Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?

INTRODUCTION

Def Jam recording artist 3rd Base were prophetic when they rapped,[1] "[Y]a boosted the record then ya looped it, ya looped it . . . now ya getting sued kinda stupid . . . ."[2] The lyrics refer to the practice of sampling, or more specifically, looping unauthorized samples.

Sampling is the process of digitally copying a portion of a pre-existing recording and inserting this "sample" into a new recording.[3] Music fans may recognize Jimmy Page's guitar riff[4] from Led Zeppelin's *Kashmir*[5] on Puff Daddy's 1998 single *Come With Me*.[6] Additionally, record producers commonly incorporate unrecognizable samples into their songs.[7] For instance, *Come with Me* also contains a four bar drum sample from Led Zeppelin's *When the Levee Breaks*.[8]

Sampling pre-existing recordings affords the record producer significant benefits.[9] A producer may reduce the costs associated with traditional recording

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1. DAVID PICKERING, CASSELL COMPANION TO 20TH CENTURY MUSIC 319 (1998). Rap music, a descendant of Reggae, is characterized by rapidly chanted, rhyming vocal lines and a hypnotic, repetitive beat. *Id.*

2. 3RD BASE, *Pop Goes the Weasel*, *on* DERELICTS OF DIALECT (Def Jam 1991).

3. *E.g.*, DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 306 (2000).

4. PICKERING, *supra* note 1, at 328. The definition of riff, possibly a shortening of refrain, is a particular musical phrase that repeats at regular intervals during a musical piece. *Id.* Rock music has since adopted the term riff in reference to fast guitar licks. *Id.*

5. LED ZEPPELIN, *Kashmir*, *on* PHYSICAL GRAFFITI (Swan Song 1975).

6. PUFF DADDY, *Come With Me*, *on* COME WITH ME (Bad Boy 1998).

7. *See* Markkus Rovito, *Bomb Tracks: A Hip-Hop How To*, REMIX, June 1, 2001, at 64-66. Rap producer E1-P, currently producing a record with the former Rage Against the Machine frontman, Zack de la Rocha, advises other producers to use their instincts and be smart when it comes to unearthing cool samples. *Id.* The consensus among other hip-hop producers is that you do not need to clear your samples as long as you choose obscure enough records or render samples unrecognizable. *Id.* Rap producer E1-P says, "I'm not digging through . . . Motown classics . . . when you're a producer and a record collector, you know what to stay away from . . . if I want to flip an Al Green record, I have to figure out how to catch it from a point where . . . [it] is unrecognizable or at a point where no one ever thought to catch it from and loop it at that spot." *Id.* DJ Spinna adds, "[a] lot of times the records I'm re-mixing are not super-commercial, and I can get away with it . . . for you to get sued these days, you've got to be on the radar screen. You've got to be charting on Billboard and after awhile people start to scope you. I'm still flying under the radar." *Id. But see* Greg Rule, *The Good the Bad and the Noisy*, KEYBOARD, May 1994, at 31. An interviewer asked Hip-hop pioneer Eric Sermon of EPMD fame about editing samples to make them "unrecognizable." Sermon responded, "I can't. That's not being true. I have to get that original effect on my record." *Id.* Unlike most artists or producers, Sermon calls the artist direct, gets permission for the use of the sample and does so without paperwork or the services of an attorney. *Id.*

8. LED ZEPPELIN, *When the Levee Breaks*, *on* LED ZEPPELIN IV (Atlantic 1971).

9. *E.g.*, Terry Fryer, *Sampling Jargon Illustrated*, KEYBOARD, June 1988, at 66-73. First, the cost barrier to enter into the audio production arena is low due to the influx of affordable digital recording

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when he uses samples because doing so minimizes the need to hire live musicians.[10] For all its benefits, however, sampling preexisting recordings without the permission of the composer[11] and record company[12] violates copyright law.[13]

The amount of appropriation required for actionable copying, however, is currently unascertainable.[14] Few unauthorized sampling lawsuits ever reach the trial level.[15] Settlements are common in sampling lawsuits primarily because case law offers sparse judicial guidance as to what constitutes an unlawful appropriation.[16] This circular problem results in scant case law.

The music industry is hopeful that a couple of sampling lawsuits pending in court will yield some insight into the unauthorized sampling issue.[17] In Nashville district court, Bridgeport Music filed a 1077-page complaint, on behalf of funk music legend George Clinton and others, alleging hundreds of instances of unauthorized sampling from record and publishing companies, artists, and others.[18] Additionally, in the Southern District of New York, rap artist Marlon Williams, professionally known as Marley Marl, filed a complaint against Calvin Broadus, professionally known as Snoop Dogg, alleging copyright infringement for sampling a portion of his song *The Symphony*.[19] These cases may serve as a benchmark for future sampling cases if the court renders a detailed judicial decision.

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equipment. *Id.* at 68. The combination of a microphone, digital audio equipment, consumer audio equipment and an album or compact disc collection are the only tools needed to produce commercial rap music. *See id.* at 66-73. Second, utilizing samples as the musical element of the song enables the producer to create commercial rap music without any original musical accompaniment prior to recording the vocals. *See id.* Third, using music samples saves a considerable amount of time when compared to the traditional recording methods because another artist already recorded the underlying music. *See id.* Last, sampling a recognizable hook from a previous hit song is a predicate for future success. *See id.*

10. *See id.*

11. 17 U.S.C. § 102(a)(2) (1994).

12. 17 U.S.C. § 102(a)(7).

13. 17 U.S.C. § 501(1994).

14. *See* 4 NIMMER ON COPYRIGHT § 13.03[A] (2001).

15. *See, e.g.*, Mary B. Percifull, *Digital Sampling: Creative or Just Plain "CHEEZ-OID?"* 42 CASE W. RES. L. REV. 1263, 1285 (1992).

16. *See, e.g.*, PASSMAN, *supra* note 3, at 306-07. In the early days of sampling, artists and record companies had the attitude of "[i]f they catch me, I'll make a deal." *Id.* If infringers were caught they would buy the rights from the record company and publisher who owned the infringed work. *Id.*

17. *See* Bridgeport Music, Inc., et al. v. 11C Music, et al., 154 F. Supp. 2d 1330 (M.D. Tenn. 2001); *see also* Richard Lawson, *Nashville Picked for Showdown on Royalties, Sampling by Rap Artists*, THE TENNESSEAN, May 11, 2001, at 1A.

18. *See Bridgeport Music*, 154 F. Supp. 2d at 1333. Defendants BMG and Bad Boy filed a motion to dismiss the plaintiff's state claim under the Tennessee Consumer Protection Act (TCPA) arguing the plaintiff lacked standing. *Id.* at 1331. The court denied the motion to dismiss the TCPA claim because according to the TCPA the plaintiff did not have to be a consumer and did not have to purchase the product. *Id.* at 1333. Defendants BMG and Bad Boy also filed a motion to dismiss the plaintiff's negligence claim arguing that the Copyright Act preempted the negligence claim. *Id.* at 1332. The court, finding preemption granted the defendants' motion to dismiss the negligence claim. *Id.* at 1334; *see also* Richard Lawson, *Nashville Picked for Showdown on Royalties, Sampling by Rap Artists*, THE TENNESSEAN, May 11, 2001, at 1A. Among the allegations in the complaint is the use of an unauthorized sample from George Clinton's song *Atomic Dog* in the soundtrack for the motion picture *Above the Rim*. *Id.* Westbound Records (a joined plaintiff) also alleges that the song *Wild Wild West*, from the movie of that same name, contained an unauthorized sample from the Digital Underground's song *The Humpty Dance*. *Id.* at 2.

19. *See* Williams v. Broadus, No. 99 CIV.10957 (MBM), 2001 WL 984714, at *1 (S.D.N.Y. Aug. 27, 2001); *see also* MARLEY MARL, *The Symphony*, on IN CONTROL VOLUME 1 (Cold Chillin' 1988).

The courts are unlikely to establish a standard for determining the threshold for unlawful appropriation.[20] Generally, the trier of fact determines whether the appropriation amounts to copyright infringement by applying various tests and theories.[21] The analysis becomes increasingly difficult, however, when the producer has looped the sample in question.[22] Does looping a de minimis sample change the unlawful appropriation analysis? This note will analyze the effectiveness of the de minimis defense when producers loop unauthorized samples.[23]

Part I of this note will define and explain the digital sampling process and summarize the historical background and popularization of digital sampling and rap music. Part II will summarize the applicable copyright laws associated with unauthorized sampling including the fair use defenses. Next, Part III will examine the de minimis rule as an affirmative defense to copyright infringement. Specifically, Part III will define the de minimis defense, apply the defense as it relates to looped samples, discuss sampling cases generally, and examine de minimis copyright cases by analogy. Lastly, Part IV will conclude that looped samples may not fall within the de minimis defense purview.

I. DIGITAL SAMPLING

A. Definition

Digital sampling involves the process of capturing periodic samples of changing analog audio waveforms and transforming them into binary code.[24] In effect, the digital recording device takes snapshots of the analog voltages along a continuous and fluctuating line, and then assigns a binary code representing the voltage level at that particular time.[25] The "sampling rate" represents the speed the sampling device captures the samples, or assigns binary numbers.[26] The higher the sampling rate, the greater the bandwidth and thus the better the quality of sound.[27]

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20. *See, e.g.*, 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03.

21. *See id.*

22. *See, e.g.*, Brett I. Kaplicer, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 231 (2000).

23. *See generally*, Fryer, *supra* note 9, at 66. An artist or producer searches for and finds a musical phrase to sample. *See id.* at 66-73. The artist or producer would then digitally copy and paste together the sample to repeat at designated times within the song. *See id.* If successful, the producer would seamlessly weave this "looped sample" into the song. *See id.* Often, the producer designs to loop samples, such as drum grooves, to repeat continuously throughout the song. *See id.* Occasionally, the producer samples vocal phrases or keyboard riffs and edits the samples to repeat at specific points in song such as the chorus section. *See id.*

24. DAVID M. HUBER & ROBERT E. RUNSTEIN, MODERN RECORDING TECHNIQUES 189-94 (1995). The sampling unit uses binary code to encode analog data. *Id.* at 189. Binary code is a computer language consisting of a series of 0s and 1s or off and on switches. *Id.* at 190. The code chains together a series of numbers to digitally represent the analog signal. *Id.* The digital sampling machine reconverts binary code back into an analog signal because the digital signal is unrecognizable to humans. *Id.* at 189. Converting the digital signal back into analog allows humans to recognize it as the original source. *Id.*

25. *E.g.*, Jim Aikin, *Digital Sampling Keyboards*, KEYBOARD, Dec. 1985, at 32.

26. *Id.* at 33.

27. *E.g.*, HUBER & RUNSTEIN, *supra* note 24, at 193.

B. History

In 1979, an Australian company introduced the first digital sampler to the audio production market.[28] Initially, producers used the digital sampler as an editing tool to save them time, money and resources.[29] As digital sampling technology progressed, other digital equipment manufacturers began to produce affordable sampling machines.[30] The low-cost sampling devices enabled professional keyboard players and home recording enthusiasts to incorporate digital sampling into their setups.[31] The popularity of home sampling increased subsequent to the development of rap music.[32]

Rap music got its start as early as 1973 when pioneer Bronx-style disc-jockeys (DJs) began to distinguish themselves from their disco counterparts by playing only the most percussive portions of a record, known as the break beat.[33] As the popularity of Bronx-style DJing increased, the DJs began to use members of their crew as "MCs" to provide vocal entertainment.[34] Using two turntables and a stereo mixer, the DJs would extend and combine the break beats into new creations that would last as long as they wanted.[35] Many DJs turned to audio production after finding music producers using the digital sampler to reproduce the DJs' live performance onto a recorded medium.[36] The record industry took notice of the rising popularity of the new musical style.

II. COPYRIGHT LAW

A. Overview

A copyright is a form of protection, codified by the Copyright Act of 1976 (Act), for authors of original works in literature, drama, music, visual arts and

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28. *See* Aiken, *supra* note 25, at 36. An Australian company manufactured the Fairlight. *Id.* The manufacturer, whose background was in telephone communications, introduced this high-end digital synthesizer with a sampling option for the hefty price of $29,000. *Id.* By 1981, a small U.S. manufacturer called E-mu, introduced an $8,000 digital sampler called Emulator. *Id.* at 37. By the mid 1980's, as many as a dozen manufacturers introduced digital samplers with various capabilities for prices ranging from $1,000 to $75,000. *Id.*; *see also* Tim Tully, *Simpler Samplers: Is It Live or is It MIDI Hex*, MACUSER, Oct. 1988, at 148, 149.

29. *See, e.g.*, TRICIA ROSE, BLACK NOISE 73 (1994). Initially, producers, engineers and composers used samplers as an editing short cut. *Id.* For example, "sometimes a horn section, a bass drum, or background vocals would be lifted from a recording easily and quickly, limiting the expense and effort to locate and compensate studio musicians." *Id.*

30. *E.g.*, Michael Marans, *Affordable Digital Recording*, KEYBOARD, July 1992, at 68.

31. *Id.*

32. *See* NELSON GEORGE, HIP HOP AMERICA 92 (1998).

33. REEBEE GAROFALO, ROCKIN' OUT 409 (1997).

34. *Id.* at 410. The MC, or Master of Ceremony, introduced the DJ. MCs began to develop their own style, which eventually became known as "rapping." *Id.* By the late 1970's rap groups such as the Furious Five, The Treacherous Three, Jazzy Five and Soulsonic Force had begun to surpass the DJs in cultural importance. *Id.* Prior to the first two commercially recorded rap songs by the Fatback Band and the Sugar Hill Gang, many artists independently distributed their recordings on homemade cassettes. *Id.* at 411. The cultural development of rap music lead to the idea that artists could record their own music without the financial backing of a major label. *Id.* This movement propelled the use of a digital sampler in home recording studios. *See id.*

35. *See* Mtume ya Salaam, *The Aesthetics of Rap*, 29 AFRICAN AMERICAN REVIEW 303 (1995).

36. *See id.*

other creative arts subjects.[37] The Act grants the copyright owner a bundle of exclusive rights.[38] An author automatically attains copyright protection the moment he affixes his work in a tangible medium for the first time.[39]

The legislature enacted these exclusive rights with the intent to motivate authors to create original works by providing them with economic protection.[40] The Act limits these exclusive rights, however, by setting the duration of exclusivity and by establishing the doctrine of fair use.[41] The Act protects a very broad range of creative works and addresses a multitude of copyright issues that are beyond the scope of this note.[42]

B. Music Sampling Protection

Unlike many other copyrighted works, the Act affords musical recordings two separate copyright protections.[43] The first copyright protects the composition itself, including the lyrics and music notation affixed in written form.[44] The second copyright protects the actual sound recording, which is the sound that is affixed in a tangible medium, such as a compact disc.[45] Unauthorized sampling impacts each copyright.[46]

A copyright infringement allegation requires the analysis of three elements.[47] The three elements are proof of ownership, proof of copying and unlawful appropriation.[48] In many unauthorized sampling cases, it may be difficult to

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37. 17 U.S.C. § 106 (1994).

38. *See* 17 U.S.C. § 106.

> The owner of a sound recording copyright has the exclusive right to 1) reproduce the copyrighted work in copies or phonographs, 2) prepare derivative works based on copyrighted works, 3) distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

Id.; *see also* 17 U.S.C. § 101 (1994). The Act defines a derivative work as "a work based upon one or more preexisting works, such as a . . . musical arrangement or . . . sound recording . . . or any other form in which a work may be recast, transformed, or adapted. *Id.*

39. 17 U.S.C. § 102(a) (1994). The Act protects "original works of authorship fixed in any tangible medium of expression [such as] . . . musical works, including any accompanying words and . . . sound recordings." *Id.*

40. *See, e.g.*, Perry Z. Binder, J.D., *Proof of Music Sampling in Copyright Infringement*, 26 AM. JUR. *Proof of Facts* 3d § 537 (1994).

41. *See* 17 U.S.C. § 302(a) (1994) "Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death." *Id.;* 17 U.S.C. § 303(a).

> Works created but not published or copyrighted before January 1, 1978 (a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

Id.; *see also* A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 140-41 (1993).

42. *See* 17 U.S.C. § 101 (1994).

43. *See* 17 U.S.C. § 102(a)(2)-(a)(7) (1994).

44. 17 U.S.C. § 102(a)(2).

45. 17 U.S.C. § 102(a)(7).

46. *E.g.*, Margaret E. Watson, *Unauthorized Digital Sampling in Musical Parody: A Haven in the Fair Use Doctrine*, 21 W. NEW ENG. L. REV. 469, 473 (1999).

47. *See* 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.01.

48. *See id.* The first element requires the plaintiff to prove that he owned a valid copyright of the work whether it was the composition or the sound recording. *Id.* The second element requires the plaintiff to prove that the defendant had access to the recording and had copied the recording without authority. *Id*. Once the

prove copying if the musical sample is not a melodic, or an easily identifiable, musical phrase.[49] Frequently, producers compound this problem when they alter the sample by changing the pitch or tempo, or alter it by other electronic means.[50] Proof of copying may serve as the most difficult barrier in establishing a valid copyright infringement lawsuit.[51]

Once the court establishes ownership and copying, it applies an unlawful appropriation analysis.[52] The trier of fact determines whether a substantial similarity exists between the original and infringed work that exceeds the threshold for an unlawful appropriation.[53] The difficulty, however, is that no bright line rules exist to indicate the threshold level.[54]

C. Fair Use Defense

Exceptions exist to the exclusive rights granted to copyright owners.[55] The fair use doctrine allows someone other than the copyright owner to use the copyrighted work in a reasonable manner without permission.[56]

The court will consider four non-exclusive factors when determining whether the fair use doctrine protects copyright infringement.[57] The court examines such factors as the alleged infringer's purpose and character for the use,[58] the nature of the use,[59] the substantiality of the portion used,[60] and the impact of the use on the potential market for the copyrighted work.[61] The

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plaintiff satisfies the first two elements, the third element requires the plaintiff to prove that the infringed work is substantially similar to the original work. *Id.* A violation occurs when a plaintiff satisfies all three elements. *Id.*

49. *See* Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y. L.J., May 22, 1992 at 5.

50. *See id.*

51. *See id.*

52. *See* Jarvis v. A&M Records, 827 F. Supp. 282, 288 (D.N.J. 1993). The copyright owner may prove infringement by showing "that he or she owns a valid copyright, that the defendant[] copied a protectable expression, and that the copying is substantial enough to constitute improper appropriation of plaintiff's work." *Id.* (*citing* Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975)); *accord* Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139-40 (2d Cir. 1992). *But see* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (indicating the plaintiff's valid copyright ownership was the only remaining issue after defendant admitted copying); *see also* Ford Motor Co. v. Summit Products, Inc., 930 F.2d 277, 290 (3d Cir. 1991) (stating that to prove copyright infringement, the plaintiff needs to only prove a valid copyright ownership and unauthorized copying by the defendant). This holding implies that the court applies the substantial similarity test only in instances where direct evidence is unavailable to determine whether an unlawful appropriation existed. *Id.*

53. *See, e.g.*, 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03.

54. *See* Rebecca Morris, *When Is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 274 (2000) (determining whether a sampled song is "substantially similar to a previous work is a fact-intensive, and often an extremely subjective endeavor").

55. 17 U.S.C. § 107 (1994).

56. *See id.*

57. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574 (1994). The statutory text "provide[s] only [a] general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another." *Id.* at 577-78.

58. *Id.* at 577 (including inquiry into whether the use is of a commercial nature or of nonprofit educational purposes and whether it supersedes the object of the original); *see also* Johnson, *supra* note 41, at 144.

59. *See, e.g.*, *Campbell*, 510 U.S. at 586 (considering the "value of the materials used"); *see also* Johnson, *supra* note 41, at 149.

60. *See, e.g.*, *Campbell*, 510 U.S. at 586 (assessing the justification for the particular amount of copying); *see also* Johnson, *supra* note 41, at 151.

61. *See, e.g.*, *Campbell*, 510 U.S. at 590 (determining whether the defendant's copying would adversely

application of the fair use doctrine arises when considering sampling issues.[62] The de minimis doctrine is a relevant consideration along with a fair use defense.[63]

III. DE MINIMIS

A. Definitions

The legal maxim "*de minimis non curat lex*" or "the law does not concern itself with trifles" is as applicable in the context of copyright laws as it is in other legal contexts.[64] For copyright law purposes, de minimis refers to actual copying that is so trivial that it falls below the required element of substantial similarity.[65]

The court may implement the "ordinary observer" test to determine if two works are substantially similar.[66] Substantial similarity exists when an ordinary listener finds the aesthetic appeal of the two works as the same.[67] Applying this test, the court instructs the trier of fact to listen to the two works in an ordinary manner without trying to detect the disparities between the two works.[68] In essence, the test determines whether the listener would be disposed to overlook any disparities.[69]

Substantial similarity between a plaintiff's work and the defendant's work is a necessary element for actionable copying.[70] To determine the genus of similarity, courts differentiate between the terms "comprehensive non-literal similarity" and "fragmented literal similarity."[71]

Fragmented literal similarity occurs when the infringed work incorporates the literal copying of a portion of an original work.[72] Comprehensive non-literal similarity occurs when the infringing work incorporates the overall theme of the original work but there is no literal copying.[73] Fragmented literal similarity

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impact the potential market for the plaintiff's original work); *see also* Johnson, *supra* note 41, at 154.

62. *E.g.*, Watson, *supra* note 46, at 509.

63. *See, e.g.*, Kaplicer, *supra* note 22, at 246.

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

65. *Id.*

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

67. *See id.*

68. *Id.*

69. *Id.*

70. *See Ringgold*, 126 F.3d at 75 *(*stating that some courts misinterpret substantial similarity). A court may appropriately use the term substantial similarity to determine actionable copying as a legal proposition. *Id.* Alternatively, the term probative similarity is more appropriate when attempting to prove copying as a factual proposition. *Id.*; *see also* Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1204 (1990). *But see Grand Upright Music Ltd.*, 780 F. Supp. at 183 (holding that once the defendant admitted copying the plaintiff's work, the only other factor was proof of ownership).

71. *See e.g.*, 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03. The court may use the concept of comprehensive non-literal similarity when there is a comprehensive similarity between the two works but no literal similarity. *Id.* This concept is applicable to cases where the infringer makes minor variations to a work to avoid the literal similarity standard. *Id.* The concept of fragmented literal similarity is appropriate when literal similarity between the two works exists. *Id.*

72. *See* 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.02[A][1].

73. *See id.*

is particularly applicable to sampling cases because digital sampling is the literal copying of another work.[74]

Finding fragmented literal similarity, however, is distinct from finding substantial similarity.[75] For example, courts have generally recognized that sampling a single note cannot rise to the level of substantial similarity; yet fragmented literal similarity exists.[76] Applying the fragmented literal similarity test, the trier of fact determines whether the alleged infringement constitutes substantial similarity.[77] The trier of fact may apply a quantitative and qualitative analysis.[78]

The quantitative analysis includes inquiry into the amount of the appropriation taken from the original work.[79] Conversely, a qualitative analysis may include inquiry into the peculiarity of the appropriation taken from the original work or inquiry into the alleged infringer's purpose for choosing that particular work.[80]

The courts have not judicially ascertained the requisite quantitative and or qualitative threshold to determine whether the unauthorized use rises to the level of an unlawful appropriation.[81] If the trier of fact determines that the level of unauthorized use does not rise above the threshold of substantial similarity, then the trier should find the unauthorized use to be de minimis.[82]

B. Issue

If the court finds the unauthorized sample to be the "heart of the work," the quantitative and qualitative analysis may be moot.[83] Problems arise when the appropriation is quantitatively small and not the heart of the work.[84] A

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74. *See* 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03[A][2]. The concept of fragmented literal similarity is appropriate when virtual similarity between the two works exists; though it is not necessary that the similarity be comprehensive. *Id*. Thus, the fragmented literal similarity is appropriate in sampling cases. *See id.*

75. *See id.*

76. See 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03[A][2] (*quoting* McDonald v. Multimedia Enter. Inc., 20 U.S.P.Q.2d 1372 (S.D.N.Y. 1991) ("[I]t could be safely said that a similarity limited to a single note never suffices . . . .")).

77. *See id.*

78. *See id.* The trier of fact must balance a number factors when applying the quantitative and qualitative analysis. *Id.* For example, an important factor may be to quantify the portion of the plaintiff's work taken and determine whether it constitutes a substantial portion of the defendant's work. *Id.* Alternatively, if the portion taken was quantitatively small, the trier of facts may still find a substantial similarity if the portion taken was qualitatively important. *Id.*

79. *See* Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 569 (1985) (holding that a 2250 word article copying 300 words from a 200,000 word book was not de minimis and too great to justify fair use defense). *But see* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 267 (5th Cir. 1988) (holding that 30 characters copied out of 50 pages of source code was de minimis).

80. *See* Roy Export Company Establishment of Vaduz, Liechtenstein, Et al. v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1106 (2d Cir. 1982) (suggesting that a network's quantitative taking of a small portion of copyrighted Charlie Chaplin films was qualitatively great and therefore infringing). *But see* Sandoval v. New Line Cinema, 147 F.3d 215, 218 (2d Cir. 1998) (finding photographs appearing in film were not displayed with sufficient detail for the average lay person to discern the subject matter).

81. *See* Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d Cir. 1930) (stating that whenever the line for substantial similarity boundaries is drawn it will seem arbitrary); *see also* Peter Pan Fabrics, 274 F.2d at 489 (stating the test to determine substantial similarity in copyright infringement cases "is of necessity, vague").

82. *See Ringgold*, 126 F.3d at 74.

83. *See Harper & Row*, 471 U.S. at 564-65 (copying small portions of copyrighted works may exceed the boundaries of fair use if it is the "heart" of the work).

84. *See* David S. Bloch, *"Give the Drummer Some!" On the Need for Enhanced Protection of Drum*

quantitatively small appropriation may range from one single note to two measures.[85] While no judicial guidelines exist to determine the percentage needed to satisfy the threshold requirement, a few copyright infringement cases address the scope of inquiry.[86]

Placing more importance on a melodic phrase than a rhythmic phrase often muddles the qualitative analysis.[87] Commentators have suggested that a simple one-measure drum groove is innocuous enough for the trier of fact to deem it de minimis, whereas a one-measure keyboard riff would have to overcome the substantial similarity analysis.[88] This conclusion has some merit, however, because the trier of fact would presumably place more importance on a melodic phrase than a rhythmic phrase.[89] This assessment, however, demands a deeper level of analysis.

The traditional application of the substantial similarity test compares the amount taken to the entire original work.[90] This analysis undermines instances when a producer loops a de minimis sample.[91] Unlike melodic samples, which producers often loop to repeat at designated points in a song, producers routinely loop drum samples to repeat throughout the entire song.[92]

Typically, when a producer or artist samples a drum groove, the amount appropriated is approximately three-seconds out of a three-minute song.[93] The producer loops the three-second drum groove to repeat throughout the infringed work.[94] If the analysis focuses on the amount appropriated from the original work, the trier of fact would never deem drum groove samples to be infringements because, quantitatively, three seconds out of a three minute song is most likely de minimis.[95] Courts have not adequately addressed the issue of looped samples, especially non-melodic samples, in unauthorized sampling cases.[96]

C. Sampling Cases

Most parties settle unauthorized sampling cases out of court.[97] In the first sampling trial, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*,[98] rap

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Beats, 14 U. MIAMI ENT. & SPORTS L. REV. 187, 189 (1997).

85. *See* 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03.

86. *See Nichols*, 45 F.2d at 121.

87. *See* Bloch, *supra* note 84, at 196, 217.

88. *See id.; see also* Kaplicer, *supra* note 22, at 231.

89. *See* 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03[E][2]. The trier of fact is not to examine "hypercritically or with meticulous scrutiny," but is to determine similarity solely on the basis on his or her "net impression," ignoring any particular impressions of similarity found by dissecting and examining elements of the two works. *Id.* (*quoting* Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1994) and Solomon v. RKO Radio Pictures, 44 F. Supp. 780, 782 (S.D.N.Y. 1942)).

90. *See, e.g.*, Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277 (1993).

91. *See* Finell, *supra* note 49, at 5 (noting that rap music often contains repeated short musical phrases resulting in a proportionately greater significance on the infringing work).

92. *See* Fryer, *supra* note 9, at 68, 73; *see also* Kaplicer, *supra* note 22, at 253.

93. *E.g.*, Rovito, *supra* note 7, at 65.

94. *See generally* Finell, *supra* note 49, at 5.

95. *See id.*

96. *See, e.g.*, Kaplicer, *supra* note 22, at 231.

97. *See* Morris, *supra* note 54, at 274.

The current lack of bright-line rules leads to unpredictability, which may be one reason that so

artist Biz Markie admitted that he sampled three words and a portion of music from the song *Alone Again (Naturally)* composed by Gilbert O'Sullivan.[99] The court failed to offer an analysis of the sampling issue and possible fair use or de minimis defense. Instead, the court held that Biz Markie's admission of unauthorized sampling, accompanied by O'Sullivan's valid copyright claim, constituted per se copyright infringement.[100]

The *Grand Upright* decision completely bypassed the substantial similarity analysis thus providing little guidance to ascertain the quantitative and qualitative threshold level for future sampling cases.[101] If interpreted literally, this decision indicates that once the plaintiff proves copyright ownership and unauthorized sampling, the result is per se infringement.[102] Consequently, under the holding in *Grand Upright*, no amount of appropriation is too small and the de minimis defense seems to be unavailable.[103]

Jarvis v. A&M Records[104] provides more insight into the sampling issue.[105] In *Jarvis*, defendants Clivilles and Cole wrote and recorded a song entitled *Get Dumb! (Free Your Body)* which contained the vocal sample, "ooh . . . move . . . free your body" and distinctive keyboard riffs, sampled from Jarvis' recording of the song, *The Music's Got Me*.[106] The court reiterated that the applicable test to determine substantial similarity is in response to the lay person.[107]

The court held that the standard for fragmented literal similarity, for unquestionable copying, is not the confusion that exists between the two works but rather an inquiry into the qualitative and quantitative analysis.[108] The court held that because it was unclear, as a matter of law, whether the samples taken were insignificant to Jarvis's song, the resolution of the question involved fact-

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> few sampling cases are brought to trial . . . . A cost-benefit analysis generally indicates that it is less expensive for a sampler to purchase a license before sampling (or settle a post-sampling lawsuit) rather than take his chances in an expensive trial, the outcome of which, at least regarding the substantial similarity factor, is nearly impossible to predict with any degree of certainty.

Id.

98. 780 F. Supp. 182 (S.D.N.Y. 1991).

99. *Id.* at 185 (holding that proof of copyright ownership and proof of copying constitutes copyright infringement).

100. *See id.*; *see also* Morris, *supra* note 54, at 265.

101. *See, e.g.*, Susan Upton Douglass & Craig S. Mende, *Deconstructing Music Sampling; Questions Arise as Practice Becomes Increasingly Common*, N.Y. L.J., Nov. 3, 1997, at S3.

102. *See, e.g.*, Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal For Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1670 (1999).

103. *See* Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation In the Limelight*, N.Y. L.J., Mar. 16, 1992, at 1; *see also* Stan Soocher, *Sampling Ruling Leaves Questions; Between Rap and a Hard Place*, ENT. L. & FIN., Jan. 1992, at 7. "This isn't the seminal case everyone wanted. That is, how much of a sample can you use before you must ask for permission?" *Id.* (*quoting* Stewart Levy, an attorney with the New York law firm, Eisenberg Tanchum & Levy).

104. 827 F. Supp. 282 (D.N.J. 1993).

105. *Id.* at 286.

106. *Id.* at 289. The bridge section of *The Music's Got Me* contained the vocal samples. *Id.* The producer sampled the keyboard riff, which contained chords and melody, from the last several minutes of *The Music's Got Me*. *Id.*

107. *Id.* at 290. "[I]t is repeatedly said that the test to determine substantial similarity is the response of the ordinary lay person." *Id.* (*citing* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)).

108. *See Jarvis*, 827 F. Supp. at 290 (stating that the standard of infringement for fragmented literal similarity cases is not the confusion between the two works). Rap songs would be immune from infringement if the artist samples music from a pop or easy listening song. *See id.*

finding.[109] Subsequently, the court denied A&M Record's motion for summary judgment.[110]

The Supreme Court addressed an unauthorized sampling issue in *Campbell v. Acuff-Rose Music, Inc.*[111] The decision provides ample discussion on the issue of fair use, particularly parody, but provides very little analysis into the amount of sampling required for a copyright infringement.[112]

Recent sampling decisions may yield a glimpse into the future of sampling.[113] In *Tuff 'N' Rumble Management, Inc. v. Profile Records*,[114] Tuff alleged that Profile recording artists, Run DMC and Dana Dane, sampled a drum groove from a Honey Drippers' song.[115] The court held that Tuff was unable to establish a valid copyright ownership or demonstrate actual copying by the Profile artists.[116]

The court, however, hypothesized that even if Tuff established copyright ownership and proved copying, Tuff would be unable to overcome the substantial similarity threshold into actionable copying.[117] This dicta suggests that a drum sample does not rise to the level of substantial similarity and would constitute a de minimis appropriation.[118] Although the decision does not indicate whether Run DMC looped the drum sample in question, it may be reasonable to infer that they did.[119]

The *Williams* sampling lawsuit, alluded to in the introduction, has already provided an interesting analysis that may bring clarity to the unlawful appropriation discussion.[120] In *Williams*, the defendant filed a motion for partial summary judgment arguing that the plaintiff did not own a valid copyright.[121] The defendant filed the motion because the plaintiff did not originally record the portion of the song the defendant admittedly sampled.[122]

Coincidentally, the plaintiff had sampled a portion of the Otis Redding song, *Hard To Handle*,[123] and inserted the sample into specific sections of *The Symphony*.[124] The court found that a genuine issue of material fact existed as to whether the plaintiff owned a valid copyright.[125] In essence, the amount the plaintiff sampled may not have overcome the threshold for an unlawful

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109. *Id.*
110. *Id.*
111. 510 U.S. 569 (1994).
112. *See id.*
113. *See* Kaplicer, *supra* note 22, at 244.
114. No. 95 CIV.0246 (SHS), 1997 WL 158364 (S.D.N.Y. April 2, 1997).
115. *Id.* at *1 (stating that Tuff alleges that they own the copyright for the sound recording of the Honey Drippers song).
116. *Id.* at *3 (finding that Tuff cannot explain why the copyright notice on the single lists a different copyright owner). The alleged infringing songs were not "strikingly similar" to the original song. *See id.*
117. *Id.* at *4 (suggesting that on a motion for summary judgment, as a matter of law, the court would not find substantial similarity).
118. *See, e.g.*, Douglass, *supra* note 101, at S3.
119. *See, e.g.*, *id.*
120. *See* Williams v. Broadus, No. 99 CIV.10957 (MBM), 2001 WL 984714, at *1 (S.D.N.Y. Aug. 27, 2001).
121. *Id.*
122. *Id.*
123. OTIS REDDING, *Hard To Handle*, on IMMORTAL (Atlantic 1968).
124. *See* Williams v. Broadus, No. 99 CIV.10957 (MBM), 2001 WL 984714, at *2 (S.D.N.Y. Aug. 27, 2001).
125. *See id.* at *5.

appropriation.[126] Thus, the court denied the defendant's motion for a partial summary judgment.[127]

The court, however, found undisputed evidence of copying.[128] The plaintiff had sampled a five note ascending phrase and a five note descending phrase from the opening measures of *Hard to Handle*.[129] The court reiterated the significance of focusing on the appropriation from the original work rather than its placement in the infringed work.[130]

The court's analysis establishes an opposing view from the "per se infringement" decision in *Grand Upright*.[131] The *Williams* court acknowledged unauthorized copying but held that the trier of fact shall still apply a substantially similar analysis to determine if the appropriation amounts to actionable copying.[132] Interestingly, the plaintiff has yet to argue his case against the defendant.[133] If the case proceeds to trial, it appears that the court is eager to address the unlawful appropriation and looping issues.[134]

D. De minimis by Analogy

A combination of two Second Circuit decisions may yield some insight into the de minimis defense for music sampling.[135] In *Ringgold v. B.E.T.*,[136] the television series ROC displayed a poster created by Ringgold as a set decoration in a particular episode.[137] The show displayed a portion of the poster nine times with an aggregate duration of approximately twenty-seven seconds.[138] The court held that both quantitatively and qualitatively the appropriation was not de minimis.[139]

Applying the *Ringgold* qualitative analysis, it appears that every instance of sampling would satisfy the threshold requirement for the qualitative component of substantial similarity.[140] The *Ringgold* court called it disingenuous for the infringer, who evidently thought that Ringgold's poster was appropriate for the scenes in question, to contend that no visually significant aspect of the poster was discernible.[141] Similarly, it would be disingenuous for a music producer to

126. *See id.*
127. *Id.* at *6.
128. *See id.* at *4.
129. Williams v. Broadus, No. 99 CIV.10957 (MBM), 2001 WL 984714, at *4 (S.D.N.Y. Aug. 27, 2001).
130. *See id.*
131. *See id. But see Grand Upright Music*, 780 F. Supp. at 183.
132. *See Williams*, 2001 WL 984714, at *4.
133. *See id.* at *2.
134. *See id.* at *5.
135. *See* Kaplicer, *supra* note 22, at 228.
136. 126 F.3d 70 (2d Cir. 1997).
137. *Id.* at 72.
138. *Id.* at 73, 76. In the nine sequences the poster, or portion thereof, was visible from between 1.86 to 4.16 seconds. *Id.* at 76. In the four second segment, as much as eighty percent of the poster was visible. *Id.*
139. *Id.* at 77 (holding that from a "quantitative assessment of the segments" the longer segments coupled with the shorter segments are not de minimis copying). The court found that from a "qualitative sufficiency" analysis, the production staff purposely selected the poster for its thematic relevance and that the poster's theme was discernible to the show's viewers. *See id.*
140. *See, e.g.*, Rovito, *supra* note 7, at 66 (stating that rap artists and producers meticulously listen to records to find a particular sample).
141. *See Ringgold*, 126 F.3d at 77.

contend that no audibly significant aspect of the sound was discernible after listening through hundreds of songs for that perfect sound.[142]

The application of the *Ringgold* quantitative analysis departs from the traditional analysis of solely determining the quantity taken from the original work.[143] The court introduced an observability analysis.[144] This analysis, or test, measures both the amount of time the copyrighted work appears in the allegedly infringing work and its prominence in that work.[145] This judicial reasoning provides a better test for analyzing looped samples because the amount appropriated from the original work may be significantly different from the amount contained in the infringed work.[146] Under the observability test, a looped drum groove sample would receive more quantitative importance than a non-looped drum sample.[147]

In *Sandoval v. New Line Cinema*,[148] artist Sandoval alleged that New Line Cinema's theatrical release of *Seven* infringed his copyrighted work when his photographs appeared in a movie scene without his permission.[149] The court reiterated the de minimis analysis in *Ringgold*, but held as a matter of law, that the use of the photographs was de minimis because the photographs were not quantitatively observable.[150] Courts continue to apply the *Ringgold* de minimis analysis.

In a recent case, *On Davis v. The Gap*,[151] an eyeglass manufacturer brought a copyright infringement action against a retailer for using its copyrighted eyeglass wear in a photograph for an advertisement.[152] Due in part to the advertisement's focus on the eyeglass wear, the court rejected the Gap's argument that the advertisement depicting persons wearing Davis's design was trivial or de minimis.[153] The court reiterated, however, that the de minimis defense is important for everyday instances of trivial copying.[154]

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142. *See, e.g.*, Rovito, *supra* note 7, at 64-66.

143. *See* 4 NIMMER ON COPYRIGHT, *supra* note 14, at § 13.03[2] (*citing* Worth v. Selchow & Righter Co., 827 F.2d 569, 570 (9th Cir. 1987) (stating the question is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work)). *But see* Turner v. Century House Publ'g Co., 290 N.Y.S.2d 637, 646 (N.Y. Sup. Ct. 1968) (holding that the copied material was a substantial part of the plaintiff's work but finding for the defendant because it was not a substantial part of the defendant's book).

144. *See Ringgold*, 126 F.3d at 76; *see also Sandoval*, 147 F.3d at 217 (applying *Ringgold*, the court noted that "observability is determined by the length of time the copyrighted work appears in the allegedly infringing work"). The court noted one factor was its prominence in that work as revealed by the lighting and positioning of the copyrighted work. *See id.*

145. *Id.*

146. *See, e.g.*, Finell, *supra* note 49, at 5.

147. *See id.*; *see also* Kaplicer, *supra* note 22, at 253.

148. 147 F.3d 215 (2d Cir. 1998).

149. *Id.* at 216.

150. *Id.* at 218 (holding that unlike Ringgold's poster, the subject matter of Sandoval's photographs were not identifiable to the average lay person).

151. 246 F.3d 152 (2d Cir. 2001).

152. *Id.* at 156.

153. *See id.* at 173 (indicating the choice of the "bizarre" eyeglass design with models otherwise exclusively wearing Gap merchandise, concludes non de minimis use).

154. *Id.* (giving examples of everyday life occurrences that are instances of de minimis or trivial copying). Instances such as, "[A] photocopy of a letter from a friend to show another, or of a favorite cartoon to post of the refrigerator . . . record television programs aired while we are out . . . [w]aiters at a restaurant sing 'Happy Birthday' . . ." are so trivial, that the copier is not breaking the law. *Id.* The court states that if copyright owners sue for trivial copying, the judgment would be for the defendant. *Id.*

A final analogous case that addressed the de minimis defense is *Prima v. Darden Restaurants*.[155] In Prima, the widow of swing singer Louis Prima sued Darden Restaurants for imitating Prima's vocal styling in his version of the song *Oh Marie* in an Olive Garden commercial.[156] The court found Darden's de minimis defense argument unpersuasive due to the continuous background playing of *Oh Marie* throughout the commercial.[157]

The court found that in other de minimis cases, the copyrighted material appeared briefly within the context of the larger work.[158] By analogizing to *Ringgold*, the *Prima* court seemed to suggest that the thematic choice of the song was a compelling reason to reject the argument that the song was not discernible.[159] This line of reasoning is parallel with a looped sample analogy because listeners hear a looped drum sample continuously throughout the song.[160] The producer chooses a drum sample for its rhythmic and production quality just as Olive Garden chose *Oh Marie* for its thematic relevance.[161]

IV. CONCLUSION

If the *Bridgeport Music* or *Williams* lawsuits ever reach trial stage, the court may resolve many of these issues. Applying the principles set forth in *Ringgold* and *Prima*, the court may find that a looped sample is not de minimis due to its quantitative observability.

This departure from the traditional substantial similarity analysis directly impacts the use of samples. Under the traditional approach, an artist may record an entire compact disc worth of de minimis samples and then loop the de minimis samples so that they become quantitatively paramount in the infringed work. The artist may then avail herself of the de minimis defense because the amount of copying from the original work was de minimis.

To illustrate, it's arguable whether sampling twenty seconds from Rachmaninoff's Second Piano Concerto[162] would constitute an unlawful appropriation. Sampling twenty seconds from a thirty-two minute musical piece is presumably de minimis. Under the traditional substantial similarity analysis, sampling twenty seconds and looping it to continuously repeat would not change the de minimis analysis. Accordingly, the trier of fact must still focus on the appropriation taken from the original work rather than its

155. 78 F. Supp. 2d 337 (D.N.J. 2000).

156. *Id.* at 340. Darden Restaurants is the parent company for Olive Garden Restaurants. *Id.* Prima popularized *Oh Marie* with his own arrangement of the song. *Id.* It was Prima's musical arrangement and vocal style that was copied in the television commercial. *Id.* at 341. Prima owned a copyright for his musical arrangement. *Id.* at 340. The infringement was not a sample from a sound recording of the song but rather an unauthorized use of Prima's copyrighted arrangement and signature vocals. *See id.* at 340-41.

157. *See id.* at 351 (applying the *Ringgold's* de minimis analysis under which a trivial or technical violation of the law will not give rise to a cause of action).

158. *Id.* (*citing* Higgins v. Detroit Educ. Television Found., 4 F. Supp. 2d 701, 707 (E.D. Mich. 1998) (finding copyrighted song audible for twenty seconds of a five-minute scene)); *Id.* (*citing Sandoval*, 147 F.3d at 216) (holding copyrighted photographs visible for 35.6 seconds in the background of a full-length feature).

159. *See id.* (applying a quantitative analysis concluding that the continuous playing of the song throughout the commercial is not de minimis). The court concluded that Darden qualitatively chose *Oh Marie* for its thematic relevance because of the song's association with people of Italian heritage. *See id.*

160. *See, e.g.*, Fryer, *supra* note 9, at 73.

161. *See Prima*, 78 F. Supp. 2d at 351.

162. ABBEY SIMON AND THE SAINT LOUIS SYMPHONY ORCHESTRA, *Piano Concerto No. 2 in C Minor*, on RACHMANINOFF, COMPLETE WORKS FOR PIANO & ORCHESTRA (VoxBox 1990).

placement in the infringing work. Unless the sample was qualitatively paramount in the original work, the infringer may effectively embrace the de minimis defense even if the instrumentation in his work does not contain newly recorded music.

Under the reinterpreted substantial similarity holdings, the *Ringgold* and *Prima* courts do not abandon the traditional analysis but rather expand it to include a modern analytical approach. Thus, the trier of fact should assess two approaches when analyzing a de minimis defense in unauthorized sampling cases. The trier should assess both the quantitative and qualitative appropriation from the copyrighted work, along with the observability of the appropriation within the alleged infringed work.

While the *Ringgold* and *Prima* holdings primarily focus on the amount appropriated from the original work, the analysis did not undermine the quantitative and qualitative observability in the infringing work. Looping a de minimis sample to repeat throughout the song impacts the quantitative observability analysis. If the *Bridgeport Music* and *Williams* courts follow the logical progression set forth by *Ringgold* and *Prima*, the de minimis defense may be unavailable in cases when the producer/artist looped the sample in question.

Sampling litigation will escalate if the court finds that looping a seemingly de minimis sample rises to the level of actionable copying. The record industry will have to take an active role in assuring that artists clear every sample. Simple indemnity clauses do not adequately protect record companies from sampling lawsuits. Demanding that the producer and artist identify "every" sound source on a recording may be a step in the right direction. Without identification, the record industry runs the risk that the once unknown looped kick drum sample becomes identifiable by the original artist.

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