

## NEWTON V. DIAMOND

349 F.3d 591 (9th Cir. 2003)

The Ninth Circuit held that sampling, or use of a brief segment of a musical recording for incorporation into a new recording, was *de minimis* and therefore not infringing of the underlying musical composition, where the sample consisted of “three notes separated by half-step over a background C note” and the sampler had obtained a license to excerpt the sound recording.

Jazz flutist James Newton composed the song “Choir” in 1978. In 1981, he performed and recorded “Choir” and licensed all rights in the sound recording to ECM Records, but retained all rights to the composition. The rap band the Beastie Boys obtained a license from ECM Records in 1992 to sample portions of the sound recording of “Choir” in various renditions of their song “Pass the Mic.” The band did not, however, obtain a license from Newton to use the underlying composition. Pursuant to their license from ECM Records, the Beastie Boys digitally sampled the opening six seconds of Newton’s sound recording of “Choir,” and repeated this six-second sample as a background element throughout their song. Newton brought suit, claiming that the Beastie Boys infringed his copyright in the underlying composition of “Choir.”

The district court granted summary judgment in favor of the Beastie Boys, holding that no license of the underlying composition was required because the three-note segment of “Choir” lacked the requisite originality and was therefore not copyrightable. The court further held that even if the segment were copyrightable, the Beastie Boys’ use of the work was *de minimis* and therefore not actionable.

The Ninth Circuit affirmed the district court’s decision for the defendants on the ground that the use was *de minimis*. The court applied the “average listener” test articulated in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), in determining whether the use was *de minimis*. Under this test, a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation. Because the Beastie Boys had lawfully licensed the sound recording, the court confined its inquiry to whether the unauthorized use of the three-note sequence transcribed in the composition was substantial enough to sustain an infringement claim. The court found that there was a high degree but limited scope of similarity between Newton’s and the Beastie Boys’ work, and thus placed Newton’s claim for infringement into the class of cases that allege “fragmented literal similarity.”

In such cases, the question is whether the similarity goes to trivial or substantial elements of the original. This phenomenon is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole. The court noted that when viewed in relation to Newton’s composition as a whole, the sampled portion was not quantitatively significant as it appeared only once in Newton’s composition and lasted only six seconds in the Beastie Boys recording. In addition, it was not qualitatively significant because the sampled section was a generic three-note sequence that lacked any distinctive elements. The court concluded that the average audience would not discern Newton’s hand as a composer from the Beastie Boys’ use of the sample and that the works in question were not substantially similar; therefore, the Beastie Boys’ use of the “Choir” composition was *de minimis*.