RAP MUSIC AND DE MINIMIS COPYING: APPLYING THE *RINGGOLD* AND *SANDOVAL* APPROACH TO DIGITAL SAMPLES

Sugarhill Gang . . . Afrika Bambaataa . . . Kurtis Blow . . . Run DMC . . . KRS-One . . . L.L. Cool J . . . A Tribe Called Quest . . . Wu-Tang Clan . . . Tupac Shakur . . . Notorious B.I.G. . . . Nas . . . Puff Daddy . . . Jay-Z . . . Master P . . . Lauryn Hill . . . DMX . . .

The foregoing list contains some of the most prominent and accomplished recording artists of the last quarter century, who through their music have fueled a musical and cultural revolution.[1] Their musical genre, which certainly cannot be confused with opera or rock and roll, is called rap music or "hip-hop."[2]

The popularity of rap music has unquestionably redefined the music industry. Many nostalgically trace its origins back to the Bronx, New York,[3] where small audiences gathered to listen to DJs and MCs create original sounds by "scratching on a set of two or three turntables."[4] Since the time of these informal performances in the "Boogie-Down,"[5] rap music has truly become big business.[6] In 1998, rap music dominated Billboard's R&B and Pop charts, making the year the genre's best ever.[7] Rap music's "banner" year had a profound effect on record revenues, as total rap album sales, coupled with sales of rap's sister genre, R&B, accounted for an astounding 44.2% of all 1998 album Soundscan[8] sales in the United

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1 *See* Neil Strauss, *The Pop Life; Crossing Racial Boundaries, Rap Gains Ground*, N.Y. TIMES, Oct. 15, 1998, at E1; *see also* Christopher John Farley, *Hip-Hop Nation; There's More to Rap Than Just Rhythms and Rhymes; After Two Decades, It has Transformed the Culture of America*, TIME, Feb. 8, 1999, at 54.

2 There is no consensus among recording artists and the record industry on what distinguishes rap music from hip-hop music (if any distinction even exists at all). For the purposes of this Note, I will use the term rap music.

3 *See* Jason H. Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 770 (1991) (citing D. TOOP, THE RAP ATTACK, AFRICAN JIVE TO NEW YORK HIP-HOP 8 (1984)).

4 *Id.*

5 The "Boogie-Down" is a common nickname for the Bronx. *See* Lisa W. Foderaro, *Our Towns; Finding Hope In a Museum of Hip-Hop*, N.Y. TIMES, July 28, 1999, at B1.

6 *See, e.g.*, Strauss, *supra* note 1 (stating that for the last two years, black popular music has reigned supreme economically in the music industry).

7 *See* Elena Oumano, *'98 Was Banner 12 Months For Hip-Hop*, BILLBOARD, Dec. 26, 1998, at 37; *see also* Eric Boehlert, *'98 Goes Boom-Hip-Hop Leads the Way in Album-Sales Growth* (visited Jan. 25, 1999) <http://www.rollingstone.com> (noting that rap album sales shot up 32% in just 12 months, breaking the 80 million-album-a-year mark for the first time).

8 *See* Ed Christman, *U.S. Music Industry Marks Strong Rebound in Yr.*, BILLBOARD, Jan. 16, 1999, at 85. Soundscan is a company that compiles market data for album sales, collecting point-of-sale information from retail, rack accounts, and other nontraditional merchants for all formats and configurations. The accounts that provide the data generate 85% of U.S. music sales, and Soundscan then projects totals for the entire U.S. market.

States.[9]

One of the distinguishing characteristics of rap music is its heavy reliance on sampling.[10] Sampling can be simply described as the "incorporation of previously recorded works into new musical compositions."[11] The routine practice of sampling has become even more prevalent due to the advent of digital sound technology.[12] For a rap artist, digital sampling provides two main advantages: 1) it provides access to a distinctive sound in an inexpensive way;[13] and 2) it offers a sound that may already have a proven appeal with the public.[14]

Despite its many advantages to recording artists, the music-making tool of digital sampling[15] raises several major copyright questions.[16] One of the more problematic issues is determining the point at which the sampling of a pre-existing work is qualitatively or quantitatively substantial enough to warrant obtaining a license from the copyright owner in order to avoid a copyright infringement suit.

Recently, the Second Circuit handed down two decisions that address the vexing problem of "*how much is too much*" when it comes to copying visual works in the context of television and motion pictures.[17] These decisions pronounce a comprehensive framework

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9 *See id.* at 82 (noting that some album titles may have appeared in more than one genre and that, consequently, rap may be heavily represented in the R&B total).

10 *See* Ronald Mark Wells, *You Can't Always Get What You Want But Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691, 699 (1989).

11 Jeffrey H. Brown, *They Don't Make Music the Way They Used To*, 1992 WIS. L. REV. 1941, 1942.

12 *See* Heather Dembert Rafter & William Sloan Coats, *From Sampling of Artistic Works to Music Distribution on the Internet: The Effect of New Digital Technology on Copyright Law, in* 17TH ANNUAL INSTITUTE ON COMPUTER LAW: THE EVOLVING LAW OF THE INTERNET—COMMERCE, FREE SPEECH, SECURITY, OBSCENITY AND ENTERTAINMENT, at 137-39 (PLI Pats., Trademarks & Literary Property Course Handbook Series No. G4-3987, 1997). "Digital technology allows an individual to transform the detailed information and expression contained within any work, whether visual or musical, into a sequence of bits—binary values of either 0 or 1—which can be stored as data in a computer." *Id.* at 139.

13 *See id.* at 140.

14 *See id.*; *see also* Bruce E. Matter, *Copyright Issues Raised By "Digital Sampling" of Musical Performances and Whether Legislation to Deal With the Practice Should be Recommended, in Committee Reports to be Presented at the Annual Meeting, Chicago, Illinois, Aug. 4, 1990/Aug. 8, 1990*, 1990 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. REP. 158 ("[D]igital samplers are [often] used by artists to capture segments of sounds for later use in a [derivative] work."); Bruce McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1725 (1987) (stating that digital sampling copies the commercially successful sound better than a live musician could because the sampled sound is an actual recording of the original performer transformed and transplanted into a new song).

15 *See* Neil Strauss, *Sampling Is (a) Creative Or (b) Theft?*, N.Y. TIMES, Sept. 14, 1997, at 28.

16 *See* Eric Leach, *Safe Sound: Protecting Digital Sample-Based Products Through Copyright*, 19 WHITTIER L. REV. 805, 814 (1998).

17 *See* Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997);

for considering the applications of two often-invoked defenses to an alleged infringement: "de minimis non curat lex," more frequently referred to by the courts as simply "de minimis,"[18] and the fair use doctrine.[19] In *Ringgold v. Black Entertainment Television, Inc.*,[20] the Second Circuit addressed the scope of copyright protection extended to a poster of an artistic work that appeared in the background of the set of a television show. The court indicated that where the unauthorized use of a copyrighted work is de minimis, in that it "makes such a quantitatively insubstantial use of the copyrighted work as to fall below the threshold required for actionable copying, it makes more sense to reject the claim on that basis and find no infringement, rather than to undertake an elaborate fair use analysis in order to uphold a defense."[21] In *Sandoval v. New Line Cinema Corp.*,[22] the Second Circuit considered a number of factors in determining whether an unauthorized use of a photograph in a motion picture was de minimis,[23] including:

> [T]he amount of the copyrighted material that was copied, as well as, (in cases involving visual works), the observability of the copyrighted work in the allegedly infringing work . . . as determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work.[24]

From both *Ringgold* and *Sandoval*, it is clear that the Second Circuit's approach to the concept of de minimis and the fair use doctrine ("*Ringgold* and *Sandoval* approach") allows film and television producers to avoid mounting a fair use defense for visual works that appear as set decorations in the background of their

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Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998); David Goldberg & Robert W. Bernstein, *Second Circuit Review of Three Cases*, N.Y. L.J., July 17, 1998, at 3.

18 *See* Deborah F. Buckman, *Application of "De Minimis Non Curat Lex" to Copyright Infringement Claims*, 150 A.L.R. Fed. 661 (1998).

19 *See* 17 U.S.C. § 107 (1998).

20 126 F.3d 70 (2d Cir. 1997).

21 *Id.* at 76. This case dealt with a poster of a work by Faith Ringgold called the "Church Picture Story Quilt" that was used as set decoration in the television sitcom "ROC." *See id.* at 72. The court also held that the "de minimis threshold had been crossed" because the poster was "recognizable as a painting, and with sufficient observable detail for the average lay observer to discern" the copyrightable aspects of the work; therefore, the case was remanded to the District Court for proper consideration of the fair use factors. *Id.* at 77.

22 47 F.3d 215 (2d Cir. 1998).

23 *See id.* at 216-217 (discussing the alleged infringement of 10 photographic transparencies of Jorge Sandoval's photographs used in New Line's motion picture entitled "Seven"). The court followed the approach taken by the *Ringgold* court for considering the applications of the fair use doctrine and the concept of de minimis. *See id.* at 217.

24 *Id.* (citing *Ringgold*, 126 F.3d at 75).

productions if they can show that their use of the copyrighted work was de minimis.[25]

But could the *Ringgold* and *Sandoval* approach work effectively in the realm of music sampling? Can Puff Daddy, considered by many as the "King of Sampling,"[26] be sure that a two-second digitally sampled guitar riff that lacks sufficiently observable detail as determined by the ordinary lay observer be found to be a de minimis taking as a matter of law? Could such an application potentially undermine the constitutional purposes of providing copyright protection?

This note will argue that the *Ringgold* and *Sandoval* approach is an effective analytical tool for use in the music industry, specifically, in digital sampling. Part I explains the process of digital sampling and describes some of the various copyright questions its use in rap music presents that the existing digital sampling case law does not sufficiently address. Part II discusses the scope of copyright protection afforded to music pursuant to the Copyright Act of 1976, including the elements necessary to establishing a viable copyright infringement suit. Finally, through a comprehensive examination of the major music sampling cases and the *Ringgold* and *Sandoval* approach, Part III argues that applying such an approach to music sampling litigation is an effective and efficient way of dealing with the scope of copyright protection of sound recordings and music compositions.

I. Digital Sampling and its Copyright Implication

Digital sampling technology provides the rap artist with an inexpensive and simple method of "appropriating the distinct tonal qualities of a particular vocal or instrumental sound."[27]

> The process of digital sampling involves the use of an electronic device referred to as a "digital sampler" . . . that receives the analog signals of sound waves and converts them into the binary or "digital" signals of computer code. The computer code can then be fed into a digital-to-analog converter or "desampler" to duplicate the original sound waves. [Once the sample has been processed,] [i]t can also be copied, dissected, and manipulated on a personal computer in an infinite variety of ways with other samples from the same or a different source and then be converted back to sound waves producing an entirely different

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25 *See* Mitchell Bard, *Film & Copyright; 'De Minimis' Defense Accepted*, Ent. Law & Finance, July 1998, at 1.

26 Strauss, *supra* note 15, at 28.

27 McGiverin, *supra* note 14, at 1724.

sound.[28]

As a result of the endless possibilities that digital sampling technology provides, the ultimate determination of copyright infringement in the digital sampling context is extremely difficult to make. One reason for this is that in many instances only one or two seconds of a sound may be used, leaving open the question of whether the amount sampled constitutes actionable copying.[29] In fact, most samples in rap music either extract only small portions of the entire song (i.e., short guitar riffs, drum beats, horn lines and lyrical phrases) or distort the samples so that they are unrecognizable to the lay observer.[30] For example, what would be the copyright implications of the rap group Run DMC digitally altering a two note sample from Pearl Jam's "Jeremy" in such a way as to reposition or reverse the musical elements?[31]

Further complicating the determination of copyright infringement is the digital sampling tool of "looping"[32]—the practice of taking one or two seconds of a sample and repeating it over and over throughout the song. To illustrate, Run DMC may choose to loop a sample of a snare drum from "Jeremy" hundreds of times throughout one track, yet arguably this multiple use is no more infringing than if it was only used once.[33] But what if Run DMC repeated the snare drum sample in such a way as to constitute the entire underlying composition?[34]

Moreover, there is little judicial guidance on the scope of copyright protection that should be extended to digital samples. Many of the earlier digital sampling opinions showed a great deal of distaste for the practice of digital sampling,[35] which resulted in

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28 Matter, *supra* note 14 (citing Note, *Digital Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987)).

29 *See* McGiverin, *supra* note 14, at 1735.

30 *See* 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, 159 (1993); *see also id.* at 142 (noting that recording artist Phil Collins' distinctive drum sound makes him "probably the most sampled drummer today") (citing Bruce L. Flanders, *Barbarians at the Gate: New Technologies for Handling Information Pose a Crisis Over Intellectual Property*, 22 AM. LIBR. 668 (July-Aug. 1991)).

31 *See* Judith Greenberg Finell, *A Musicologist Discusses Disguised Infringement*, N.Y. L.J., May 29, 1992, at 5; *see also* Marcus, *supra* note 3, at 777 (noting that "although digital sampling involves taking the exact sound, artists will often filter the sound, scratch it up, or further manipulate the sound until it is no longer recognizable").

32 *See* Johnson, *supra* note 30, at 161 n.174 (stating that "[t]o loop a sample, one directs it to automatically return to the beginning of the sample when it reaches the end," thus producing repetition of the sample).

33 *See id.* at 157.

34 *See id.* at 156.

35 *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991); Jarvis v. A&M Records, 827 F. Supp. 282 (D. N.J. 1993).

the courts not treating sampling in the same manner as all other potentially infringing activities.[36] Furthermore, the earlier opinions did not completely evaluate and discuss the copyright issues evoked by digital sampling, leaving the music and legal communities with little guidance as to the amount of sampling that constitutes copyright infringement.[37]

Unlike the precedent concerning digital samples, the application of the *Ringgold* and *Sandoval* approach to future digital sampling litigation would set forth a comprehensive framework for evaluating potentially infringing samples and would resolve many of the copyright questions that are presented by digital sampling technology. To help explain why the *Ringgold* and *Sandoval* approach would be useful in evaluating digital sampling copyright infringement claims, the next section will examine the scope of copyright protection that is extended to music pursuant to the Copyright Act of 1976 and the various elements necessary to bring a viable copyright infringement claim.

II. COPYRIGHT ACT

Any time a rap artist utilizes a given digital sample, this activity potentially violates a number of the exclusive rights afforded the sample's copyright owner pursuant to the Copyright Act of 1976 (the "1976 Act"),[38] especially the right to reproduce and distribute the copyrighted song and the right to make derivative works from it.[39] The 1976 Act[40] extends copyright protection to "original

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[36] *See* 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.

[37] *See id.*

[38] Congress enacted the first Copyright Act in 1790. Since its enactment, it has been amended in 1831, 1870, 1909, and 1976. There have been additional changes to the Copyright Statute since the enactment of the 1976 Act, but none of these changes affect the analysis herein. Therefore, this Note will refer to the 1976 Act as the valid and relevant federal Copyright Act (as it encompasses these later amendments). *See also* 17 U.S.C. § 106 (1998). The copyright owner

> has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership . . .;
> (4) . . . to perform the copyrighted work publicly;
> (5) . . . to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

[39] *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 209 (3d ed. 1997) (discussing an exception to the exclusive rights granted to copyright holders of musical works is the compulsory mechanical license located in section 115 of the 1976 Act); *see also* Note, *New Spin on Music Sampling: A Case For Fair Pay*, 105 HARV. L. REV. 726, 732 (1993) ("[S]ection 115 . . . allows an artist to record his own version or 'cover' of a

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."[41] Thus, in order for a work to qualify for copyright protection, it must be both "original" and "fixed."[42] In *Feist Publications v. Rural Telephone Service*,[43] the Supreme Court stated that "[t]o qualify for copyright protection, a work must be original to the author[, which] means . . . that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[44] In addition, copyright protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[45] In music sampling, this idea/expression dichotomy can be illustrated as follows: while Puff Daddy's *idea* to sample the Police's "Every Breath You Take" in his song, "I'll Be Missing You,"[46]

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musical composition once a phonorecord version of it has been distributed by complying with the statutory notice and fee requirements."). The license applies to a song once it has been published (i.e., recorded and released). At that point, "a copyright owner must license it: (a) to anyone else that wants to use it in a phonorecord, and (b) for a specific payment established by the law." PASSMAN, *supra*, at 209.

40 *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "to 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"). Pursuant to this constitutional grant of authority, Congress enacted the Copyright Act, which is designed to provide a fair return to creators of original works of authorship in an effort to "stimulate artistic creativity for the general public good." Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 432 (1994). Copyright protection can be simply viewed as a tool of suppression that is aimed at creating a marketplace of expression with a universe of works that are of high quality, high quantity, and diverse. *See* Marci A. Hamilton, *Art and the Marketplace of Expression*, 17 CARDOZO ARTS & ENT. L.J. 167 (1999).

41 17 U.S.C. § 102(a) (1998).

42 *See id.* § 101.

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id.

43 499 U.S. 340 (1991).

44 *Id.* at 345. The Supreme Court discarded the sweat of brow doctrine as a standard for copyrightability separate from its creative elements and explaining that the time taken to create a work is irrelevant; only if it is sufficiently original and is fixed in a tangible medium of expression does it qualify for copyright protection. *See id.* at 363.

45 17 U.S.C. § 102(b) (1998).

46 Puff Daddy's song, "I'll Be Missing You," was written and released in memoriam of the late hip-hop artist, Christopher Wallace (a.k.a. The Notorious B.I.G.). The actual sample from "Every Breath You Take" was used by permission and under license from Polygram Special Markets, a Division of Polygram Group Distribution, Inc. The song appeared on Puff Daddy's multi-platinum debut album, "No Way Out."

is not copyrightable, his precise choice of the portion of the preexisting work to be sampled and the manner in which it is used is expression that is copyrightable.

A. *Copyright Protection for Music*

There are generally two distinct components of music that are protectable under the 1976 Copyright Act:[47] (1) musical works, including any accompanying music;[48] and (2) sound recordings.[49]

Musical works, more commonly known in popular music as musical compositions, typically encompass "two distinct components: music and lyrics."[50] Copyright protection attaches to a musical work as soon as a work is "fixed in a tangible medium of expression."[51] To illustrate, world-renowned record producer Kenneth "Babyface" Edmonds could obtain protection for a new song by merely writing down the melody and/or lyrics on a paper napkin in some coherent form. In this hypothetical, Babyface gets such protection because copyright protection attaches the very instant the original work is fixed.

The 1976 Act also gives copyright protection to sound recordings, which are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[52] A sound recording can be viewed as a "physical embodiment of a particular performance of the musical composition, usually in the form of (and usually referred to as) a master recording."[53] Since a sound recording by its definition is fixed,[54] protection exists for this subject matter of copyright[55] by the mere recording of the original components (i.e., the vocal performances and combination of sounds) into some tangible copy, such as a compact disc or a cassette tape.[56]

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47 *See* 5 NIMMER ON COPYRIGHT § 24.01 (1998) [hereinafter NIMMER].
48 *See* 17 U.S.C. § 102(a)(2) (1998).
49 *See id.* § 102(a)(7).
50 NIMMER, *supra* note 47, § 24.01.
51 17 U.S.C. § 102(a).
52 *Id.* § 101 (1998).
53 NIMMER, *supra* note 47, § 24.01.
54 *See* 17 U.S.C. § 101.
55 *See id.* § 102(b).
56 Many experts take the position that one or two notes of a sound recording are not copyrightable, based upon the statutory definition of a sound recording. *See id.* § 101 (defining a copyrightable sound recording as a work that "result[s] from the fixation of a series of musical . . . sounds"); *see also* Johnson, *supra* note 30, at 141 (arguing from this statutory language that, implicitly, "one note, chord or sound effect alone cannot be copy-

Whether a rap artist has sampled the musical composition and/or the sound recording, it is extremely important to recognize that the copyright ownership of the sound recording is "distinct from the ownership of the copyright in the musical composition itself."[57] In order to "clear" a sample, a rap artist who samples both the underlying musical composition and the sound recording of that composition in his song would invariably need to obtain two separate licenses.[58] If a rap artist does not take the affirmative steps to clear a sample with its copyright holders, he may very well expose himself to copyright infringement liability.

B. *Copyright Infringement*

To bring a viable copyright infringement suit against a rap artist for sampling a copyrighted work, the copyright owner must prove (1) ownership of a valid copyright in the work, (2) that the rap artist copied from the work, and (3) that the rap artist's copying constitutes an improper appropriation.[59] Irrespective of the copyrightable subject matter in question, all infringement suits need to demonstrate these three elements in order to adequately state a claim for which relief can be granted.

1. Copyright Ownership

A copyright registration certificate from the Copyright Office[60] will generally suffice as prima facie evidence of copyright ownership.[61] However, this presumption of ownership and the is-

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righted—rather, an aggregate of sounds must exist"); Matter, *supra* note 14 ("Although 'series' is not defined in the statute, it seems that the fewer the number of sounds, the less likely a sound recording copyright can be claimed and that a single sound is not sufficient.").

57 NIMMER, *supra* note 47, § 24.01. The copyright ownership over the musical and lyrical components of musical works will usually be "subject to a contractual relationship between the creators of the music and lyrics and a publishing entity which has also acquired a proprietary interest in the copyright." *Id.* For sound recordings, the copyright ownership is usually the subject of a contract between the recording artist and their record company, whereby the record company becomes the owner of any master recordings created during the term of their exclusive recording agreement. *See id.*

58 *See Digital Music Sampling*, 26 AM. JUR. 3D *Proof of Facts* § 3 (1998); *see also* Robert G. Sugarman & Joseph P. Salvo, *Whose Rights? Sampling Gives Law A New Mix*, N.Y. L.J., Nov. 11, 1991, at 21 ("[T]o clear a sample, a record company must obtain a license from the owner of the underlying sound recording, typically owned by another record label, and a license from the owner of the underlying song, or composition, typically a publisher.").

59 *See* NIMMER, *supra* note 47, § 13.01; *see also* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 285 (2d ed. 1998).

60 *See* 17 U.S.C. § 410 (1998); *see also id.* § 412 (stating that for many copyright infringement claims, registration is a pre-requisite to obtaining statutory damages or attorney's fees).

61 *See* NIMMER, *supra* note 47, § 13.01[A]; *see also* Santrayall v. Burrell, 993 F. Supp. 173 (S.D.N.Y. 1998) (deciding not to invalidate plaintiffs'—rap artists known as "The Legend"—copyright infringement suit because their original copyright application did not in-

sue of copyrightability may be overcome by demonstrating that the plaintiff's work is not sufficiently original to warrant copyright protection.[62] In music copyright infringement claims, this kind of challenge usually requires the expert testimony of a musicologist, one who has achieved expertise in the scholarly study of music.[63]

2. Copying

Many of the traditional standards for evaluating copying do not apply in digital sampling litigation.[64] In most copyright infringement suits, copying is established by getting the defendant to admit that he copied the work or through circumstantial evidence, which is generally proven by showing access from which the trier of the fact may reasonably infer copying and substantial similarity of protectable expression.[65] A plaintiff can prove access by showing that the defendant had a reasonable opportunity to view or copy the work during the time period between the creation of the plaintiff's work and the creation date of the defendant's work.[66] If the plaintiff has established copying, the defendant may rebut the inference by presenting proof of independent creation.[67]

In digital sampling litigation, demonstrating that a rap artist has copied the plaintiff's work is largely dependent upon proving that the rap artist actually sampled the plaintiff's pre-existing work. One reason for this is that copying is usually not an issue, since a

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dicate that they had used unauthorized prior works in their rap song). The *Santrayall* court did not dismiss The Legend's infringement suit because their alleged omissions occurred at a time "when the concept of 'sampling' was just gaining popularity," but rather, because "[t]he music industry was slow to adopt standards for the copyrighting of material containing samples from other works, and confusion existed as to what disclosures the law required." *Id.* at 176. For a general discussion of the *Santrayll* opinion, see *Jury Hammers Rap Star's 'Uh-Oh's Away*, THE ENT. LITIG. REP., Apr. 30, 1998.

62 *See* Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15 ENT. & SPORTS LAW. 3 (1997); *see also* Acuff-Rose Music, Inc. v. Jostens, Inc., 988 F. Supp. 289 (S.D.N.Y. 1997) (finding that the copied lyrical phrase "You've Got to Stand for Something or You'll Fall for Anything" was in the public domain and, as a result, the line in the song lacked the requisite originality to warrant protection). For a general discussion of the *Jostens* opinion, see Darryl J. Adams, *Recent Developments in Copyright Law*, 6 TEX. INTELL. PROP. L.J. 317, 323 (1998); *Copyright to Song "You've Got to Stand for Something" Was Not Infringed by Advertising Slogan Used by Class Ring Seller, Because Copied Lyric Was Not Original, Federal District Court Rules*, ENT. L. REP., Aug. 1998.

63 *See generally* Lepera & Manuelian, *supra* note 62.

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

65 *See, e.g.*, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). *See also* NIMMER, *supra* note 47, § 13.03[A] (noting that while courts sometimes state that substantial similarity is used to prove copying, in fact, the test is used only after copying has been established, to show "that enough copying has taken place") (quoting Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1190 (1990)).

66 *See* LEAFFER, *supra* note 59, at 288.

67 *See generally* Lepera & Manuelian, *supra* note 62.

sample itself is a copy, even if the original has been altered electronically.[68] Typically, access is not an issue in a digital sampling dispute because "sampling establishes access to the sampled recording."[69] Thus, it becomes paramount to the plaintiff's case to prove that the rap artist has in fact sampled the work because such a showing invariably establishes copying.

Sampling is often difficult to detect as a result of the endless alterations and manipulations made possible by digital sampling technology. One way to detect if a work has been sampled is to compare the tempos of each of the song's related portions.[70] "If they are identical, and other factors sound identical too, sampling is a good possibility."[71] Other factors often considered include: whether the related fragments of the two songs are in the same key and whether or not the alleged sampler left a "footprint that enables the second song to be traced to the first."[72] If the evidence of sampling is absent, courts generally require that the two works be so strikingly similar that independent creation is not a possibility.[73] While difficult to do, proving independent creation is possible in the musical context, as evidenced by the non-sampling music copyright case of *Selle v. Gibb*.[74]

3. Improper Appropriation

Even if the plaintiff has copyright ownership of a sample and can show that the rap artist has actually sampled his work, he still must demonstrate that his work was improperly appropriated.[75] This involves the subjective process of the trier of fact assessing whether there was a material taking of the original and expressive elements of a copyrighted work, as determined by the ordinary lay observer.[76] In the context of a music copyright infringement suit,

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68 *See* Finell, *supra* note 64.

69 *Id.*

70 *See id.*

71 *Id.*

72 *Id.* "These 'footprints' include the underlying accompaniment parts." *Id.*

73 *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *see also* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES, 398 (4th ed. 1993) (discussing the different approaches of the circuit courts to the concept of striking similarity).

74 567 F. Supp. 1173 (N.D. Ill. 1983) (holding that the defendants, the Bee Gees, did not have access to the plaintiff's song when they created, "How Deep Is Your Love," because they created it when they were in France, whereas the plaintiff's song was unpublished and had only been performed at weddings and bar mitzvahs in Chicago, Illinois), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

75 *See* NIMMER, *supra* note 47, § 13.01[A].

76 *See, e.g.*, Country Kids 'n City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996) (stating that the relevant inquiry is "whether the accused work is sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value" (citing Atari,

the relevant inquiry is "whether the defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."[77] The requisite level of similarity between the two works to constitute actionable copying, often referred to as substantial similarity,[78] is a very abstract notion that is extremely difficult to define and apply.[79] As earlier music copyright infringement cases clearly demonstrate, there is no golden rule as to what constitutes substantial similarity in music.[80]

One thing that the courts do agree on regarding the requisite level of similarity to constitute actionable copying is that the taking from the copyrighted work can not be merely a de minimis or trivial one.[81] But as the determination of substantial similarity presents one of the "most difficult questions in copyright law and one that is the least susceptible of helpful generalizations,"[82] the circuit courts have taken different approaches to its ultimate determination.

The dichotomy existing among the circuit courts is best illustrated by comparing the approaches of the Second and Ninth Circuits. The Second Circuit's approach, authored by Learned Hand in *Nichols v. Universal Pictures Corp.*[83] (often referred to as the "abstractions test"), requires the court to separate the uncopyrightable

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Inc., v. North Am. Philips Consumer Electronics Corp., 672 F.2d 607, 614 (7th Cir. 1982))); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960). The ordinary lay observer makes these determinations because we live in a market-driven society that aims to protect the potential market value of the product. *See, e.g.,* Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause, in* OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY NO. 5 (Cardozo School of Law 1999). Since the lay observers are the ones who ultimately make the purchasing decisions, it is best that they determine the similarity between two works in order to increase the market to its maximum level.

77 *Arnstein,* 154 F.2d at 473.

78 *See* NIMMER, *supra* note 47, § 13.03[A].

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

80 *See, e.g.,* Boosey v. Empire Music Co., 224 F. 646 (S.D.N.Y 1915) (holding that a five-word phrase and accompanying music was infringement); *cf.* Marks v. Feist, 290 F. 959 (2d Cir. 1923) (holding that appropriating six of 450 bars of a composition is not actionable); Fisher v. Dillingham, 298 F. 145 (S.D.N.Y. 1925) (holding that an eight-note ostinato in a song was substantial enough to prove copyright infringement).

81 *See* Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

82 NIMMER, *supra* note 47, § 13.03[A]. Nimmer developed an approach to distinguish between the different forms of similarity that may exist between two works. *See id.* § 13.03[A][1]. Nimmer refers to those situations where the "fundamental essence or structure of the work is duplicated in another" as "comprehensive nonliteral similarity." *Id.* § 13.03[A][2]. Nimmer refers to those situations where there is verbatim copying of a portion of a work as "fragmented literal similarity." *Id.*

83 45 F.2d 199 (2d Cir. 1930).

ideas from the original expression and then compare the two works to see if they are substantially similar.[84] The analysis is both qualitative and quantitative, and the inquiry should be focused solely on the original protectable elements of the work and not ideas or expression that exists in the public domain.[85]

In contrast to the abstractions test lies the Ninth Circuit's test for substantial similarity, which is often referred to as the "total concept and feel approach."[86] In *Roth Greeting Cards v. United Card Co.*,[87] the Ninth Circuit developed this approach, which requires looking at both works as a whole to determine if the allegedly infringing work would be recognizable by an ordinary observer as having been taken from the copyrighted work.[88]

Regardless of the approach taken by the court to determine substantial similarity, the task is accomplished on a case-by-case basis[89] in music copyright cases by the lay observer's comparison of the two songs' main melodies (pitches and rhythms), harmonies (chords), structure and style.[90] Professor Nimmer has pointed out

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84 *See id.* The Second Circuit's approach to digital sampling provides adequate protection to a copyright owner whose work has been sampled in small amounts, since the trier of fact would eventually identify the small sample (when comparing the raw expressive elements) as substantially similar. On the other hand, it may not seem ideal from a qualitative standpoint; a digital sampler could alter so much of the copyrighted work that the works may not appear to be substantially similar to the ordinary lay observer, when in fact the sampler has appropriated the very essence of the copyrighted work.

85 *See, e.g.*, Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980). The abstractions test is very helpful in describing the "nature of the quest for 'the expression of an idea.'" NIMMER, *supra* note 47, § 13.03[A][1][a]. However, it does not provide a mechanism for pinpointing the idea/expression dichotomy on each "level of abstraction." *Id.*

86 NIMMER, *supra* note 47, § 13.03[A][1][c].

87 429 F.2d 1106 (9th Cir. 1970).

88 The Ninth Circuit subsequently developed a two-part test to determine whether there is substantial similarity between two works. *See* Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1164-65 (9th Cir. 1977). Initially, the court undertook an "extrinsic test" to determine the similarity in general ideas between the two works, and, after this inquiry, the court conducted an "intrinsic test" to compare the particular expression used. *See id.*; *see also* NIMMER, *supra* note 47, § 13.03[A][1][c]. Nimmer criticizes this test for substantial similarity to the extent that it allows the lay observer to consider the similarity between the two works in terms of ideas and concepts, both of which are statutorily excluded from copyright protection. He also states that the "addition of 'feel' to the judicial inquiry, being a wholly amorphous referent, merely invites an abdication of analysis." *Id.* Based on this analysis, in the context of digital sampling, an absolute application of the Ninth Circuit approach may be suspect because a rap song that samples an opera and totally repackages the sample could never infringe the opera, since no reasonable person could ever conclude that the two works have the same feel to them. *See also* Douglass & Mende, *supra* note 36 (explaining that a pragmatic application of the Ninth Circuit's approach that would look at the two works as a whole may prove effective in considering small insignificant unauthorized samples).

89 *See* Sandoval v. New Line Cinema Corp., 47 F.3d 215 (2d Cir. 1998).

90 *See* Finell, *supra* note 31; *see also* Susan Upton Douglass & Craig S. Mende, *Hey, They're Playing My Song! Litigating Music Copyrights*, N.Y. L.J., July 14, 1997, at S1 ("Generally, protection is accorded to original melodies. Protection is also given to arrangements and, in some cases, harmonies, although protection in these cases requires a greater showing of

that the notion that copying of three bars from a musical work never constitutes infringement is without foundation.[91] But whether it is one note, two notes, or even three, the trier of fact in each case should ultimately determine whether the defendant has appropriated, either qualitatively or quantitatively, enough of the plaintiff's original expression to rise to the level of substantial similarity. The next section examines the ways in which the existing digital sampling case law has not adequately inquired into the substantial similarity between the sampled work and the subsequent rap song, and argues that application of the *Ringgold* and *Sandoval* approach to digital sampling litigation would remedy the courts' deficient analysis.

III. Discussion

A. *Digital Sampling*

In considering whether the *Ringgold* and *Sandoval* approach is an effective analytical tool for evaluating digital sampling infringement suits, it is first necessary to more closely examine the few significant opinions expressly dealing with digital sampling. Unfortunately, there are very few digital sampling opinions because the majority of such disputes are settled out of court[92] before the trier of fact can speak to any of the substantive copyright issues.

The first case addressing the copyright implications of digital sampling technology was *Grand Upright Music Ltd. v. Warner Bros. Records.*[93] This case involved the rapper Biz Markie's alleged infringement in his song, "I Need a Haircut," of three words and a portion of the music from "Alone Again" by Gilbert O'Sullivan.[94] Biz Markie sampled the first eight bars of O'Sullivan's song and looped it throughout so as to constitute the underlying composition of his song.[95] He then added a drum track and vocals on top of the O'Sullivan sample and three words from O'Sullivan's song, "alone again, naturally."[96]

Beginning with the Old Testament phrase, "Thou shalt not

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the creativity involved since exclusive rights to an obvious arrangement or harmony would essentially give the arranger a monopoly over use of the song.").

91 *See* Nimmer, *supra* note 47, § 13.03[A][2].

92 *See* Mary B. Percifull, *Digital Sampling: Creative or Just Plain "CHEEZ-OID?"* 42 Case W. Res. 1263, 1285 n.175 (1992).

93 780 F. Supp. 182 (S.D.N.Y. 1991).

94 *See id.* at 183.

95 *See* Johnson, *supra* note 30, at 161.

96 Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation In the Limelight,* N.Y. L.J., Mar. 16, 1992, at 1.

steal,"[97] the decision was certainly not a favorable one for rap artists, although its precedential value can be questioned. The *Grand Upright* court's analysis of Biz Markie's appropriation was flawed to the extent that it presumed that Biz Markie's sample infringed O'Sullivan's copyright interest merely because Biz Markie admitted to sampling the work.[98] Some experts have stated that by only looking at whether the plaintiff owned the work and whether the defendant actually copied it, the court never analyzed whether there was substantial similarity between the defendant's work and the protectable elements of the plaintiff's work.[99] Furthermore, because of Biz Markie's "extensive, repeated use of a relatively long segment of the recording,"[100] the *Grand Upright* opinion did not address whether a quick use of a brief snippet of a sample would satisfy the substantial similarity test.[101] "Consequently, although the district court in *Grand Upright* directly addressed the issue of copyright in digital samples, its opinion provided little guidance for future cases due to the fact that potential litigants cannot afford to overlook the improper appropriation issue."[102]

The next major digital sampling decision handed down was *Jarvis v. A&M Records*.[103] Unlike the *Grand Upright* decision, the *Jarvis* court provided some insight (although limited) into how to consider copyright infringement claims in the digital sampling context.[104] In *Jarvis*, songwriter and recording artist Boyd Jarvis was suing renowned record producers Robert Clivilles and David Cole for digitally sampling sections of Jarvis' song entitled "The

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97 *Grand Upright*, 780 F. Supp. at 182 (quoting Exodus 20:15). This phrase is the seventh of the Ten Commandments.

98 *See* Douglass & Mende, *supra* note 36, at S3.

99 *See id.* The *Grand Upright* court relied heavily upon the fact that Biz Markie attempted to clear the sample with O'Sullivan prior to the release of his album. *See Grand Upright*, 780 F. Supp. at 184. In contrast, the Supreme Court has held that an artist's request for permission to use the original should not weigh against a finding of fair use. *See* Campbell v. Acuff-Rose, 510 U.S. 569, 585 n.18 (1994).

100 Sugarman & Salvo, *supra* note 96, at 1. This case states that "[t]he extensive, repeated use of a relatively long segment of the recording thus probably precluded a de minimis use defense and made a 'fair use' argument more difficult than it would have been with a shorter sample used sparingly." *Id.* (emphasis in original).

101 *See* 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).

102 Leach, *supra* note 16, at 824; *see* Irv Lichtman, *Suit vs. Biz Markie Settled*, BILLBOARD, Jan. 11, 1992, at 80 (noting that the dispute in *Grand Upright* was ultimately settled out of a court for an undisclosed amount).

103 827 F. Supp. 282 (D. N.J. 1993).

104 *See* Leach, *supra* note 16, at 824 (stating that the *Jarvis* court provided an in-depth analysis of the musical work copyright claim, addressing each of the three requirements for infringement).

Music's Got Me" in three versions of their song, "Get Dumb."[105] The defendants actually sampled two main components of Jarvis' work: the bridge section, which contains the words "ooh . . . move . . . free your body," and a distinctive keyboard riff included in the last several minutes of the song, which functioned as both rhythm and melody.[106] The *Jarvis* court rejected the argument put forth by the defense that an infringement could be found only if the two songs were substantially similar "in their entirety."[107] In part, the *Jarvis* court stated:

> If it were really true that for infringement to follow a listener must have to confuse one work for the other, a work could be immune from infringement so long as the infringing work reaches a substantially different audience than the infringed work. In such a situation, a rap song, for instance, could never be held to have infringed an easy listening song or a pop song.[108]

Thus, the *Jarvis* court stated that the relevant inquiry in determining whether a digital sample constitutes copyright infringement is whether the defendant has sampled, either quantitatively or qualitatively, the elements of the plaintiff's song that are original, "such that the copying rises to the level of an unlawful appropriation."[109] Furthermore, the court seemed to be saying that even if the taking is quantitatively small, the trier of fact may properly find substantial similarity if it is qualitatively important to the work.[110]

The *Jarvis* court held that a trier of fact could reasonably find that the defendants appropriated original expression from the plaintiff's work that could have substantially diminished its value.[111] With respect to the actual samples, which the defendants argued were not sufficiently original to warrant copyright protection, the *Jarvis* court appeared to hold that "although the copying involved cliched phrases typical in the musical field, their use together in a particular arrangement and in the context of a particular melody

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105 *See Jarvis*, 827 F. Supp. at 286.

106 *Id.* at 289.

107 *Id.* at 290; *see generally Court Refuses to Dismiss Copyright Infringement Claim in Case Involving Digital Sampling of Recording of "The Music's Got Me" in Recordings of "Get Dumb!," Though Other Claims Are Dismissed*, ENT. L. REP., May 1994.

108 *Jarvis*, 827 F. Supp. at 290.

109 *Id.*

110 *See id.* at 291.

111 *See id.* at 292.

could constitute copyrightable expression."[112]

Although *Jarvis* did not produce a dynamic analytic framework for considering all types of digital samples, it did provide the record industry with some guidelines regarding actionable sampling. However, much like the *Grand Upright* court, the *Jarvis* court seemed to view the defendant's admitted unauthorized sampling with a great deal of distaste, which undermined their analysis of the copyright issues.[113] As a result, the court was precluded from further discussing how the full spectrum of samples should be considered under the Copyright Act.[114]

In *Campbell v. Acuff-Rose Music, Inc.*,[115] the Supreme Court finally had an opportunity to discuss the many issues regarding digital sampling. In *Campbell*, the rap group 2 Live Crew was sued for allegedly sampling portions of Roy Orbison's song entitled "Oh, Pretty Woman" in their parody version entitled "Pretty Woman."[116] Unfortunately, because 2 Live Crew's appropriation of protectable expressive elements of Orbison's work was so substantial, the Supreme Court did not examine how much of a sampled work would amount to a de minimis taking, and thus did not resolve any other of the copyright ambiguities regarding digital samples.[117]

The recent decision of *Tuff 'N' Rumble Management Inc. v. Profile Records Inc.*,[118] seems to suggest that "unauthorized samplers will not always be deemed infringers and may represent a significant step forward in the courts' movement toward applying classic substantial similarity analysis to digital sampling cases."[119] In *Tuff 'N' Rumble*, the plaintiff alleged that separate songs by rap artists Run DMC and Dana Dane sampled drum tracks from its master recording entitled "Impeach the President," infringing the copyrights in both the sound recording and musical composition.[120] Despite the fact that Tuff 'N' Rumble could neither establish own-

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112 Robert D. Sprague, *Multimedia: The Convergence of New Technologies and Traditional Copyright Issues*, 71 DENV. U. L. REV. 635, 662 (1994).

113 *See* Douglass & Mende, *supra* note 36, at S3.

114 *See id.*

115 510 U.S. 569 (1994).

116 *See id.* The Supreme Court opinion did not address whether 2 Live Crew actually sampled Orbison's songs, as opposed to merely copying and incorporating key elements; *see also* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992) (noting that the plaintiff's musicologist testified that elements of the defendant's song were likely sampled from Orbison's work).

117 *See Campbell*, 510 U.S. at 574 ("It is uncontested . . . that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, . . . but for a finding of fair use through parody.").

118 42 U.S.P.Q.2d 1398 (S.D.N.Y. 1997).

119 Douglass & Mende, *supra* note 36, at S3.

120 *See Tuff 'N' Rumble*, 42 U.S.P.Q.2d at 1399.

ership of the copyrights nor demonstrate actual copying, the court went on to discuss whether or not Tuff 'N' Rumble could demonstrate substantial similarity.[121] In part, the court stated that in evaluating substantial similarity in the digital sampling context, courts should "look at the works as a whole, as opposed to dissecting a work into its constituent elements or features."[122] Some experts have argued that this language implicitly means that a small degree of sampling may not create liability.[123] The *Tuff 'N' Rumble* opinion appears to take a step in the right direction for digital sampling litigation by evaluating the claim in a manner consistent with all other subject matter fit for copyright protection. Ultimately, this may lead the courts, when adjudicating future digital sampling cases, to first ask whether "the allegedly infringing work makes such a quantitatively insubstantial use of the copyrighted work as to fall below the quantitative threshold of substantial similarity,"[124] an inquiry consistent with the *Ringgold* and *Sandoval* approach.

B. Ringgold *and* Sandoval *Approach*

The approach taken by the Second Circuit in *Ringgold* and *Sandoval* would prove extremely useful in evaluating copyright infringement claims in the realm of digital sampling. Both cases deal with the appropriate applications of the defenses of de minimis copying and the fair use doctrine in the context of visual works in television and motion pictures.[125]

1. *Ringgold v. B.E.T.*

In *Ringgold*, the Second Circuit considered whether the unauthorized use of a poster of Faith Ringgold's artistic work entitled "Church Picnic Story Quilt" in the background of the set of an episode of the television sitcom "ROC" constituted copyright infringement.[126] In determining whether or not Ringgold's copyright had been infringed, the court first considered whether the use of the poster was de minimis.[127]

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121 Douglass & Mende, *supra* note 36, at S3.

122 *Tuff 'N' Rumble*, 42 U.S.P.Q.2d at 1402.

123 *See, e.g.*, Douglass & Mende, *supra* note 36, at S3.

124 Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 76 (2d Cir. 1997); *see also* Douglas & Mende, *supra* note 36, at S3 (stating that a relevant question to the determination of substantial similarity in future digital sampling litigation is "whether the copying of copyrightable elements is of such a degree to merit a finding of infringement, if the overall work is different").

125 *See* Bard, *supra* note 25, at 1.

126 *See Ringgold*, 126 F.3d at 71. "The District Court sustained the defendants' defense of fair use." *Id.*

127 *See id.* at 74.

a. De Minimis Copying

The *Ringgold* court stated that the legal maxim of de minimis "insulates from liability those who cause insignificant violations of the rights of others."[128] Within the context of copyright law, the concept of de minimis has significance in many respects.[129]

De minimis can be viewed (as it is in other legal contexts) as a "technical violation of a right so trivial that the law will not impose legal consequences."[130] As the *Ringgold* court pointed out, such factual patterns are rarely litigated, as they "involve questions that never need to be answered."[131]

The *Ringgold* court also stated that the principle of de minimis copying can be viewed as copying that "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."[132] The *Ringgold* court stated that the de minimis analysis should only be considered "after the fact of copying has been established, as the threshold for determining that the degree of similarity suffices to demonstrate actionable infringement."[133] This inquiry is necessary to determine whether the copying is "quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred."[134]

b. De Minimis Inquiry Distinguished from the Fair Use Doctrine

The *Ringgold* court also discussed how some courts have inappropriately applied the concept of de minimis to the third prong of the fair use defense,[135] the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."[136] Section 107 of the Copyright Act provides a limitation on the exclusive rights of a copyright owner by way of the fair use defense for works copied for purposes such as "criticism, comment, new re-

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128 *Id.*

129 *See id.*

130 *Id.*

131 *Id.* (citing Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997) (internal quotation marks omitted)).

132 *Id.*

133 *Id.* The *Ringgold* court distinguished the two contexts in which courts have used the term "substantial similarity" and found that the term should only be used to refer to the threshold for determining "the degree of similarity that suffices" to demonstrate actionable copying. *Id.* The court suggested that when substantial similarity is used to mean the threshold for copying as a factual matter, the better term is Latman's "probative similarity." *Id. See also* Latman, *supra* note 65, at 1204 (explaining probative similarity).

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

135 *See id.* at 76.

136 17 U.S.C. § 107(3) (1998).

porting, teaching, etc."[137] It provides that:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[138]

The fair use defense was codified in the Copyright Act to establish that "a use that has no demonstrable effect upon the potential market for, or value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."[139] Moreover,

> [a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.[140]

Nevertheless, what is clear regarding the application of the fair use defense pursuant to the Supreme Court's decision in *Campbell* is that "all [four factors] are to be explored, and the results weighed together, in light of the purposes of the copyright."[141]

The *Ringgold* court acknowledged that there is a "partial mar-

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[137] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (holding that the preamble terms are merely illustrative with respect to appropriate fair use categories).

[138] 17 U.S.C. § 107 (1998).

[139] Buckman, *supra* note 18, at 669.

[140] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 448 n.31 (1994) (quoting H.R. REP. No. 94-1476, at 65-66).

[141] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

riage between the doctrine of fair use and the legal maxim de minimis non curat lex,"[142] but explained that there is a fundamental conceptual difference between these two defense theories.[143] It stated that the de minimis inquiry is made prior to the plaintiff establishing his prima facie case of infringement (i.e. ownership, copying, and improper appropriation), while the fair use defense is evoked after the prima facie case has been established.[144] As a result, these two defenses, although making similar inquiries into the amount and significance of the appropriation, are answering two very different copyright questions.

In examining whether a given amount of copying constitutes a de minimis taking, the question is whether there was enough copying to rise to the level of copyright infringement. If the trier of fact determines as a matter of law that the appropriation was de minimis, the copyright infringement suit is dismissed because the plaintiff was unable to demonstrate that the defendant took enough protectable expression to constitute actionable copying. As one commentator states, "the de minimis line is crossed when the allegedly infringing work is 'readily identifiable.'"[145]

In contrast, the third prong of the fair use analysis asks, after the prima facie case is established, whether the amount and significance of copying combined with the three other factors should avail the defendant of the fair use defense. As the *Ringgold* court stated, "[t]he third fair use factor concerns a quantitative continuum. Like all the fair use factors, it has no precise threshold below which the factor is accorded decisive significance."[146] To illustrate, if the trier of fact engages in a fair use analysis and determines that the taking was slight with respect to the "amount and substantiality of the portion used,"[147] this would not be dispositive on the infringement claim, as the trier of fact would also need to consider the other three factors.

In the actual dispute in *Ringgold*, the defendant's inclusion of the plaintiff's poster was found to be not de minimis as a matter of law since the plaintiff's work was "plainly observable, even though not in exact focus"[148] in the defendant's television program. As a result of this initial determination that the "threshold of actionable

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142 Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 75 n.4 (2d Cir. 1997) (citing *Sony*, 464 U.S. at 451 n.34).

143 *See Ringgold*, 126 F.3d at 76.

144 *See id.*

145 Bard, *supra* note 25, at 1 (quoting Gregory Sioris, a New York copyright attorney).

146 *Ringgold*, 126 F.3d at 76.

147 17 U.S.C. § 107.

148 *Ringgold*, 126 F.3d at 76.

copying had been crossed,"[149] the *Ringgold* court next considered whether the defendant's unauthorized copying of the poster was a fair use. Finding error in the district court's consideration of the fair use defense, the *Ringgold* court ultimately reversed and remanded the case back to the district court to reconsider the fair use factors under the applicable legal principles.[150] Nevertheless, the *Ringgold* court held that not every unlicensed use of artwork would be infringing,[151] as it explained that

> in some circumstances, a visual work, though selected by production staff for thematic relevance, or at least for its decorative value, might ultimately be filmed at such distance and so out of focus that a typical program viewer would not discern any decorative effect that the work of art contributes to the set.[152]

2. *Sandoval v. New Line Cinema*

In the later decision of *Sandoval v. New Line Cinema Corp.*,[153] the Second Circuit applied the framework set forth in *Ringgold* for considering the concept of de minimis and the fair use defense. In *Sandoval*, photographer Jorge Antonio Sandoval brought a copyright infringement suit against New Line Cinema for including ten of his photographs in their movie, "Seven."[154] The district court dismissed Sandoval's complaint and held that New Line's use of the copyrighted photographs constituted a fair use.[155] On appeal, the Second Circuit found that the district court erred by "deciding the fair use issue without first ascertaining whether or not the use of the copyrighted material was de minimis,"[156] but "because the claimed copying [was] de minimis as a matter of law,"[157] the Second Circuit affirmed the judgment of the district court.[158]

Citing *Ringgold*, the *Sandoval* court stated that:

> in determining whether or not the allegedly infringing work falls below the quantitative threshold of substantial similarity to the copyrighted work, courts often look to the amount of the

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149 *Id.* at 77.
150 *See id.* at 81.
151 *See Artist Faith Ringgold Is Entitled to Trial in Copyright Infringement Claim Against HBO and Black Entertainment Television, on Account of the Use of a Poster of Her Artwork as Set Decoration in an Episode of Sitcom "Roc"*, ENT. L. REP., June 1998.
152 *Ringgold*, 126 F.3d at 77.
153 147 F.3d 215 (2d Cir. 1998).
154 *See id.*
155 *See id.* at 217.
156 *Id.*
157 *Id.*
158 *See id.*

> copyrighted work that was copied, as well as, (in cases involving visual works), the observability of the copyrighted work in the allegedly infringing work.[159]

"Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work."[160] Because the *Sandoval* court had determined that the photographs were clearly out of focus and not displayed with sufficient detail for the average lay observer to identify their subject, it determined as a matter of law that the unauthorized copying was de minimis.[161]

C. *De Minimis Inquiry in Non-Sampling Music Infringement Suits*

The Second Circuit's approach for considering the defenses of de minimis and fair use in *Ringgold* and *Sandoval* is neither innovative nor an attempt to revolutionize copyright infringement analyses. Rather, it appears that the Second Circuit described and validated the appropriate inquiries for evaluating copyright infringement claims that other courts in recent years had failed to consider.[162] As the approach is not novel, some pre-*Ringgold* and pre-*Sandoval* decisions that dealt with non-sampling music infringement employed a similar framework.

In *Elsmere Music, Inc. v. National Broadcasting Co.*,[163] the Second Circuit initially inquired into whether the defendant's use of the plaintiff's copyrighted work was de minimis.[164] In *Elsmere*, the defendants copied the first four notes of the famous jingle, "I Love New York" in their parody entitled, "I Love Sodom," which subsequently appeared on the weekly variety program, "Saturday Night Live."[165] The defendants argued that their taking was de minimis, in that they only appropriated four notes from the song, which was comprised of a forty-five word lyric and 100 measures.[166] The district court rejected this argument by stating that:

> Although it is clear that, on its face, the taking involved in this action is relatively slight, on closer examination it becomes apparent that this portion of the piece, the musical phrase that the

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159 *Id.* at 218 (citing *Ringgold*, 126 F.3d at 75).
160 *Id.* (citing *Ringgold*, 126 F.3d at 75).
161 *See id.*
162 *See, e.g.*, Sandoval v. New Line Cinema Corp., 43 U.S.P.Q.2d 1949 (S.D.N.Y. 1997).
163 482 F. Supp. 741 (S.D.N.Y.), *aff'd* 623 F.2d 252 (2d Cir. 1980).
164 *See id.*
165 *See id.* at 743.
166 *See id.* at 744.

> lyrics "I Love New York" accompany, is the heart of the composition. Use of such a significant (albeit less than extensive) portion of the composition is far more than merely a [d]e minimis taking.[167]

Upon determining as a matter of law that the use was not de minimis, the district court next determined whether or not the defendant's appropriation constituted a fair use.[168]

Similarly, in *Fisher v. Dees*,[169] the Ninth Circuit first determined whether or not the defendant's unauthorized copying of the main theme of the plaintiff's song was de minimis.[170] The *Fisher* court held as a matter of law that recording artist Rick Dees' copying of the main theme of the plaintiff's song "When Sunny Gets Blue" in his parody "When Sonny Sniffs Glue" was not de minimis.[171] As the *Fisher* court stated, "a taking is considered de minimis only if it so meager and fragmentary that the average audience would not recognize the appropriation. Here, the appropriation would be recognized instantly by anyone familiar with the original."[172]

D. *The* Ringgold *and* Sandoval *Approach is an Effective Analytical Tool for Evaluating Copyright Infringement Claims Involving Digital Samples*

Digital sampling via rap music has dramatically changed mainstream popular music, but it should not change or alter the framework from which copyright infringement is considered. Applying the *Ringgold* and *Sandoval* approach to digital sampling litigation would be an effective and efficient way of dealing with the scope of copyright protection of sound recordings and music compositions. Although the *Ringgold* and *Sandoval* approach does not provide the trier of fact with any bright line rules as to what actually constitutes a de minimis taking, the framework would prove extremely helpful in determining whether a given sample should be cleared with the copyright owner.[173] Furthermore, if future court opinions ac-

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167 *Id.*

168 *See id.* at 745; *see also id.* at 747 (concluding that the defendant's copying was a fair use).

169 794 F.2d 432 (9th Cir. 1986).

170 *See id.*

171 *See id.* at 434.

172 *Id.* The court engaged in a fair use analysis and ultimately determined that Dees' appropriation of the main theme was a fair use. *See id.* at 440.

173 *See* Mary Cabanski-Evers, *Intellectual Property Court Watch Roundup of Recent Developments*, THE INTELL. PROP. STRATEGIST, Aug. 1998, at 11 ("Determining whether the use of another's copyrighted work is de minimis, and thus falls below the threshold requirement of copying for copyright infringement, is a highly subjective analysis that generally defies clearly defined rules. Nevertheless, here the Second Circuit articulates a relatively coher-

knowledge that some samples could be de minimis, it ultimately could provide the music marketplace in this age of rap music with its maximum level of creative works.

When adjudicating future digital sampling copyright infringement suits, the trier of fact should not presume that a digital sample is infringing until it inquires into whether the actual sample rises to the level of substantial similarity. As some commentators have explained, "the mere fact that there has clearly been copying should not be sufficient to establish infringement."[174] Such an inquiry into the substantial similarity between the two works implicitly requires the trier of fact to decide whether the taking is merely de minimis.

The *Ringgold* and *Sandoval* test for determining whether an unauthorized use of a copyrighted work is de minimis is whether it "occur[s] to such a trivial extent as to fall below the threshold of substantial similarity, which is always a required element of actionable copying."[175] Relying on the work of Nimmer, the *Ringgold* court stated that the quantitative measure "generally concerns the amount of the copyrighted work that is copied, a consideration that is especially pertinent to exact copying."[176] As another commentator explains, "the 'calculation' to determine whether a quantitatively significant portion has been taken is clearly an indefinite science."[177]

In the digital sampling context, as with all other copyrightable subject matter, the trier of fact should consider how much quantitatively the sampler has appropriated from the plaintiff's song. This can generally be accomplished by looking at the percentage of the original recording that was sampled and the percentage of the infringing recording that consists of the sampled material.[178]

However, a purely quantitative examination of the two works could be extremely misleading. To illustrate, what if rap artist Method Man of the Wu-Tang Clan sampled four notes from the hook of Stevie Wonder's song "Part Time Lover?" Arguably, the amount taken from the overall song would not quantitatively amount to a large portion, but any ordinary person who listened to it would recognize those four notes as quintessential Stevie Won-

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ent subject matter/style recognition analysis that may provide some guidance in a de minimis analysis.").

174 Douglass & Mende, *supra* note 36, at S3.

175 Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997) (citing NIMMER ON COPYRIGHT § 13.03[A] (1997)).

176 *Id.* (citing NIMMER, *supra* note 174, § 13.03[A][2]).

177 Buckman, *supra* note 18, at 671.

178 *See* Finell, *supra* note 64, at 5.

der. Thus although silent on the issue, the *Ringgold* and *Sandoval* definition of de minimis inherently encompasses a consideration into the qualitative aspects of the appropriated portion. A concurrent qualitative inquiry corrects for situations like the Method Man hypothetical and ultimately allows the trier of fact to determine that there was actionable copying when the amount taken was relatively small, but amounted to the "heart of the work."[179] As one commentator explains, "the qualitative analysis reasons that if the unique portion of a song is appropriated, then the whole song is damaged. It is the consumer value or what appealed and motivated the consumer musically, that concerns the courts."[180] Furthermore, an inquiry into the qualitative components as well as the quantitative components is consistent with the trier of fact's ultimate determination of substantial similarity.[181]

The Second Circuit's observability standard for determining de minimis copying is also extremely appropriate for considering copyright infringement claims, irrespective of subject matter. As the *Sandoval* court stated, "observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work."[182] Although the observability standard does not present any bright line rules,[183] it proves helpful in adjudicating certain kinds of infringement claims, especially in those cases where the trier of fact determines that the lay observer can't recognize the copyrighted work at all in the allegedly infringing work.

By analogy, the Second Circuit's observability standard would serve useful in considering infringement suits involving digital samples. In digital sampling infringement suits, the trier of fact should consider whether the ordinary lay observer can discern or recognize the sampled material in the defendant's work. If the sample is not observable, then the infringement suit should be dismissed.

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179 *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (finding that defendant's unauthorized copying was not a fair use, in part because the defendant appropriated essentially the heart of the work); Baxter v. MCA, 812 F.2d 421, 425 (1987) ("[E]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.").

180 Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 892 (1992).

181 *See* NIMMER, *supra* note 47, § 13.03[A][1] (stating that the qualitative aspect of substantial similarity "concerns the copying of expression, rather than ideas, a distinction that often turns on the level of abstraction at which the works are compared").

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

183 *See id.*

This inquiry by the courts into the observability of a sample would likely prove outcome determinative in a large number of digital sampling infringement suits. This concept is illustrated in the following hypotheticals.[184]

If the rap group Nice & Smooth sampled two extremely insignificant notes of James Brown's song "I Feel Good" and included them once in an insignificant portion of their new track, this unauthorized sampling would likely be found as a matter of law to be de minimis, and the infringement suit would be dismissed. The trier of fact would likely find the taking was so minute as to preclude any recovery or so trivial "as to fall below the quantitative threshold of substantial similarity."[185] If these two notes were significant to James Brown's track and thus somewhat observable in the subsequent rap song, the trier of fact must be more careful when considering whether or not the taking is de minimis.[186]

However, what if Nice & Smooth sampled two distinct notes of "I Feel Good" and looped the sample throughout their rap song so as to constitute the underlying composition of the track? The trier of fact would likely determine that the de minimis threshold had been crossed, since the ordinary lay observer would recognize the sample in Nice & Smooth's work. This result is especially likely for rap songs where the "sampled music fragment might be the only melodic material in the new song, and may be the musical glue that binds the piece."[187] But the result is not as clear in the case where the two insignificant notes are looped in such a way that they do not constitute the entire background of the song. In such a case, the trier of fact must pay careful attention to determine how much the sample contributes to the latter work and its overall observability.[188] Nevertheless, if the trier of fact determines that there was actionable copying, Nice & Smooth's only other course of action to insulate themselves from liability, if applicable, would be to mount a fair use defense.

Finally, if Nice & Smooth took two distinct notes from "I Feel Good" and dressed them up with a brass section, guitar riff, and percussion so that the ordinary lay observer could not recognize

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184 It is important to note that these hypotheticals do not provide the definitive outcome for every potential digital sampling claim; rather, they demonstrate the appropriate framework for evaluating potential sampling claims and the kinds of inquiries the trier of fact should make when adjudicating copyright infringement in the digital sampling context.

185 Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

186 *See* Judith Greenberg Finell, *Musicologist Takes Look at Recent Court Rulings*, N.Y. L.J., May 15, 1992, at 5.

187 Finell, *supra* note 64, at 5.

188 *See id.*

the James Brown sample, the trier of fact would likely determine as a matter of law that such a taking was de minimis. Although this result may seem disturbing to some who fear that there is a serious possibility of depriving the copyright holder of his just reward with such non-actionable samples,[189] the last Nice & Smooth hypothetical is completely analogous to New Line's appropriation of the photographs in *Sandoval*. The *Sandoval* court essentially said that no one could discern any of the protectable expressive elements of the photographs; the same would be true of James Brown's two distinct notes.

Judicial recognition of the *Ringgold* and *Sandoval* approach in digital sampling infringement suits would finally cause the courts to appropriately apply the existing copyright law to sampling infringement suits.[190] While the *Tuff 'N' Rumble* opinion seems to be a step in the right direction, if a future opinion rejects an infringement suit involving an unauthorized sample by finding that it was a de minimis taking, it would alleviate any lingering effects emanating from the earlier sampling cases, which seemed to hold that digital sampling is per se infringement. It would also place the burden back on the plaintiff to prove the elements of his infringement suit instead of presuming infringement and forcing the rap artist to mount a fair use defense. This ultimately may have a benefit in terms of judicial economy; if the plaintiff can't show substantial similarity between his song and the sampling rap song, the case is thrown out as a matter of law. Like the district court in *Sandoval*, it seems that many courts have mistakenly considered the fair use defense before the determination of whether the copying is de minimis, potentially making litigation costs higher and trials longer, as evaluating the four factors is a tedious and intricate process.

In addition, judicial recognition of the relevance of the *Ringgold* and *Sandoval* approach to digital sampling infringement suits may potentially provide the marketplace with more creative musical works. If rap artists like Puff Daddy and Jay-Z had more judicial guidance and an increased level of certainty regarding certain types of non-actionable samples, it would allow them to create even

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189 *See, e.g.*, Rafter & Coats, *supra* note 12, at 146 ("By sufficiently altering a digitized 'intermediate copy,' an individual may be able to capture the essence of an artist yet avoid infringing that artist's copyright. In such cases, the author of the original work is not compensated for its use, even though much of his creative effort may be reflected in the digital manipulation. . . . As authors are deprived of economic rewards for their efforts, incentives for the creation of original works may decline.").

190 *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991); Jarvis v. A&M Records, 827 F. Supp. 282 (D. N.J. 1993).

more diverse and rewarding works for the music community as a whole. In applying the *Ringgold* and *Sandoval* approach to digital samples, the courts would be more readily engaged in "balancing . . . the interests of artists in retaining artistic and economic control over their works against the interest of artists in having access to raw material for use in creative works."[191] Ultimately, application of the *Ringgold* and *Sandoval* approach to digital sampling would allow rap artists to be even more creative, thus allowing rap music to continue to reshape the face of popular music and lead the music industry into the next century.

IV. CONCLUSION

Applying the *Ringgold* and *Sandoval* approach to music sampling litigation is an effective and efficient way of dealing with the scope of copyright protection of sound recordings and music compositions. Although this approach does not offer any bright line rules, it provides a comprehensive framework for evaluating copyright infringement suits involving digital samples and provides a rap artist with additional guidance as to how much he can sample a pre-existing work before exposing himself to liability. Furthermore, judicial recognition of the appropriate application of the *Ringgold* and *Sandoval* approach to digital samples would further validate the contention that copyright infringement in the digital sampling context should be evaluated in the same manner as all other copyrightable subject matter.

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191 Percifull, *supra* note 92, at 1269.

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