *You Can't Always Get What You Want But Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691 (1989) (contending that, if copyright law is not used flexibly to keep digital music sampling in check, sampling will pose a threat to the livelihood of musicians in this country). One student note suggests that the Second Circuit test can be applied adequately to music sampling. See Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227 (2000). This Note, however, contends that this Second Circuit test, especially in its application to music sampling, is vague and weak. This Note suggests that a different judicial test, under the current copyright legislation, can deal more certainly with de minimis music sampling in accordance with the purpose of copyright law. See discussion *infra* Part IV.

I. WHAT IS DIGITAL MUSIC SAMPLING?

A. Overview of Digital Music Sampling

Digital music sampling is the practice of using previous sound recordings to create new music.²⁸ This process provides an inexpensive avenue for an artist to produce distinctive sounds and “offers a sound that may already have a proven appeal with the public.”²⁹ Digital music sampling is a process that consists of “three steps: digital recording, computer sound analysis, and playback.”³⁰ Vibrations that create sound can be represented by analog waves.³¹ A digital sampler can receive these waves and transfigure them as computer code.³² Modern equipment can copy and manipulate these digital computer codes to change pitch, tempo, and timbre, and make numbers of other alterations.³³ This technology provides “endless possibilities;” and, these possibilities make it difficult to determine how much of the new expression should be attributed to the original work and how much is created by the person utilizing this technology.³⁴ Obviously, the technology involved in this process and the mixing between old and new works makes music sampling copyright questions very difficult determinations for courts to make.

Digital sampling began on a widespread basis when the digital MIDI synthesizer came on the market in 1981.³⁵ This innovation gave anyone with enough money to purchase the equipment the

28. See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1479-81 (3d ed. 2002).

29. Kaplicer, *supra* note 27, at 228.

30. Kravis, *supra* note 27, at 237; see also Houle, *supra* note 27, at 880-81; Bruce J. McGiverin, Note, *Digital Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987); Wells, *supra* note 27, at 699-700.

31. See KOHN & KOHN, *supra* note 28, at 1480.

32. See *id.*

33. See *id.* at 1481. The sample of Newton's “Choir” that the Beastie Boys exploited in “Pass the Mic” was a six-second, three-note segment. See *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1246 (C.D. Cal. 2002). They slowed the tempo of the segment, which lowered the pitch of the notes, and looped the sample throughout their work. See Statement from the Beastie Boys (Sept. 17, 2002), at <http://www.beastieboys.com/msgboards/showthread.php?s=&threadid=1230>.

34. See Kaplicer, *supra* note 27, at 230-31.

35. See Kravis, *supra* note 27, at 239.

ability to digitally record, alter, and play back sound recordings.³⁶ As the price of the equipment declined, more people were able to take advantage of this technology, and sampling became more widespread.³⁷ Today, popular music is filled with artists who rely on this technology.

B. Examples of Digital Sampling in Popular Music

Examples of digital sampling in popular music are numerous. The controversial method of creation burst onto the public radar when Vanilla Ice's "Ice, Ice, Baby" rose to number one on Billboard Music's Top 40 chart with a sampled background beat from Queen and David Bowie's "Under Pressure."³⁸ In his song "I Need a Haircut," Biz Markie's sampling from a Gilbert O'Sullivan song gave the courts an early opportunity to address the matter of digital sampling.³⁹ The court's attitude was obvious from the opening line of their opinion—"Thou shalt not steal," the court quoted from the Ten Commandments.⁴⁰ Surely digital sampling and its complicated relationship with copyright law merits more than this simplistic response.⁴¹

36. *See id.*

37. *See id.*

38. *See* Gary Graff, *Vanilla Ice: Red-Hot Rapper Hits It Big and Keeps His Cool*, ORLANDO SENTINEL TRIB., Nov. 2, 1990, at 20. Vanilla Ice did not purchase a license to use this work. Although he was never sued for using portions of the song as the foundation for his hit, it is rumored that he settled out of court for an undisclosed (six-figure) sum. *See* Steve Morse, *Setting the New Market in Sampling: Sellers Are Looking To Make a Deal, But Buyers Are Wary*, BOSTON GLOBE, Mar. 3, 2002, at L1.

39. *See* *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991). As discussed in the opinion, there was no question that Biz Markie's use exceeded the de minimis threshold; the most important issue was whether Gilbert O'Sullivan actually owned a valid copyright in the work. *See id.* at 183. The court easily found O'Sullivan did own a valid copyright. *Id.* at 184-85. In fact, the court noted that Biz Markie admitted that a valid copyright existed in a letter to O'Sullivan's brother and agent seeking permission to use the sample. *Id.*

40. *Id.* at 183 (quoting *Exodus* 20:15).

41. The court in *Grand Upright Music* went on to discuss the case with necessary detail and complexity of analysis. *See id.* at 183-85. Because of the court's strong language denouncing digital music sampling, this result sent a shockwave of fear through the music industry. *See* KOHN & KOHN, *supra* note 28, at 1479. For the purpose of this Note, it is important to note that the court did not spend time discussing the elements of infringement.

Still, digital music sampling continues to be heard in all styles of popular music. Rap music has often been cited for its heavy reliance on music sampling.⁴² However, other popular styles (such as rock music) have also relied on borrowing to spur creation.⁴³ Today, the increased popularity of hip-hop and rap music has meant increased public exposure to music sampling.⁴⁴

II. BACKGROUND OF COPYRIGHT LAW

A. History of Copyrights

Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress the power to enact copyright legislation.⁴⁵ It authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁶ In 1790, Congress first utilized this authority to protect creative works by adopting a federal Copyright Act.⁴⁷ Since its inception, Congress has amended the Copyright Act several times.⁴⁸

The Copyright Act of 1976 is the most recent comprehensive revision to the Act.⁴⁹ This Act states that the owner of the copyright has the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work publicly, perform the work publicly, display the work publicly, and in the case of sound recordings, perform the work publicly by means of a digital audio

42. See John Leland, *The Mover vs. the Rapper*, NEWSWEEK, Jan. 6, 1992, at 55 (noting that most rap music incorporates samples).

43. See K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 381 n.197 (1999).

44. See Joan Anderman, *Hip-Hop Setting the Beat in First, Black Artists Hold Billboard's Top 10*, BOSTON GLOBE, Oct. 4, 2003, at A1.

45. U.S. CONST. art. I, § 8, cl. 8.

46. *Id.*

47. See Act of May 31, 1790, ch. 15, 1 Stat. 124.

48. The Copyright Act was substantially amended since the original enactment of copyright legislation. See 1 NIMMER & NIMMER, *supra* note 25, OV-1 to -10. The Copyright Act of 1976 is the most recent overhaul, although it has been amended several times since then. See *id.*

49. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1332 (2000)).

transmission.⁵⁰ The Copyright Act of 1976 grants copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁵¹

B. Purpose of Copyrights

As stated in the Constitution, the purpose of copyright law is "[t]o promote the Progress of Science and useful Arts."⁵² Copyrights are not ultimately intended to reward the creator, but to encourage public benefits.⁵³ The reward often felt by the creator is an effect rather than a purpose of the law; this reward is seen as the most effective means to secure this public benefit.⁵⁴ In *Fox Film Corp. v. Doyal*,⁵⁵ the Supreme Court stated that, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."⁵⁶ Thus, copyrights are meant to encourage creativity rather than to limit usable expression.⁵⁷ The laws have tried to forge a balance between allowing the public to benefit and use the artistic expression, and protecting the rights of the creator sufficiently to encourage the creation. "Implicit in this rationale is the assumption that in the absence of such public benefit, the grant of a copyright monopoly to individuals would be unjustified."⁵⁸

50. 17 U.S.C. § 106 (2000).

51. *Id.* § 102(a).

52. U.S. CONST. art. I, § 8, cl. 8.

53. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (rejecting the merit-based "sweat of the brow" doctrine as inconsistent with the purpose of copyright law); 1 NIMMER & NIMMER, *supra* note 25, § 1.03[A].

54. 1 NIMMER & NIMMER, *supra* note 25, § 1.03[A].

55. 286 U.S. 123 (1932).

56. *Id.* at 127. The Supreme Court has restated this primary purpose of copyright numerous times. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Feist*, 499 U.S. at 354; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

57. This focus is often lost when copyright issues are publicly debated. However, copyright laws are formed with this principle as the foundation.

58. 1 NIMMER & NIMMER, *supra* note 25, § 1.03[A].

C. *What Is a Copyright Infringement?*

To establish a copyright infringement, the plaintiff must prove both ownership of a valid copyright in the work and that the defendant copied the work.⁵⁹ Thus, if the plaintiff has a copyright in the work, any work substantially similar to the copyrighted expression constitutes an infringement, providing that it is not created by an independent effort.⁶⁰ However, if an unauthorized use of a copyrighted work is “so trivial ‘as to fall below the quantitative threshold of substantial similarity’”⁶¹—meaning, if it is *de minimis*—it is not actionable.

D. *The Dual Nature of Music Copyrights*

Copyrights in musical works are especially complex because a copyright exists both in the musical recording and in the underlying musical composition.⁶² Those who wish to use musical works often must obtain a license both in the composition and in the recording to proceed safely.⁶³ Unfortunately, courts have provided very little guidance as to when someone using a sample needs to secure a license in the recording or in the composition.

As described in the Introduction, the Beastie Boys obtained a license to use the recording of Newton’s work, but did not secure a license to use the underlying composition—the manuscript of the work.⁶⁴ Thus Newton argued that the infringement should stand on the Beastie Boys’ use of the written composition.⁶⁵ The court, however, found that it was not necessary for the Beastie Boys to obtain a license in the underlying composition because their use was so trivial or *de minimis*—they copied a simple and common

59. 17 U.S.C. § 501 (2000); *see also* 4 NIMMER & NIMMER, *supra* note 25, § 13.01. The plaintiff can prove this second prong by showing the defendant’s access to the original work and substantial similarity between the original and new work. *See id.* § 13.01[B].

60. *See* 2 NIMMER & NIMMER, *supra* note 25, § 8.01[G].

61. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1256 (C.D. Cal. 2002) (quoting *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998)).

62. *See, e.g., id.* at 1248-49; *see also* KOHN & KOHN, *supra* note 28, at 10-11.

63. *See* KOHN & KOHN, *supra* note 28, at 10-11.

64. *Newton*, 204 F. Supp. 2d at 1260.

65. *Id.* at 1256.

three-note pattern of C to D-flat to C.⁶⁶ Had the composition incorporated the distinctive playing techniques heard in the recording, a different decision may have been reached.⁶⁷ But, when deciding whether the copyright of the composition was infringed, the court could only look to the notations actually included in the composition.⁶⁸

III. THE DE MINIMIS USE DOCTRINE

A. *What Is De Minimis Use?*

To constitute an infringement, the similarity between the original and the new work must overcome the legal maxim of *de minimis non curat lex*.⁶⁹ De minimis use means that a copying “has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”⁷⁰

While the definition states that this is a quantitative analysis, this is not entirely accurate. A completely quantitative definition, for the sake of argument, may suggest that whenever there is a sampling of more than five musical notes, it constitutes a copyright infringement. This approach completely ignores the significance of the originality in the sample, the use in the earlier work, the use in the later work, and many other qualitative factors. Courts, including the *Ringgold* court, have consistently looked at these qualitative factors to determine whether the use is de minimis.⁷¹ Distinctiveness has appeared as an important qualitative factor to

66. *Id.* at 1256, 1260.

67. *Id.* at 1251 (noting that the composition did not include techniques used in the recording).

68. *Id.*

69. See 2 NIMMER & NIMMER, *supra* note 25, § 8.01[G].

70. *Ringgold v. Black Entm't Television*, 126 F.3d 70, 74 (2d Cir. 1997).

71. See, e.g., *Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001) (holding that the small use of eyeglasses in a Gap advertisement constituted a copyright violation because the glasses were very distinct); *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998) (finding that the use of photographs in a movie did not constitute a copyright infringement because they were blurred and not displayed with sufficient detail); *Ringgold*, 126 F.3d 70 (holding that the de minimis threshold was crossed because a poster on the wall of a television show set was identifiable).

surpass the de minimis threshold. In *Newton*, the court found that the use of the underlying composition was de minimis, despite the fact that the copying was not contested because the distinct qualities of the recording were not noted in the composition.⁷² This facet of the de minimis use doctrine has not been uniformly applied by courts.⁷³ However, recently, there has been a trend in courts to recognize “trivial violations” as de minimis.⁷⁴

B. Separating De Minimis Use from Fair Use

Although the distinctions are not always entirely clear,⁷⁵ the de minimis use doctrine should not be confused with the fair use doctrine of copyright law.⁷⁶ The fair use doctrine grants an infringement exemption to certain types of copying, as an affirmative defense.⁷⁷ It may be best understood as an excused infringement.

72. *Newton*, 204 F. Supp. 2d at 1256-57.

73. *E.g.*, *Konor Enters., Inc. v. Eagle Publ'ns, Inc.*, 878 F.2d 138 (4th Cir. 1989) (holding defendant liable for copying a few pages of a military telephone directory onto a postcard solicitation); *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989) (holding that the distribution of nine copies of a medical syllabus for use in a lecture exceeded the de minimis threshold); *Walt Disney Prods. v. Filmation Assocs.*, 628 F. Supp. 871, 876 (C.D. Cal. 1986) (finding liability for making a story board and story reel for defendant's animators to use in preparing a motion picture); *see also* 2 NIMMER & NIMMER, *supra* note 25, § 8.01[G] (“[T]he overwhelming thrust of authority upholds liability even under circumstances in which the use of the copyrighted work is of minimal consequence.”).

74. *E.g.*, *Ringgold*, 126 F.3d at 74-77.

75. Nor do courts clearly apply the distinctions between these doctrines. *See, e.g.*, *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). In *Nichols*, Judge Learned Hand set out the “abstractions” test, which is currently used as a test to determine whether a copying is de minimis. *See id.* at 121. Judge Hand phrased the issue as “whether the part so taken is ‘substantial,’ and therefore not a ‘fair use’ of the copyrighted work.” *Id.* at 121. However, the question as Judge Hand phrased would be better analyzed as a question of de minimis use, not a question of fair use. *See also* 2 NIMMER & NIMMER, *supra* note 25, § 8.01[G] (noting confusion between the de minimis use doctrine and the fair use doctrine in many courts).

76. Nimmer and Nimmer point out that “the defense of fair use is often invoked without reference to the particular use employed by the defendant, and merely as an alternative label for similarity that is not infringing because it is not substantial. This terminology is unfortunate: the meaning of ‘fair use’ is thereby rendered confusingly ambiguous.” 4 NIMMER & NIMMER, *supra* note 25, § 13.03[A][2]. While some courts have confused the issue, *see supra* note 75, other courts have clearly distinguished between the two doctrines. *See, e.g.*, *Ringgold*, 126 F.3d at 75-76; *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741, 744-45 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

77. The fair use doctrine is codified in 17 U.S.C. § 107 (2000). It states that works with the purpose of “criticism, comment, news reporting, teaching (including multiple copies for

Under the fair use doctrine, courts can find the infringement of a work to be nonactionable after weighing the following factors laid out by the Copyright Act: "the purpose and character of the use," "the nature of the copyrighted work," "the amount and substantiality of the portion used," and "the effect of the use on the potential market for or value of the copyrighted work."⁷⁸ De minimis analysis, on the other hand, focuses entirely on whether the copying amounts to a level that constitutes an infringement.⁷⁹ The de minimis issue should be addressed before one reaches the affirmative defense of fair use analysis; the fair use analysis, on the other hand, should only be applied after substantial similarity is found.⁸⁰ This Note analyzes only the de minimis use doctrine and does not consider how this doctrine should apply to the fair use analysis.⁸¹

C. What Tests Do the Courts Use?

While de minimis use occurs when the use falls below the "threshold of substantial similarity,"⁸² there is no bright-line rule to determine what constitutes substantial similarity and, thus, a copyright infringement violation. Judge Learned Hand stated that "[t]he test for infringement of a copyright is of necessity vague."⁸³ Courts must view each case in light of the amount of protectable

classroom use), scholarship, or research, is not an infringement of copyright." *Id.* One of the most publicized music copyright infringement cases centered around whether 2 Live Crew's parody of the song "Pretty Woman" fell under this fair use doctrine. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that summary judgment for the plaintiff was incorrect and remanding to determine whether the use of the song should be considered a parody and, thus, fall under the fair use doctrine).

78. 17 U.S.C. § 107 (2000). Thus, a copyright violation can be rejected even if the copying is obvious and substantial. *See generally* WILLIAM F. PATRY, 1 COPYRIGHT LAW AND PRACTICE 718-84 (BNA 1994).

79. *See* 2 NIMMER & NIMMER, *supra* note 25, § 8.01[G].

80. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998).

81. It is difficult to completely divorce de minimis use and fair use because courts look at many of the same factors and use much of the same terminology. However, this Note only intends to analyze the situation of a work not qualifying for copyright infringement because it falls below the threshold of substantial similarity.

82. *Ringgold v. Black Entm't Television*, 126 F.3d 70, 74 (2d Cir. 1997).

83. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

matter copied and the surrounding circumstances to determine whether an infringement occurred.⁸⁴

Substantial similarity can be found in two different situations when the entire work is not wholly and exactly copied: (1) where the works as a whole are similar, but not exactly identical, termed comprehensive nonliteral similarity; or (2) where only a small segment of the works are identical, termed fragmented literal similarity.⁸⁵ This Note, because it deals with music sampling, focuses on the second situation—where a segment of the works is nearly identical. The courts have developed a number of tests to help determine what constitutes substantial similarity when there is fragmented literal similarity.

1. *The Test in the Second Circuit*

Judge Learned Hand developed the “abstractions test” in *Nichols v. Universal Pictures Corp.*⁸⁶ Judge Hand suggested that any work can be described in any number of ways with increasing generality—as the description becomes more general, more of the details are left out.⁸⁷ For example, a general way to describe a song may be its title and a general description of its sound.⁸⁸ A more specific way to describe the same song might include the sound of its main theme. Still, the most specific way may be a replication of the song itself. Judge Hand stated that “there is a point in this series of abstractions where [the expression itself is] no longer protected, since otherwise the [composer] could prevent the use of his ‘ideas,’ to which ... his property is never extended.”⁸⁹ This view is an attractive way to view copies of a work that has undergone an alteration by the new user—a problem often encountered in the

84. See 4 NIMMER & NIMMER, *supra* note 25, § 13.03[A]; see also *supra* Part III.A (discussing qualitative factors in de minimis analysis).

85. 4 NIMMER & NIMMER, *supra* note 25, § 13.03[A].

86. See 45 F.2d 119 (2d Cir. 1930). In *Nichols*, the plaintiff alleged that similar characters and plot themes in the defendant’s movie violated plaintiff’s copyright in her play. *Id.* at 120. The court noted many differences between the works and concluded that the works were not substantially similar. *Id.* at 121-22. Any similarities did not violate protectable property and, thus, there was no copyright violation. *Id.* at 121.

87. *Id.* at 121.

88. Judge Hand’s description in the opinion describes a play rather than a song. *Id.*

89. *Id.* (changing the example from a playwright to a composer).

arena of digital music sampling. Judge Hand's analysis, however, does not offer an answer to the question of where, on this spectrum of abstractions, the copy becomes a copyright violation. Judge Hand merely explained this spectrum, offering a fresh and helpful way to view the problem.

Judge Learned Hand has been criticized⁹⁰ and cheered for this test.⁹¹ Still, while it may be an interesting way to pose the problem, the abstractions test does not help actually define what constitutes a *de minimis* infringement.⁹²

A number of cases in the Second Circuit have used this approach to analyze questions of *de minimis* copyright infringement. Most recently, the court has focused on *de minimis* use in *Ringgold v. Black Entertainment Television, Inc.*,⁹³ and *Sandoval v. New Line Cinema Corp.*⁹⁴

a. Ringgold v. Black Entertainment Television, Inc.

In *Ringgold*, an artist sued Black Entertainment Television, Inc. (BET) and Home Box Office, Inc. (HBO) for violating her copyright, claiming the defendants used her artwork on the set of a broadcasted television program.⁹⁵ A poster on the set of the program showed a painting entitled "Church Picnic Story" and appeared on screen during an episode of the television show "ROC" nine different times for a total screen time of 26.75 seconds.⁹⁶

The court defined *de minimis* use in three different ways. First, it suggested that "*de minimis* in the copyright context can mean

90. See *Shipman v. RKO Radio Pictures, Inc.*, 100 F.2d 533, 537 (2d Cir. 1938) (criticizing the abstractions test as impractical). But see *id.* at 538 (Hand, J., concurring) (defending his abstractions test).

91. In a Ninth Circuit opinion, the court claimed that "[n]o court or commentator ... has been able to improve upon Judge Learned Hand's famous 'abstractions test.'" *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

92. 4 NIMMER & NIMMER, *supra* note 25, § 13.03[A][1][a].

93. 126 F.3d 70 (2d Cir. 1997).

94. 147 F.3d 215 (2d Cir. 1998).

95. *Ringgold*, 126 F.3d at 71-72.

96. *Id.* at 72-73. The painting *Ringgold* created depicted a Sunday School picnic held by the Freedom Baptist Church in Atlanta, Georgia, in 1909. *Id.* at 72. In the sequences during which the poster was visible, a portion of it was visible for durations ranging from 1.86 to 4.16 seconds. *Id.* at 73.

what it means in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences.⁹⁷ Second, it looked at the definition on which this Note focuses⁹⁸—a copying that “fall[s] below the quantitative threshold of substantial similarity.”⁹⁹ Third, the court noted the definition from which this Note attempts to distance itself¹⁰⁰—“*de minimis* might be considered relevant to the defense of fair use.”¹⁰¹

In applying these definitions to decide whether the copying exceeded the quantitative threshold of *de minimis* use, the court looked at some qualitative factors of the defendants’ use.¹⁰² Looking at the amount and clarity of the poster in the television program, the court found that it was recognizable “with sufficient observable detail for the ‘average lay observer.’”¹⁰³ The court’s focus was on whether the plaintiff’s original expression of ideas was identifiable to the “average lay observer” in the new work.¹⁰⁴ Here, the court found that the defendant’s use exceeded the *de minimis* threshold.¹⁰⁵

b. *Sandoval v. New Line Cinema Corp.*

A year later, the Second Circuit decided a similar issue in *Sandoval v. New Line Cinema Corp.*¹⁰⁶ The court looked at whether New Line Cinema’s use of a photographer’s pictures in scenes of the

97. *Id.* at 74. The court offered the example of posting a newspaper cartoon on a refrigerator. *Id.*

98. *See supra* Part III.A.

99. *Ringgold*, 126 F.3d at 74.

100. *See supra* Part III.B.

101. *Ringgold*, 126 F.3d at 75.

102. *Id.* at 76-77. The court stated that “[t]he qualitative component concerns the copying of expression, rather than ideas, a distinction that often turns on the level of abstraction at which the works are compared.” *Id.* at 75. So, while this court did not expressly adopt Judge Learned Hand’s test, it looked at the “level of abstractions” to find if the copying was a violation. *Id.*

103. *Id.* at 77 (quoting *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992)). As an interesting side note, the court also looked at whether Congress provided for royalties to be paid by public broadcasting entities for this type of use. *See id.* The court noted that 37 C.F.R. § 253.8 (1996) provided for these royalties, suggesting that such a use should not be considered *de minimis*. *Id.*

104. *Id.*; *see also Rogers*, 960 F.2d at 307 (2d Cir. 1992).

105. *Ringgold*, 126 F.3d at 77.

106. 147 F.3d 215 (2d Cir. 1998).

movie "Seven" constituted a copyright violation.¹⁰⁷ Ten transparencies, reproductions of self-portrait photographs by artist Jorge Antonio Sandoval, were attached to a light box on a back wall during a scene showing the movie's main character's apartment.¹⁰⁸ Over the course of a minute and a half, the pictures were visible in eleven different camera shots for a total of 35.6 seconds.¹⁰⁹

The court defined de minimis use as "the copying of the protected material [that] is so trivial 'as to fall below the quantitative threshold of substantial similarity.'"¹¹⁰ This is the second definition from the *Ringgold* analysis and the definition this Note uses.¹¹¹ Again, the court focused on the qualitative observability of the copied work in question.¹¹² In *Sandoval*, because the photographs were displayed briefly in poor lighting, at great distance, and out of focus, the court found that the copies were "not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them, and that the use was de minimis."¹¹³

c. Summary of the Test Used in the Second Circuit

Although the terminology differed in each of the cases, the Second Circuit has analyzed whether the infringing item was recognizable or observable to determine whether the use was de minimis.¹¹⁴ The court looked at the defendant's work to determine whether the copy used was distinct or whether it blended into the background.¹¹⁵ As discussed below, the Second Circuit's analysis

107. *Id.* at 216.

108. *Id.* The light box was turned on, which allowed light to pass through the nonopaque portions of the transparencies posted on the box. *Id.*

109. *Id.* The longest uninterrupted view of the photographs lasted six seconds. *Id.* (noting that "[t]he photographs never appear in focus, and except for two of the shots, are seen in the distant background, often obstructed from view by one of the actors").

110. *Id.* at 217 (quoting *Ringgold*, 126 F.3d at 74).

111. See *supra* Part III.C.1.a.

112. *Sandoval*, 147 F.3d at 217.

113. *Id.* at 218.

114. In the recent case of *Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001), the Second Circuit found that the defendant's use of plaintiff's eyeglasses in an advertisement was a copyright violation because the eyeglasses were "highly noticeable." *Id.* at 173.

115. This presents a question of whether the courts give more protection to bizarre items that are more noticeable. While an interesting question, this issue is outside the scope of this

has evolved into a question similar to the Ninth Circuit's "total concept and feel" test.¹¹⁶

d. Applying the Second Circuit's Analysis to the Newton Hypothetical

Although these examples of the de minimis use analysis in the Second Circuit cases focus on visual works, the same analysis can be applied to sound recordings in music sampling cases. In determining whether the Beastie Boys' use of Newton's work would be de minimis (using the hypothetical assumption from the Introduction—that no license was obtained) one in the Second Circuit would ask whether the sample of Newton's work used by the Beastie Boys is "observable" so that "the average lay listener" can identify the sampled material.¹¹⁷ The court would have to listen to the material in question and make this determination. As with photographs and paintings, this is a difficult subjective determination, in which a court could decide either way. Making the analysis even more difficult is the fact that no court has applied this test for de minimis use in the music sampling arena. The moaning flute at the beginning of "Pass the Mic" seems to be comparable to a blurry photograph because the bounds of the sample are difficult to notice and the sample itself is difficult to distinguish. However, a court looking at this question with the same facts, by focusing on the listener's ability to hear the sample rather than its distinctness, could also find that the sample is noticeable and, thus, breaks the threshold of de minimis use.

e. Problems with the Second Circuit's Approach

As shown in the application to the Newton hypothetical,¹¹⁸ the Second Circuit's approach is ambiguous and allows a court too much latitude in making its determination. The result is "ad

Note.

116. See discussion *infra* Part III.C.2.

117. See *Davis*, 246 F.3d at 173; *Sandoval*, 147 F.3d at 218; *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 77 (2d Cir. 1997).

118. See *supra* Part III.C.1.d.

hoc"¹¹⁹—a decision that cannot serve as precedent to other courts deciding similar cases, or, more importantly, to artists who wish to sample and need to decide whether to obtain a license. A more definitive analysis would serve as a better guide to both courts and artists, as well as provide a better foundation on which a court can base its decisions.

2. *The Test in the Ninth Circuit*

The Ninth Circuit introduced a "total concept and feel" test in 1970 in *Roth Greeting Cards v. United Card Co.*¹²⁰ This test looks at both works as a whole, rather than simply the sample of the original work in the allegedly infringing work, to determine if the allegedly infringing work would be recognizable by an ordinary observer as having been taken from the copyrighted original work.¹²¹

a. *McCulloch v. Albert E. Price, Inc.*

*McCulloch v. Albert E. Price, Inc.*¹²² rested on whether two plates that bore the phrase "You Are Special Today" were substantially similar.¹²³ The court laid out a two-part test to determine if works are substantially similar based on the separation of the non-copyrightable idea from the copyrightable expression.¹²⁴ The first part is an "extrinsic test" that asks whether a similarity of ideas is shown in the objective details of the two works.¹²⁵ If there is a similarity of ideas, the court makes an "intrinsic" inquiry to determine whether there is a similarity of expression between the

119. *But see* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (claiming that "[d]ecisions must ... be ad hoc").

120. 429 F.2d 1106, 1110 (9th Cir. 1970) (stating that "[i]t appears to us that in total concept and feel the cards ... are the same").

121. *Id.* The court in *Roth Greeting Cards* used this standard to determine whether the two works in question were substantially similar. *Id.*

122. 823 F.2d 316 (9th Cir. 1987).

123. *Id.* at 318-19.

124. *Id.* at 319. For examples of other cases in which the Ninth Circuit applied this two-part test, see *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 492-93 n.9 (9th Cir. 1985), and *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984).

125. *See* *McCulloch*, 823 F.2d at 319.

two works.¹²⁶ Thus, if the court objectively finds as a matter of law that similarity of ideas is shown in the details of the works, the second part of the test asks the trier of fact the “total concept and feel” question to find “substantial similarity.”¹²⁷ In *McCulloch*, the court found that both parts of the test were satisfied and, thus, the two plates were substantially similar.¹²⁸

In affirming the holding of the lower court, the Ninth Circuit found that the lower court correctly applied the two-part extrinsic-intrinsic analysis to determine whether the plates were substantially similar.¹²⁹ The court noted that one of the co-designers of the original plate testified that “the idea behind the plate was to honor somebody at dinner if they had done something.”¹³⁰ While the court did not definitively conclude that this was the idea of the plate, it held that the district court found a similarity of ideas by noting “that Price, Inc.’s plate ‘is confusingly similar in appearance to Plaintiffs’ plate.’”¹³¹

The court next turned to the lower court’s determination of similarity of expression.¹³² The Ninth Circuit concluded that the lower court properly looked at the “total concept and feel” of the plates, including the fact that the wording was the same, to determine that the plates had a similarity of expression.¹³³

b. The Ninth Circuit’s Analysis Applied to the Newton Hypothetical

Using this analysis, it is probable that a court would find that the Newton sample and the Beastie Boys’ “Pass the Mic” are not substantially similar. This work passes the objective-extrinsic test of similarity of ideas. The musical notes of Newton’s composition and recording are the same as the Beastie Boys’ sample. Both also use the overblowing technique on the flute. In fact, the Beastie Boys

126. *See id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.* at 320 (quoting testimony of Lucyann Cameron).

131. *Id.* at 319 (quoting the district court’s findings of fact).

132. *See id.* at 320-21.

133. *Id.* at 321.

admitted, and the court found, that a direct copy existed.¹³⁴ However, the “total concept and feel” of the two works seemed very different,¹³⁵ which meant that the second prong of the test—the intrinsic-subjective test of similarity of expression—failed and the works were not “substantially similar.”

c. Problems with the “Total Concept and Feel” Test

This test does not translate well into the realm of music sampling. Often, samples are not meant to convey similarity of expression. The “total concept and feel” test is simplistic and an effective method of looking at the material, but it has received much criticism.¹³⁶ Still, Nimmer and Nimmer criticize this test for its inapplicability to more complex works, like computer code:

It may, conceivably, make sense to refer to the “total concept and feel” of a greeting card or game or anthropomorphic fantasy world; the words utterly lose their meaning, however, as applied to source or object code. The phrase is geared towards simplistic works that require only a highly “intrinsic” (i.e., unanalytical) evaluation; it serves no purpose in the realm of computers, where analytic dissection and expert testimony emphatically are needed.¹³⁷

The authors also suggest that this test “threatens to subvert the very essence of copyright.”¹³⁸ Copyright protects the expression, and not the concept or idea behind this expression.¹³⁹ This Note echoes this criticism as the “total concept and feel” test is applied to digital music sampling issues—the test does not achieve the goals of copyright law by separating the idea from the expression. The Nimmers’ criticism has deterred other courts from finding an infringement based on the “total concept and feel” of two works.¹⁴⁰

134. See *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1246-47 (C.D. Cal. 2002).

135. See *id.* at 1246.

136. See 4 NIMMER & NIMMER, *supra* note 25, § 13.03[A][1][c].

137. *Id.* (footnotes omitted).

138. *Id.*

139. *Id.*

140. *Id.*

Nimmer and Nimmer suggest that the courts should abandon this test altogether.¹⁴¹

3. Other Tests for *De Minimis* Use

Other tests have emerged in copyright litigation—often in specialty cases that do not lend themselves well to an established test, such as those involving computer software infringement.¹⁴² None of these other tests can be applied suitably to digital music sampling and copyright infringement and, therefore, should be ignored.

D. Problems with the Tests Currently Used by the Courts

The tests used by the courts, including the Second and Ninth Circuit tests, do not lend themselves well to digital sampling litigation because each looks at the entire work to find whether substantial similarity exists. Often, music sampling cases center not on whether the sample is similar to the previous work, but whether the sample is substantial as compared to the entire previous work.¹⁴³ This evaluation often merges with fair use analysis, which can cause confusion of the issue. In analyzing whether a “fragmented literal similarity” is substantially similar, the question in each case is “whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s”¹⁴⁴ earlier, copyrighted work—“not whether such material constitutes a substantial portion of defendant’s work.”¹⁴⁵

IV. HOW SHOULD COURTS LOOK AT DE MINIMIS USE?

The application of copyright law has lost sight of its original purpose. As discussed in Part II.B, the purpose of copyright law is

141. *Id.*

142. *See id.* § 13.03[A][1][d].

143. This phenomenon is called “fragmented literal similarity.” *Id.* § 13.03[A][2]. “This aspect of the substantial similarity test may be characterized as an inquiry as to whether the subject usage is substantial or *de minimis*.” *Id.* § 13.03[A][2] n.92.2.

144. *Id.* § 13.03[A][2].

145. *Id.*

"[t]o promote the Progress of Science."¹⁴⁶ To determine whether protection would further this interest, the courts must analyze whether the discouragement of progress from nonprotection outweighs the encouragement of having the work at issue free for use in the public domain.

A. The Costs of Copyright Protection

This balancing test weighs the costs of copyright protection against the deterring effects of nonprotection. Professor William M. Landes discusses these costs in his article, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*.¹⁴⁷ His article focuses on appropriation art—a form of art that this Note argues has many similar aspects to music sampling.¹⁴⁸ Appropriation art uses recognizable images—many of which copyrights protect—to create new works of art.¹⁴⁹ The manipulation of earlier expressions to form a new expression is a common bond between appropriation art and music sampling.

Landes groups the costs of copyright protection into two major categories: (1) access costs and (2) administrative and enforcement costs.¹⁵⁰ Access costs fall both on consumers and creators.¹⁵¹ The consumers feel the costs of copyright protection in the higher price that they must pay to gain access to the work.¹⁵² Because a work that is not protected can be duplicated at a lower price than the cost of creating a new work, copyright drives the price higher for consumers. "Access costs also fall on creators who are deterred from building upon prior works because they are unwilling to pay the price the copyright holder demands."¹⁵³ This access cost is contrary to the purpose of copyright law—it discourages creation that uses others' expression.

146. U.S. CONST. art. I, § 8, cl. 8; see *supra* Part II.B.

147. William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 6-7 (2000).

148. See *id.* at 1.

149. *Id.*

150. *Id.* at 6-7.

151. *Id.* at 6.

152. *Id.*

153. *Id.*

B. The Costs of Nonprotection

There is also an economic rationale for copyright protection. Nonprotection can deter creation because it offers no economic reward.¹⁵⁴ Thus, it is obvious that some level of copyright protection is needed to encourage the “Progress of Science.”¹⁵⁵

C. Using the De Minimis Use Doctrine To Promote the Purpose of Copyright Law

The tests that the courts currently employ do not further the goals of copyright law. If a music sample is so insignificant that it does not frustrate the purpose of copyright law, it should be found to be a de minimis infringement. In looking at copyright questions in music sampling, the courts should use an economics-based view, similar to Landes’ test for appropriations art,¹⁵⁶ to determine whether the sample frustrates the purpose of copyright law.

D. Proposed Test and the Newton Hypothetical

A court revisiting the Beastie Boys’ use of Newton’s work should ask a number of questions to determine whether the use of the sample frustrates the purpose of copyright law. When James Newton composed “Choir,” did he consider that an artist might use a six-second piece of the recording in a future work? Did the Beastie Boys’ use of Newton’s sample discourage or frustrate his efforts?¹⁵⁷ Does this use discourage other artists from composing?¹⁵⁸ If the copy does not discourage or frustrate the plaintiff’s efforts, if there is no

154. See *id.* at 5 (stating that, without copyright protection, “the party who expended the resources to create the work in the first place will be unable to recover his costs. Hence, the incentive to create new works will be significantly undermined without protection against unauthorized copying”).

155. See U.S. CONST. art. I, § 8, cl. 8.

156. See Landes, *supra* note 147, at 23-24.

157. These questions will suggest that Newton and similarly situated artists either expect or do not expect to receive compensation for this type of use. If, in creating his work, Newton intended it to be sampled by later artists, it would suggest that denying protection would frustrate the purpose of copyright law.

158. If denying protection would discourage others from creating, this would frustrate the purpose of copyright law.

direct negative effect on the plaintiff's work, and if this use does not discourage other artists from composition, the purpose of copyright law suggests that such a small sampling does not amount to a copyright violation—it should be considered *de minimis* use.

In *Newton v. Diamond*, such a determination would hinge on specific factors that are not in the record. Assuming, however, that Newton cannot show that he intended to profit from the sampled use of his work¹⁵⁹ and it cannot be shown that such a small sample discourages creation, the Beastie Boys' use of "Choir" is such an insignificant infringement that it qualifies as *de minimis* use.

E. Problems with this Economic Approach

Several arguments against this proposed test exist. First, as with the other tests, it can be argued that this test is too ambiguous and requires an *ad hoc* analysis. However, the economic focus of this test reduces these problems because it gives the proposed test a more objective basis. Second, this test ignores the inherent value of personal expression. Ignoring the intrinsic value of expression may deter creation that benefits the public. This Note suggests that such a phenomenon would manifest itself primarily as an economic factor. This assumption is imperfect, but it is more accurate than any of the other tests. Third, it may be argued that economic factors are inaccurate—that an artist may want to protect his expression so that it does not assist and promote a new expression that he finds distasteful. These problems must be considered when looking at this economics- and purpose-based test for *de minimis* use. Ultimately, the advantages of this test and its accordance with the foundation of copyright law outweigh these detriments.

CONCLUSION

The Court of Appeals for the Second Circuit began its opinion in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*¹⁶⁰ with the words "[t]hou shalt not steal."¹⁶¹ The unavoidable implication of this

159. Newton stated that, if asked, he would not have granted the Beastie Boys permission to sample "Choir." See Wiltz, *supra* note 3.

160. 780 F. Supp. 182 (S.D.N.Y. 1991).

161. *Id.* at 183 (citing *Exodus* 20:15).

statement is that an inherent proprietary interest exists in an original creation. However, artists expect this protection only because courts have granted this protection in the past—it is not constitutionally mandated, nor is it necessarily consistent with the Constitution's Copyright Clause.¹⁶² An interest in the original expression should exist only to the extent that it promotes creation that benefits the public. Courts should analyze whether a digital music sample inhibits the purpose of copyright law to determine whether the sampling passes a quantitative and qualitative threshold of *de minimis* use.¹⁶³ The tests the courts currently employ stray from the foundation of copyright law. Instituting a new test that looks to economic factors to determine the effect of the music sample would bridge this chasm. The benefits of having a defined, economics-based test supersede its disadvantages. Such a test would be helpful for courts determining questions of *de minimis* use, and would aid artists using samples of old recordings in their new works.

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162. U.S. CONST. art. I., § 8, cl. 8.

163. There is an argument that the *de minimis* use determination should be a completely quantitative standard. A quantitative definition, for example, may suggest that any sampling of more than five musical notes constitutes a copyright infringement. This approach completely ignores the significance of the originality of the sample, the use in the earlier work, the use in the later work, and many other qualitative factors. Courts have consistently looked at these qualitative factors to determine whether the use is *de minimis* and should continue to do so. *See, e.g., Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001) (holding that the small use of eyeglasses in a Gap advertisement constituted a copyright violation because the eyeglasses were very distinct).