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Look What They've Done to My Song Ma - Digital Sampling in the 90's: A Legal Challenge for Tthe Music Industry

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LOOK WHAT THEY'VE DONE TO MY SONG MA[1]—DIGITAL SAMPLING IN THE 90's: A LEGAL CHALLENGE FOR THE MUSIC INDUSTRY

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I. INTRODUCTION

Originally believed to be a bunch of noise and a lusty gyration of sound,[2] "pop," "rock n'roll," or rock music is today an institution. From the advent of the domestic political waves of the 1960's to the various musical "invasions" from across the Atlantic, American society has evidenced the impact of this music in every facet of its social and political strata. The musicians of today articulate many ideas, beliefs, and emotions of Americans, much like the bards of old on the Continent. From pre-teen to mid-life, there are musicians and music genre offshoots of rock with which each age

1. THE NEW SEEKERS, *Look What They've Done to my Song Ma* (Electra Records 1971). *See* JOEL WHITBURN, THE BILLBOARD BOOK OF THE TOP 40 HITS (2d ed. 1985).

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2. THE ROLLING STONE ILLUSTRATED HISTORY OF ROCK & ROLL 1 (Jim Miller 2d ed. 1980).

group identifies. As a result, musicians play an important role in the lives of most Americans.

As society approaches the twenty-first century, music as an art form has kept abreast of changing technology. In the early years of the twentieth century, Thomas A. Edison spoke into a device resembling a megaphone and recited *Mary Had a Little Lamb*,[3] which was recorded on a scratchy aluminum-like foil cylinder. Since that time, the recording industry has come full-fold, creating recording equipment which can reproduce the human voice with nearly absolute accuracy.[4]

Accompanying these advancements, however, are significant considerations concerning the protection of the original musician's work. Consumer copying in the form of home taping, for instance, remains a serious consequence of technological progress in this field.[5] The recent advent of advanced digital technology has redirected the focus to another source, namely, other musicians.

Ironically, imitation has been known in certain entertainment industries as the sincerest form of flattery. For reasons that will be addressed in this Article, this poses serious problems in the music industry. Traditionally, rock musicians have borrowed blues, folk, and jazz from their predecessors. Recently, the interesting question has arisen whether this impedes creativity and originality. It has only been very recently, however, that actual "samplings" or portions of a finished recording are interplayed into new records and marketed as new "original" recordings.[6]

Notwithstanding the adverse effects of this type of copying of the original artist, the public continues to purchase these "new" works, as evidenced by million-selling songs.[7] The result has been that the original artists are uncompensated monetarily and artistically. Under current interpretations of the applicable statutes, the

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3. N.Y. TIMES, Nov. 4, 1990, § 4, at A44. *See generally* MATTHEW JOSEPHSON, EDISON (1959).

4. Linda Benjamin, Note, *Tuning Up the Copyright Act: Substantial Similarity and Sound Recording Protections*, 73 MINN. L. REV. 1175, 1190 (1989).

5. *See generally* Todd Page, *Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?*, 77 KY. L.J. 441, 456 (1989) (citing several professionals that have objected to home taping). Page also cites sources in the recording industry, indicating that home taping has resulted in substantial losses in sales. *Id.* at 458 (citing Jonathan Fein, Note, *Home Taping of Sound Recordings: Infringement or Fair Use?*, 56 S. CAL. L. REV. 647 (1982-83)).

6. *See generally* Jon Pareles, *Digital Technology Changing Music*, N.Y. TIMES, Oct. 16, 1986, at C23.

7. *See generally* Chuck Phillips, *Read Her Lips: R & B Singer Says Hot Dance Hit is Lip-Synced*, L.A. TIMES, Feb. 21, 1991, at F1.

musician is essentially left without a forum and, as evidenced by the lack of court cases on the subject, without such assistance if changes are not accounted for in the near future.

This Article will assess the need for a broad reading of the current copyright statute to include claims of digital sampling. It will also examine the available causes of action in this field, such as the "fair use" defense. The issue of damages will also be addressed, focusing on pending cases. It will demonstrate the need for and expansion of the present interpretation of the copyright statutes. In addition, it will proffer some suggestions for the benefit of both consumer and musician.

II. IT'S THE SAME OLD SONG, BUT WITH A DIFFERENT MEANING[8]

A. *Sampling Defined*

While not difficult to envision, digital sound sampling is rather complicated in its physical properties. Described most accurately as a recycling of fragments of sound, originally recorded by other musicians,[9] digital sampling makes imitation an exact science. It is a process by which sound waves are converted into binary digital units intelligible by a digital computer. The sound waves reach the transducer of a microphone, which causes it to vibrate. This process creates an electrical pressure or signal that charges as the vibration is received. For computer storage, an analog signal must be translated into bits by an analog to digital converter, which measures the voltage of the signal at equally spaced intervals in time. Each measure or sample is then given a numerical value and recorded in the computer's memory.[10] Once a sample is stored in digital form, it can be altered and manipulated electronically.

Generally, sampling has been employed to make the later released version better than the prior live recording of the same tune.[11] The distinct tonal qualities are stored so that they may be used in a different musical context. Sampling often occurs in situations in which a musician desires a certain number of drumbeats in

8. THE FOUR TOPS, *It's The Same Old Song* (Motown Record Corp. 1965). *See* WHITBURN, *supra* note 1, at 130.

9. Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 427 (1988).

10. Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 148 (1989).

11. *Id. See* Tim Tully, *Simpler Samplers: Is it Live or is it MIDI Hex?*, MACUSER, Oct. 1988, at 148.

a recording.[12] In the past, a record producer would direct a drummer, describing the number of drum beats needed for a particular effect. In that situation, the producer could only hope that the drummer, acting upon the producer's direction, successfully performs. By contrast, sampling allows the same producer to record a string of fifteen to twenty drum beats on the studio recorder, or on a previous recording. The producer, choosing the version that is closest to his or her ideal, stores the beat as a sample.[13]

While the use of sampling is unquestionably extensive, the appropriateness of this process and its effect on the different aspects of the music industry has not been thoroughly considered.[14] Originally, sampling concentrated on sounds. More recently, however, song blurbs have become more common.[15] The use of song blurbs frequently occurs in the genre of rap music. Because this music requires the repeated use of other music selections as background,[16] the use of songs by other artists poses interesting questions regarding copyright infringement. When the rap group, the Beastie Boys, for example, attempted to use the Beatles' song, *I'm Down*, as a background filler, singer-songwriter Michael Jackson informed them that he owned the rights to the song. Upon consultation, the Beastie Boys decided not to use the recording.[17]

B. The Beat Goes On:[18] *Sampling in the Industry*

Record producer Tom Lord-Alge received a master that had used James Brown's[19] classic "screams" from a previous recording. The record was eventually used by the new wave group Orchestral Manuevres in the Dark (OMD) on an album produced by Lord-Alge, who had won a Grammy in 1987 for sound engineering.[20]

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12. Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987).

13. McGraw, *supra* note 10, at 150.

14. *Id.* at 151. (discussing the *Art Of Noise* and *Yes* cases mentioned by Pareles, *supra* note 6).

15. While song blurbs are a portion of the larger problem of sound sampling, they are not the particular focus of this Article.

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

17. Elizabeth Drake, *Digital Sampling: Looming Copyright Problems*, BC CYCLE (UPI), May 8, 1987.

18. SONNY & CHER, *The Beat Goes On* (Atco Records 1967). *See* WHITBURN, *supra* note 1, at 294.

19. Michael W. Miller, *Creativity Furor: High-Tech Alteration of Sights and Sounds Divides the Art World*, WALL ST. J., Sept. 1, 1987, at A1, A25.

20. *Id.*

While such vocals are being sampled in the 1990's, sounds have been appropriated in the 1980's. A work completed by Steve Winwood, for example, who also received the prestigious music award, contained the feet stomping and hand clapping of Diana Ross and the Supremes from their original rendition of *Where Did Our Love Go?*[21] More recently, ex-bodyguard-turned-rapper Tone Loc's recording of *Wild Thing* borrowed the exact guitar riffs recorded by guitarist Eddie Van Halen on the song, *Jamie's Cryin'*.[22]

Additionally, rapper M.C. Hammer used James Brown's vocal screams and Rick James' guitar riffs (originally recorded on James' previous super-single, *Super Freak*). Unlike the use of the songs and sounds referred to previously, all rights and acknowledgements were duly noted in Hammer's album.[23] Lord-Alge explains, "That's the way it was done (in the eighties)." Singer James Brown, however, insists that "[a]nything they take off my record is mine. Is it all right if I take some paint off your house, and put it on mine? Can I take a button off your shirt and put it on mine . . . ?"[24]

These examples illustrate the need for legal protection of original works or sounds of original works in the music industry. Musician Frank Zappa has gone so far as to place a warning on his most recent record, noting that "unauthorized reproduction/sampling is a violation of applicable laws and subject to criminal prosecution."[25] William Krasilovsky, lawyer and co-author of *This Business of Music*,[26] suggests that if one were to use jazz musician Jascha Heifitz's sound to play *Rock Around the Clock*, and one were

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21. Steve Winwood's album was entitled "Back in the High Life," for which he received a Grammy in 1986.

22. Van Halen recorded *Jamie's Cryin* on its debut album, "Van Halen" in 1978. While this claim has yet to be brought, it is the contention of the author of this Article that the riffs are one and the same.

23. *See* M.C. HAMMER, PLEASE HAMMER DON'T HURT'EM (Capitol Records 1990); Jim Sullivan, *It's Only Rock 'N' Roll Awards: Cheers for Pop's Heroes, Jeers for Its Villains*, BOSTON GLOBE, Dec. 28, 1990, at 59.

24. Miller, *supra* note 19, at A25.

25. From the record album, "Jazz From Hell," recorded by Frank Zappa. *See* Drake, *supra* note 17. According to Pareles, *supra* note 6, at C23, Producer Trevor Horn used a big band brass chord sample in *Owner of a Lonely Heart* recorded by the group, Yes. Conversely, he admits to using a sample of Yes's drummer Alan White's riffs on a record of another group which he later produced. However, again, this is nothing new. *See also* Keyt, *supra* note 9, at 427, n.33. Paul McCartney is quoted as saying that the Beatles were "the biggest nickers in town—plagiarists extraordinaire." PLAYBOY, Dec. 1984, at 107. George Harrison, another Beatle, recorded *My Sweet Lord,* which was later found to have been copied from *He's So Fine,* originally recorded by the Chiffons. *See generally* Drake, *supra* note 17.

26. *See generally* S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC (3d ed. 1982); *Digital Sampling Cheered, Jeered*, CHI. TRIB., Oct. 23, 1986, at 10.

to put musician Jascha's name on it, that third parties would be abusing his right of privacy. But if you simply used his distinguishable work and merely "refashioned" it, it may be protected as a derivative work.[27] Notwithstanding these alleged violations, the recording industry has not established policies to deter unauthorized sampling.[28] To the contrary, sampling is thriving.[29]

III. DON'T PLAY THAT SONG:[30] THE ISSUES RAISED—THE *DIAMOND* AND *RUBIN* CHARGES[31]

The Copyright Act of 1976 contains no specific language that refers to digital sampling. Nevertheless, a broader interpretation of the Act may permit its inclusion. No "test cases" have been adjudicated, however, which could provide an adequate means of redress to a copyright owner alleging the unauthorized use of his or her sounds.[32] The primary problem in bringing a sampling claim is one of quantity. "There are various amounts of sampling taken without permission and no one ever really owns up to it."[33]

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27. SHEMEL & KASILOVSKY, *supra* note 25. *See generally* Ralph S. Brown, *The Widening Gyre: Are Derivative Works Getting Out Of Hand?*, 3 CARDOZO ARTS & ENT. L. J. 1 (1984).

28. E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273, 276 (1987).

29. VH-1 News (VH-1 television broadcast, Sept. 5, 1990) (transcript on file in the Publicity and Promotion Department of the VH-1 (Video Hits One) studios located at 1775 Broadway, New York). Note also that *Ice, Ice Baby*, recorded late in 1990 by Vanilla Ice, uses quotes from *Pressure* by Queen/David Bowie, previously recorded. Drummer, Phil Collins' snare drum has been sampled on many popular recordings. *See* Steven Dupler, *Digital Sampling: Is it Theft?*, BILLBOARD, Aug. 2, 1986, at 1. David Earle Johnson, percussionist, was sampled by Jan Hammer on introductory music for the Miami Vice television series. *See* Anthony DeCurtis, *Who Owns a Sound*, ROLLING STONE, Dec. 4, 1986, at 13.

30. BEN E. KING, *Don't Play that Song* (Atco Records 1962). *See* WHITBURN, *supra* note 1, at 181.

31. *See* Complaint, Castor v. Rubin, 87 Civ. 6151 (S.D.N.Y. filed Aug. 25, 1987) (alleging copyright infringement, unfair competition, among other claims) [hereinafter Complaint]. *See also* Complaint, Thomas v. Diamond, 87 Civ. 7048 (S.D.N.Y. filed Oct. 1, 1987), which has been sealed in a federal depository in Hudson County, New Jersey and only available on special application. It has been effectively closed. Telephone conversation with the Clerk's Office, S.D.N.Y. (Dec. 20, 1990). The *Castor* matter was still open as recently as February 1990, but was settled out of court for an undisclosed agreement, according to Nelson Bollack, associate with Ken Anderson, Esq., at Berger & Steingut in New York (attorneys for defendants, Adam Yauch, Adam Horowitz and Michael Diamond). Telephone conversation with Nelson Bollack (Nov. 15, 1990). According to Mr. Bruce Gold, now counsel at Capitol Industries-EMI, Inc., in New York, no briefs were filed. (Copies of both Complaints on file with the U. MIAMI ENT. & SPORTS L. REV.) Telephone interviews with Bruce Gold, Esq. (Dec. 20, 1990). Both matters are cited in Stan Soocher, *License to Sample*, NAT'L. L.J., Feb. 18, 1989, at 1.

32. *See* Johnson, *supra* note 28, at 273.

33. Dan Torchia, Managing Editor of *Intertech*, a recording trade newspaper. *See gen-*

In two cases, a number of issues were raised regarding the rights of musicians.[34] The possible causes of action in this area include the following: 1) an action for an injunction and damages for infringement of copyright in a musical composition; 2) unfair competition; 3) wrongful misattribution of authorship;[35] 4) wrongful misappropriation of a musical composition; and 5) defamation of character. In *Thomas v. Diamond*,[36] the United States District Court for the Southern District of New York suggested that a violation of section 43(a) of the Lanham Act could also be addressed. Each of these actions are evidently valid. Moreover, the leading authors addressing this subject have mentioned that these actions constitute the universe of actions possible under a sampling claim.[37]

A close scrutiny of each cause of action, its procedural aspects, and its relation to sampling is necessary. Specifically, when analyzing the possibility that digital sampling may fall within the current copyright statutes, the exact process of copyright protection merits attention.

A. Hey, Baby (They're Playing Our Song):[38] The Copyright Infringement Action

To prove a copyright infringement claim, the following four elements must be established: 1) sound sampling originality; 2) the existence of sound sample ownership; 3) the copying of sound samples; and 4) the proving of either substantial similarity or fragmented literal similarity.[39] The test is composed of the three prongs. First, the plaintiff must own a valid copyright in the material alleged to have been copied by the defendant.[40] Second, the plaintiff must prove that the defendant actually copied from the

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erally Drake, *supra* note 17.

34. *See* Complaint, *supra* note 31.

35. Wrongful misattribution of authorship will not be addressed in this Article. After research inquiries, it appears that such a cause of action is novel. While one case, Lamothe v. Atlantic Recording Co., 847 F.2d 1403, 1404 (9th Cir. 1988), did mention the issue of misattribution of authorship, it made no mention as to the requisite elements and remanded to the District Court.

36. 87 Civ. 7048 (S.D.N.Y. filed Oct. 1, 1987). *See supra* note 31 and accompanying text.

37. *See generally* McGraw, *supra* note 10; McGiverin, *supra* note 12, at 1727 n.24, 1738-45; Johnson, *supra* note 28, at 294-305.

38. THE BUCKINGHAMS, *Hey Baby (They're Playing Our Song)* (Columbia Records 1967). *See* WHITBURN, *supra* note 1, at 54-55.

39. *See* Complaint, *supra* note 31.

40. Jeffrey G. Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. (ASCAP) 81 (1977).

original copyrighted work.[41] Finally, the plaintiff must prove that the defendant's copying constituted an unlawful infringement on the plaintiff's copyright.[42] Determination of the third element, in turn, depends upon whether the defendant copied so much of what is "pleasing to the ears" of lay listeners, who comprise the audience for whom such music is composed, that it could be said to have been wrongfully appropriated by the defendant. A plaintiff must therefore establish substantial similarity.[43]

1. Establishing the Copyright

To properly address the possibility of a copyright infringement claim for unauthorized sampling, the legislative history of the subject is helpful. In an effort to include the advancement of new technologies, Congress enacted the Copyright Act of 1976.[44] The requirements for establishing copyright for protection include originality and fixation in a tangible medium. The concept of originality requires that the work be made independently (without copying) and with a modest but discernable "quantum of creativity."[45] Independently created works, therefore, do not infringe upon another's work if they are found to be substantially similar although created without reference to the copyrighted works.[46]

The originality requirement is qualified by the length of time of the protected work. In addition, individual names, titles, slogans, listings of ingredients, and tables of contents do not constitute the requisite minimal effort necessary to invoke protection.[47] Certain "gems" of small quantity of effort may deserve copyright but ordinary words, mottos, and slogans do not generally merit copyright protection.[48] Once the author or artist establishes the elements of ownership, the registration constitutes prima facie evi-

41. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946), *aff'd on rehearing*, 158 F.2d 795 (2d Cir. 1946). For a discussion of the facts of *Arnstein*, see Lawrence W. Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOK. L. REV. 279, 280 (1987).

42. *Id.*

43. *See* McGraw, *supra* note 10, at 162, 164.

44. 17 U.S.C. §§ 101-810 (1988), H.R. REP. No. 94-1976, 94th Cong., 2d Sess. 1 (1976).

45. A. LATMAN, THE COPYRIGHT LAW 21 (5th ed. 1979).

46. *See* 1 M. NIMMER, NIMMER ON COPYRIGHT § 8.01[A], at 8-10 (1987) (citing Sid & Marty Kroft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1987); Reader's Digest Inc. v. Conservative Digest Ass'n, 821 F.2d 800, 805 (D.C. Cir. 1987); Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir. 1987).

47. A. LATMAN, THE COPYRIGHT LAW 23 (6th ed. 1986).

48. *Id.* at 24.

dence of originality.[49]

Fixation in a tangible medium, the second requirement under the Act,[50] is satisfied when the work is embodied in a copy[51] or phonorecord[52] and can be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.[53] As a result, musical composition is considered "fixed" for copyright purposes when it is recorded, transcribed into sheet music, or performed live while being simultaneously recorded. A live performance is not itself "fixed" for copyright purposes and is therefore not entitled to protection. However, under section 101 of the Act, a live performance that is being simultaneously recorded is sufficiently fixed for copyright protection.[54]

While a generic musical composition may be thought of as a mere song, it is defined more precisely in copyright terms as a nondramatic musical work.[55] Three areas are usually protected. First, there is protection for a simple melody.[56] Second, a musical arrangement of melody, harmony, rhythm, timbre, and spatial organization,[57] into what may be recognized as a complete song, is protected. Finally, the lyrics accompanying a melody or arrangement may also be entitled to copyright protection.[58]

Typically, one copyright protects an entire musical composi-

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49. The primary difficulty with regard to originality in the sound sampling setting is the requirement of the certain degree of distinguishing personality necessitating copyrightability. For example, one note by a singer might be identifiable as a particular creation. However, the setting in which the sampling is taken may be crucial. *See generally* McGraw, *supra* note 10. McGraw distinguishes commercial and noncommercial sound in this context. For steps regarding the originality requirement, see 17 U.S.C. § 410(c) (1988), *cited in* Southern Bell Tel. & Tel. v. Associated Telephone Directory Publishers, 756 F.2d 801 (11th Cir. 1985); Arthur Rutenberg Corp. v. Dawney, 647 F. Supp. 1214, 1216 (M.D. Fla. 1986). *See* 1 NIMMER, *supra* note 46, at § 12.11[A].

50. Copyright Act of 1976, 17 U.S.C. § 102(a) (1988).

51. Copy is defined as "material objects other than phonorecords in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1988).

52. Phonorecords are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1988).

53. 17 U.S.C. § 102(a) (1988).

54. *See* McGiverin, *supra* note 12, at 1727.

55. Latman & Ginsburg, *Let the Sounds of Music Creep Into Our Ears*, 189 N.Y. L.J., May 20, 1983, at 1.

56. *Id.* (defined as a "pleasing progression of notes").

57. *See* Keyt, *supra* note 9, at 422.

58. Latman & Ginsburg, *supra* note 55, at 1.

tion. A composition may require, however, as many as three copyrights. Within one composition, for example, both the composers of the melodies and the composer of the lyrics may have a copyright.[59] It follows that the composers of the completed composition could also seek copyright protection for his or her creative contributions to the composition.[60]

The actual mechanics of obtaining a copyright for a musical composition, despite the complexities in deciding which ones apply, are relatively simple.[61] The modern copyright generally covers the life of the author plus a period of fifty years.[62] Upon expiration of this period, the composition falls into the public domain.[63]

Once a copyright owner follows the copyrighting process, he or she obtains several rights. These rights include the following: the right to reproduce the work in copies or phonorecords; the right to prepare derivative works based on the copyrighted works; the right to distribute copies or phonorecords of the work to the public; the right to perform publicly; and the right to display the work publicly.[64] The limited duration of this "monopoly" serves to effectuate Congress' objective of promoting artistic creativity. This is achieved by restricting the extent to which any one artist can exploit his or her work.[65] The eventual termination of the artist's limited monopoly provides for the assimilation of artistic works into society, thereby accomplishing the ultimate objective of copyright law, namely, the promotion of creativity.[66]

Currently, there are limitations on the copyright owner's exclusive right to his or her work.[67] Most notable of these is contained in section 115 of the Copyright Act of 1976, which states

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59. *Id.* at 3.

60. *Id.* (citing 17 U.S.C. § 103 (1988)). While performers and engineers usually have a copyright in the particular sounds they contributed to the sound recording, it is commonplace for the record company who makes the recording to buy the copyrights of each author thus making the record company the exclusive copyright owner.

61. CHISUM & WALDBAUM, ACQUIRING AND PROTECTING INTELLECTUAL PROPERTY RIGHTS § 2.03 (1988).

62. 17 U.S.C. § 302(a) (1988). For works created after January 1, 1978, copyright protection exists from the date of creation. For those works created before January 1, 1978, and copyrighted under the Copyright Act of 1909, copyright protection vested only upon publication/distribution of copies of phonorecords of the work to the public by sale, rental, or lease.

63. Scott L. Bach, Note, *Music Recording, Publishing and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 382 (1986). *See* Chisum & Waldbaum, *supra* note 61, at § 2.05[2], for the basic process to securing a copyright.

64. 17 U.S.C. § 106 (1988).

65. *See* BACH, *supra* note 63, at 383.

66. *Id.* The ultimate objective is the promotion of creativity.

67. *See* 17 U.S.C. §§ 107-116 (1988).

that once a composition is recorded and distributed to the public, others can record it and distribute phonorecords embodying it to the public.[68] The only restrictions imposed on this compulsory license are minimal notice requirements.[69]

Determination of the threshold questions of originality and fixation raises the interesting question regarding copyright infringement in a sampling claim. An analysis of the sampling claim requires examination of section 102 of the Act in order to determine which of the areas of classification a work may receive.[70] These categories include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings.[71] Because sound sampling involves recording of sounds and voice, the recording provision[72] is applicable for this classification. Under the Act sound recordings are defined as works resulting from the fixation of a series of musical, spoken, or other sounds, regardless of the nature of the material objects such as disks, tapes, or other phonorecords in which they are embodied.[73]

Until the Sound Recording Act of 1971, sound recordings were excluded by Congress on the basis of the copyright clause of the Constitution, which referred to copyright protections in terms of "writings."[74] Initially, it was believed that Congress intended to extend protection to creative works that had similarities to books or writings, namely, musical scores. Because record discs could not be seen or perceived as words, they were protected. Under the 1971 Act, sound recordings fixed after February 15, 1972, were entitled to federal copyright protection.[75] State laws, however, protect pre-1972 sound recordings in the form of unfair competition, misap-

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68. 17 U.S.C. § 115(a)(1) (1988).

69. *Id.* A person wishing to obtain a compulsory license to record a composition need only give notice to the copyright owner before or within 30 days after recording the composition and before phonorecords of the work are distributed, payment of statutory royalties shall be given to the copyright owner. *See* 37 C.F.R. §§ 307.2 to -.3 (1988).

70. *See* explanatory note, *supra* note 49.

71. 17 U.S.C. § 102(a) (1988).

72. 17 U.S.C. § 114 (1988).

73. 17 U.S.C. § 101 (1988).

74. J.C. Thom, Comment, *Digital Sampling: Old Fashioned Piracy Dressed Up in Sleek New Technology*, 8 LOY. ENT. L.J. 297, 307 (1988) (citing 17 U.S.C. § 301(c) (1988)). *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have 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.").

75. 17 U.S.C. § 301(c) (1988). *See Prohibiting Piracy of Sound Recordings: Hearings on S.646 and H.R. 6927 Before Sub-Comm. of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 25 (1971). *See also* Thom, *supra* note 74, at 304.

propriation, or specific antipiracy statutes.[76]

2. Infringement Elements

To establish a claim of infringement, a plaintiff must demonstrate an ownership or interest in the copyrighted work and the substantial similarity of the defendant's copy to the original copyrighted work.[77] Unlike owners of copyrights embodied in sound recording, individuals owning sound recording copyrights cannot restrict others from publicly performing the songs. Along this line, at least one case has stated that proof of infringement of a sound recording copyright requires a showing of more than substantial similarity, actual sound must be recaptured. The substantial similarity is not satisfied by similar sound recordings that are not actual duplications; duplications alone do not constitute infringements.[78] Moreover, duplicating a portion of the actual sounds in a recording is not an infringement per se. Rather, the resulting duplication must be substantially similar to the original recording.[79]

Plaintiffs attempting to prove infringement of copyrights in sound recordings utilizing samples face the difficult problem of proving copyright. This is due to the fact that only small quantities of sounds are copied. Before the advent of sound sampling, the taking of small quantities of sounds from copyrighted sound recordings for re-use in other recordings was possible but not practical. With the exception of "musique concret" in Paris in the

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76. H. Craig Hayes, *Performance Rights in Sound Recordings: How Far to the Horizon?*, 27 COPYRIGHT L. SYMP. (ASCAP) 113, 117 (1982). The terms piracy and plagiarism should be distinguished in this context. Piracy is defined as the production and sale of unauthorized literal copies of a work as distinguished from "plagiarism" which involves false designations of authority and other unattributed uses of copyrighted material. However, in this context, without the benefit of a universal, federal law, serious problems were created and by the early 1970's virtually one quarter of all records and tapes in the United States were illegal duplicates.

77. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.01[A], at 13-4 (1987).

78. U.S. v. Taxe, 540 F.2d 961, 968 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977). In *Taxe*, the defendants had re-recorded commercially available popular sound recordings and had decreased and increased original recording speed, placed echo within the recordings, certain portions of sounds were reduced in volume or eliminated and other sounds added by synthesizers. Then, the re-recordings were sold to the public. The *Taxe* court, however, found that in opposition to the defendant's belief that their re-recording was an independent fixation and in compliance with 17 U.S.C. § 114 (1988), it believed that the defendants had nonetheless illegally duplicated the sound recordings. Such guilt was found due to the fact that there was a substantial similarity between the protected (copyrighted) recordings and the re-recording of the defendants. Contrary to the facts of *Taxe*, this Article only addresses exact re-recordings of originals which have been used in background sounds. However, altered original vocals or sounds are beyond the scope of this Article.

79. *Id.*

1940's,[80] most viewed the magnetic tape manipulation required to use individually recorded sounds in different settings as too time consuming when compared to originally recorded new sounds.

Because most sounds sampled from sound recordings are derived from musical works, it is important to distinguish the question of infringing the copyright in the sound recording from the question of infringing the copyright in the musical composition embodied in the sound recording. The difficulty arises when the duplication of sound recordings results in copies that are shorter in length than one complete musical composition. A sample of several notes might infringe the copyright in the sound recording.[81] If the portion copied from a plaintiff's work is the part that makes it valuable, substantial similarity will be found even if a very brief phrase is copied.[82] That is, if the portion borrowed is short, identifiable, and repeated throughout the composition, the phrase is of greater importance, thereby becoming a substantial part of the complaining work.[83]

Substantial similarity is established when the copy consists of enough of the copyrighted work so that it could substitute for the original work. The plaintiff's resulting damage thus becomes evident.[84] Even when the defendant has copied from the plaintiff's copyrighted work, if the only material copied are those elements of the plaintiff's work that are not protectable, the resulting copy will not constitute infringement.[85]

The third element under both *Taxe* and *Arnstein* allows substantial similarity to be qualitatively measured. The question becomes whether the part duplicated was the very part of the song

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80. *See* THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 107-109 (1980), *cited in* Johnson, *supra* note 28, at 289 n.102.

81. Boosey v. Empire Music Co., 224 F. 646 (S.D.N.Y. 1915). *See* Johnson, *supra* note 28, at 290.

82. *See* example in *supra* note 69.

83. Nimmer referred to this copying as "fragmented literal similarity." *See* 13 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[A], at 13-41 (1988). A big brass chord sample, for example, might be indicative of a unique sound thereby identifying the artist. *See supra* note 25.

84. Sherman, *supra* note 40, at 81.

85. 12 M. NIMMER, NIMMER ON COPYRIGHT § 8.01[E], at 8-17 (1988). As noted in *Taxe*, it is erroneous to characterize all re-recordings as infringements. Raphael Metzger, *Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 34 COPYRIGHT L. SYMP. 139, 153-71 (1987). Instead only those recordings or duplicates that are substantially similar will be infringements. Thus most advocates believe that the traditional substantial similarity test should be applied to sound recordings and infringement cases. Because digital sampling involves the "cloning" of sounds from sound recording, digital sampling would only infringe when it is substantially similar to the sampled sound recording. *See Taxe, supra* note 78, at 965.

that makes the plaintiff's work popular and valuable, or that portion of the plaintiff's work from which its popular appeal and commercial success is derived.[86] A producer could therefore sample individual instrumental sounds as performed by star performances on a variety of commercial recordings and subsequently create a new "all-star" recording without infringing copyrights of the various commercial recordings.[87] If the sampled sounds are longer than one note, however, plaintiffs could argue that an aggregation of sounds has been sampled. In this way, each duplication is a separately copyrightable and thus protected part of plaintiff's sound recording. The all-star recording could thus be described as an unauthorized derivative work.[88]

3. Conclusion as to Copyright Infringement Involving Sampling

An infringement claim for sound sampling must be made on a case by case basis and involves a qualitative determination. The qualitative measure of the substantial similarity has been expressed in various ways. The court could determine whether the defendant appropriated any one of the following: 1) "the meritorious part of the song"; or 2) "material of substance and value in plaintiff's work"; or 3) "the very part that makes . . . [the complaining work] popular and valuable"; or 4) "that portion of [the complaining work] upon which its popular appeal and hence, its commercial success depends,"; or 5) "what is pleasing to the ears of lay listeners . . . ."[89]

If the primary portion of a plaintiff's composition, artistically speaking, is but a short portion of the piece, it would hardly be conducive to the promotion of the arts to deny protection for his or her artistic portion only because it was surrounded by something less artistic.[90] In *Meredith Corp. v. Harper & Row*, for example, the court found that even a small usage may be unfair if it is of

86. *See* Thom, *supra* note 74, at 323.

87. *See* Sherman, *supra* note 40, at 104 (citing Johnson, *supra* note 28).

88. *Id.* (citing 17 U.S.C. § 106(a) (1988)). Section 106(a) reads, in pertinent part, that the owner of copyright, "has the exclusive right to do and authorize . . . derivative works based on one or more preexisting works such as a sound recording or any other form in which a work may be recast, transformed or adopted."

89. Sherman, *supra* note 40, at 104 (citing Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir.), *aff'd on rehearing*, 158 F.2d 795 (2d Cir. 1946); Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282, 283 (8th Cir. 1939); Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956); Northern Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 397 (S.D.N.Y. 1952); 1 M. NIMMER, NIMMER ON COPYRIGHT § 143.53 (1971)).

90. Sherman, *supra* note 40, at 104.

critical importance to the work as a whole and taken by the infringer merely to save time and expense incurred by the copyright owner.[91]

B. *Treat Me Nice:*[92] *Unfair Competition*

1. The Common Law

Unfair competition arises when there has been a "misappropriation for the commercial advantage of one person of a benefit or property right belonging to another . . . ."[93] The *Metropolitan Opera* court held that by failing to pay the plaintiff for recording the performances and thus bear the costs normally incurred by a record company, the defendant was guilty of unfair competition. The court acknowledged that property rights (specifically, literary, artistic, or musical property rights) are recognized and protected by the courts.[94]

As a result, the modern view holds that unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be protected from any form of unfair invasion or infringement. A court of equity will likely penetrate and restrain "every guise resorted to by the wrongdoer."[95]

Because property rights would be utilized in digital sampling of distinctive sounds, the cause of action is similar to the exclusive right to use one's own name and reputation. These rights are protected by well established tenets of trademark and unfair competition law.[96] The primary obstacle in establishing that a sound should be protected by a trademark, is proving that the performer's sound is distinctive and is readily recognizable by the

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91. 378 F. Supp. 686 (S.D.N.Y. 1974), *aff'd*, 500 F.2d 1221 (2d Cir. 1974).

92. ELVIS PRESLEY, *Treat Me Nice* (RCA Records 1957). *See* WHITBURN, *supra* note 1, at 250.

93. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483, 489 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (1951). In *Metropolitan Opera*, the defendant recorded, without permission, the plaintiff's opera performance from live broadcasts, and then sold recordings of the performance. The *Metropolitan Opera* case has been criticized to some degree in light of new statutory changes in the Copyright Act. For a treatment of the case in a modern context, see Elizabeth T. Tsai, Annotation, *Unfair Competition by Direct Reproduction of Literary, Artistic or Musical Property*, 40 A.L.R.3D 566 (1990). *See also* Gordon & Sanders, *The Rap On Sampling: Theft Or Innovation*, N.Y.L.J., April 28, 1989, at 6.

94. *Metropolitan Opera*, 101 N.Y.S.2d at 493.

95. *Id.*

96. W. KEETON ET AL., ON THE LAW OF TORTS § 130, at 1015 (5th ed. 1984).

public.[97]

While vocalists have shown that their distinctive sounds are easily recognizable, this type of claim is not readily available for the sounds of instrument players.[98] It is believed, however, that because sounds are usually taken to reduce expenses, rather than for their distinctiveness, and then stored by producers, the sampling claim may likely fail under the common law requirement of distinctiveness.[99]

2. Federal Lanham Act[100]

Under Section 43(a) of the Federal Lanham Act, Congress essentially created a new federal statutory tort. Courts have interpreted this section broadly and have asserted that its purpose is the "protection of consumer and competitors from a wide variety of misrepresentations of products and services in commerce."[101] The Lanham Act has been held to apply to situations that would not qualify formally as trademark infringement, but that involve unfair competitive practices that result in actual or potential deception.[102]

Under the Lanham Act, a plaintiff must establish the following three elements: 1) involvement of goods or services; 2) effect on interstate commerce; and 3) a false designation of origin or false description of the goods or services.[103] In *Allen v. National Video,*[104] the court found that the advertisement in question involved goods or services because the defendant solicited business for a video rental franchise. The second element was found to involve interstate commerce because National's claim was nationwide and the advertisement was placed in magazines having interstate distributions. Determination of whether the plaintiff

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97. Johnson, *supra* note 28, at 299.

98. *See* Miller, *supra* note 19. Examples of this include the sounds of all types of musical instruments. *See* McGiverin, *supra* note 12, at 1726 (stating that bassists, string players, as well as percussionists have been copied to such an extent that they have effectively "lost their jobs to a computer").

99. *Id. See* Neal v. Thomas Organ, Co., 241 F. Supp. 1020, 1023 (S.D. Cal. 1965). *See also* Johnson, *supra* note 28, at 298.

100. 15 U.S.C. § 1125(a) (1987).

101. CBS, Inc. v. Springboard International Records, 429 F. Supp. 563, 566 (S.D.N.Y. 1976). *See also* Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76, 79 (2d Cir. 1981); Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985); Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 586 (S.D.N.Y. 1967), *rev'd on other grounds*, 393 F.2d 91 (2d Cir. 1968).

102. S.K. & F, Co. v. Premo Pharmaceutical Lab, 625 F.2d 1055, 1065 (3d Cir. 1980).

103. *See CBS, Inc.*, 429 F. Supp. at 566.

104. *See Allen*, 610 F. Supp. at 627 n.9.

established the third element required an analysis by the *Allen* court of the likelihood of consumer confusion.[105]

In a sampling cause of action, an unfair competition argument could be made if the sample was "passed off." This occurs when the defendant causes the public to think that the plaintiff had something to do with the defendant's efforts.[106] If an engineer copies a famous artist's original unrecorded samples, for example, without authorization, and later samples it on to another recording, this may create the impression that the artist contributed to the recording, if the artist's work is readily identifiable.[107] Similarly, if the work is not attributed to the artist, it may be known as "reverse palming off."[108] It has been suggested that this would result in unfair competition.[109]

C. My Song:[110] *Wrongful Misappropriation of a Musical Composition*

The right of publicity, first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,[111] relates to misappropriation. In *Haelan*, the United States Court of Appeals for the Second Circuit recognized the right of baseball players to trade in the publicity value of their photographs.[112] The right was extended to protect individuals in a particular field of art, science, business, or others exemplifying extraordinary ability, from those who would commercialize or exploit or capitalize upon that person's name, reputation, or accomplishments.[113]

These cases generally involve the use of pictures, names, biographies, and other explicit references to the name or likeness of a

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105. The *Allen* court looked to the six factors considering the issue of likelihood of confusion in the case of Standard & Poor's Corp. v. Commodity Exchange, 683 F.2d 704, 708 (2d Cir. 1982). These factors include the following: 1) the strength of the plaintiff's marks and name; 2) the similarity of plaintiff's and defendant's marks; 3) the proximity of plaintiff's and defendant's products; 4) evidence of actual confusion as to source or sponsorship; 5) sophistication of defendant's audience; and 6) defendant's good or bad faith. *Id.*

106. *See* J. T. McCarthy, Trademarks and Unfair Competition § 10:19 (1984).

107. Thomas C. MoGlovkin, Note, *Original Digital: No More Free Samples*, 64 S. Cal. L. Rev. 135, 163 (1990).

108. *Id. See* PIC Design Corp. v. Sterling Precision Corp., 231 F. Supp. 106, 113 (S.D.N.Y. 1964).

109. *See* MoGlovkin, *supra* note 107, at 164 (discussing drummer, Phil Collins).

110. Aretha Franklin, *My Song* (Atlantic Records 1968). *See* Whitburn, *supra* note 1, at 132.

111. 202 F.2d 866 (2d Cir. 1953).

112. *Id.* at 868.

113. *Id.* (citing Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967)).

famous personality.[114] In the context of sound sampling, if a sound is sampled and reused in a commercial recording, references to the name of the sampled musician in packaging or advertising of the new recording can support a cause of action for invasion of the right of publicity. In this situation, references to name and reputation are exploited. The unauthorized commercial exploitation of a sound or voice without more, however, has not been considered by the courts.

While digital sampling may present a situation in which this type of claim might be found, a plaintiff proceeding under the theory of the invasion of privacy will face significant evidentiary problems. This is due to the fact that most plaintiffs find that their sound is not recognizable sufficient to constitute their own particular name or likeness.[115]

It has been suggested that case law as applied to sound-alikes in commercial advertisements is hostile towards plaintiffs.[116] Moreover, this hostility is believed to carry over to the plaintiff alleging sampling. As a result, it appears to offer little protection.[117]

D. Don't Do Me Like That:[118] *Defamation of Character*

Defamation arises when the defendant has appropriated the plaintiff's distinctive sound and used it in such a way as to injure the reputation of the artist in the public arena; "to diminish the esteem, respect, goodwill, or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant opinions against him."[119] Additionally, it is not necessary for the defendant to be identified by name.[120] Rather, imitating the plaintiff's identi-

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114. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Martin Luther King v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982).

115. *See* J. McCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 4.14(D) (1982).

116. *Id.*

117. *See* Johnson, *supra* note 28, at 304.

118. TOM PETTY & THE HEARTBREAKERS, *Don't Do Me Like That* (MCA Records 1979). *See* WHITBURN, *supra* note 1, at 245.

119. *See* KEETON, *supra* note 96, § 111, at 773. *See also* Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962). In *Lahr*, the plaintiff, the cowardly lion from the Wizard of Oz, comedian Bert Lahr, had become known for a career based on a style of vocal comic delivery which by the use of pitch, inflection, accent, and comic sounds had caused him to become widely known and readily recognized. The defendant, Adell, used an actor to imitate Lahr's voice who provided the voice for a cartoon duck in its Lestoil commercial. The plaintiff asserted that the imitation was inferior in quality and presented him in a way which reduced him to giving television commercials. *Id.* at 258.

120. Louka v. Park Entertainments, Inc., 1 N.E.2d 41 (Mass. 1936). *See* KEETON, *supra* note 96, § 111, at 776.

fiable voice and later implying that the plaintiff has stooped to perform below his or her class has been held as enough to constitute a defamation claim.[121]

A mere showing that the plaintiff was falsely associated with an advertising campaign is insufficient; injury to his or her reputation must be established. A communication has been defined to be defamatory if it tends to so harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.[122]

To utilize the defamation cause of action in the sampling context, the performer must prove that his or her demonstrably distinctive sound is redone in a way that is "below his class," which causes damage to his or her professional reputation. The difficulty in proving a defamation claim for most performers lies in establishing actual harm.[123] Defamation, as a result, is asserted in the rare case in which a performer is falsely associated with a performance that damages his or her reputation. While the law of defamation may not provide the needed redress, it is suggested that the private tort of "false light in the public eye" provides a more viable avenue.[124]

IV. LET THE MUSIC PLAY:[125] THE DEFENSE OF FAIR USE

Often confused with the substantial similarity test,[126] the defense of fair use might apply in an appropriation case. If the amount appropriated in a second work is small, an allegation of fair use may not be raised unless other facts support that finding.[127] Similarly, if the taking is not substantially similar, there is a fair use.[128]

Another overlap between the fair use analysis and substantial

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121. *Lahr*, 300 F.2d at 256, *cited in* KEETON, *supra* note 96, § 111, at 776.

122. RESTATEMENT (SECOND) OF TORTS § 559, cmt. e (1977). *See* Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973).

123. *See* Johnson, *supra* note 28, at 301.

124. *Id.* at 301-02 (citing Braun v. Flynt, 726 F.2d 245, 250 (5th Cir. 1984)).

125. BARRY WHITE, *Let The Music Play* (A & M Records 1976). *See* WHITBURN, *supra* note 1, at 335.

126. Confusion results from the third element, which is the same under both causes of action. The four factors are as follows: 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 a value of the copyrighted work. 17 U.S.C. § 107 (1988). *See also* Sherman, *supra* note 40, at 101.

127. Sherman, *supra* note 40, at 103.

128. *Id.* at 101.

similarity is the focus on the result. If the defendant's copy could serve as a substitute for the plaintiff's original work in the marketplace, no fair use will be found.[129] Generally, if the defendant's work, even though containing substantially similar material, contains a musical piece performed differently than that of the plaintiff's, the fair use defense may be successfully used.[130]

In the context of digital sampling, it is recognized that splicing a sample of another performer's work and inserting it into a new creation may actually generate additional demand for the infringed owner's work.[131] To deny a fair use defense, it has been suggested, would effectively eliminate such sampling as a form of creative expression, and thus be in direct contravention of the purpose of the Copyright Act.[132] A second theory advanced states that to allow this defense is presumptively unfair under 17 U.S.C. § 107 when dealing with a commercial use of copyrighted materials.[133] Digital sampling as a fair use, however, may ultimately rest with Congress, which has stated that each case involving the defense is a matter of equity.[134]

V. PAY TO THE PIPER: THE REMEDIES[135]

The recognized remedies under the copyright infringement action include injunctions, actual damages, recovery of infringing profits, and/or statutory damages.[136] While the prescribed penalty depends upon the nature of the work that is infringed upon, statutory damages range from $250 to $10,000 and may be awarded in

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129. Leo Feist, Inc. v. Song Parodies, 146 F.2d 400, 401 (2d Cir. 1944).

130. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[b], at 13-86 (1987).

131. *See* McGraw, *supra* note 10, at 167. While this Article does not address other defenses, one author has suggested some additional defenses, including electronic alteration of a digital sample, and the clean hands doctrine. *Id.* at 165, 168. *See also* Arnstein v. Porter, 158 F.2d 795 (2d Cir. 1946).

132. *Id. See* Jean-Victor A. Prevost, *Copyright Problems in Mastermixes*, 9 COMM. & L. 3, 17-24 (1987).

133. *Compare* McGraw, *supra* note 10, at 167, *with* Sherman, *supra* note 40 (citing *Sony Corp. of America*, 464 U.S. 417, 451 (1984)). *See* McGiverin, *supra* note 12, at 1736 (arguing that use of sound recordings should not be considered a fair use). *Sony Corp. of America*, 464 U.S. at 451, states that this is a rebuttable presumption if the defendant's evidence is strong with regard to the three remaining factors and the defendant may succeed. *But see* Prevost, *supra* note 132 (arguing that small takings from sound recordings by disco disc jockeys producing mastermixes of snippets of many individual recognizable songs mixed (interwoven) into a unifying background, is a fair use).

134. H.R. 1476, 94th Cong., 2d Sess. 65-66 (1976).

135. CHAIRMEN OF THE BOARD, *Pay To The Piper* (Invictus Records 1970). *See* WHITBURN, *supra* note 1, at 64.

136. *See* M. NIMMER, NIMMER ON COPYRIGHT ch. 14 (1987).

lieu of actual damages or profits.[137] However, if the defendant has registered the copyright in a timely fashion, the damages awarded may be less.[138]

It is understood that even if a court of law were to award damages to "sampled" plaintiffs, they would likely be the statutory minimum.[139] One author believes that minimum awards will continue because the judiciary wishes to discourage musicians from pursuing these claims, which in the end would be outweighed by the cost of judicial economy.[140]

VI. CONCLUSION

As society approaches the twentieth century, and technological advancements in the music industry continues at breath-taking speed, only two additional lawsuits have been filed regarding sampling-related claims.[141] Notwithstanding the technological progress, it is difficult for a plaintiff to successfully argue an infringement claim in the context of digital sampling under the Copyright Act as it is currently written.

Interestingly, the Act was adopted in essence to promote creativity. While other creative vehicles used by musicians are appropriate and tend to promote creative processes, the casual use of

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137. *See* McGraw, *supra* note 10, at 168.

138. *Id.*

139. *Id.* at 165 (citing Fred Fisher, Inc., v. Dillingham, 298 F.145 (S.D.N.Y. 1924) (Judge Learned Hand "handed" over only a trivial "bother" to a plaintiff whose accompaniment had been copied.)).

140. *Id.*

141. *See* John Leland, *That Synching Feeling; In the Video Era the Milli Melodies Are a Common and Accepted Way of Doing Business*, NEWSDAY, Nov. 25, 1990, § II, at 4 (stating that singer, Martha Wash, filed a lawsuit against model Katrin Quinol in U.S. District Court in San Francisco, suing on a sampling related claim that alleged that BMG (Bertelsmann Music Group) had falsely advertised). Ms. Wash also filed actions against the group Black Box and the group Seduction on similar claims. While some of these actions were settled or about to be settled, Ms. Wash's attorney, Steven Ames Brown, had plans to file suit against CBS records and the group C & C Music Factory on related claims. *See* Jon Pareles, *Lawsuits Seek Truth in Music Labeling*, N.Y. TIMES, Dec. 6, 1990, at C17. The Leland article also states that the German group, Snap, sampled records of Jocelyn Brown and rapper, Chili Rob, for its hit, *The Power*. *See also* Richard Giulliatt, *Illusions and Lawsuits Rock the Video Age*, THE INDEPENDENT, Dec. 9, 1990, at 14. This article states that David Clayton Thomas, formerly of Blood, Sweat and Tears, sued in New York Supreme Court, filing an action against Rob Filatus and Fab Morvan of the now infamous, Milli Vanilli, for sampling his 1969 tune, *Spinning Wheel*, onto their *All or Nothing* song in 1989. The Turtles' song, *You Showed Me*, is alleged to have been sampled on rap group De La Soul's rap, *Transmitting Live From Mars*, and, as a result, a $1.7 million lawsuit was filed. *See* Bruce L. Flanders, *Barbarians at the Gate: New Technologies for Handling Information Pose a Crisis Over Intellectual Property*, 22 AM. LIBR. 668 (1991) (citing Jeffrey Ressner, *Sampling Amok?*, ROLLING STONE, June 14, 1990, at 103).

digital sampling remains largely unchecked. As a consequence, it has been suggested, originality is almost moot.[142] Notwithstanding sources that believe the bringing of these lawsuits of infringement or other claims raised here would be ludicrous,[143] the problem must be addressed before it reaches levels beyond the control of the judiciary. Musicians constitute a legitimate art form[144] and are entitled to effective protection and encouragement by the court system. Original works of sound and voice and the musicians who record, perform, or own them, must be provided a forum if our society places any importance on creativity and originality. Otherwise, the current practice of allowing a studio engineer, often a nonmusician, to create a pop-art form by bastardizing the artist's work and deceiving the American public, will only overshadow the most precious and esteemed of all art works—the original.

142. *See* Leland, *supra* note 141, at 4.

143. "I can see it now: Bob Dylan in Los Angeles federal court, filing suit against Bruce Springsteen, John Cougar Mellencamp, Lou Reed, Roger McGuinn, Elvis Costello, Graham Parker, Steve Forbert, Elliot Murphy, et al., winning a huge settlement—and then being forced to hand it over to the estates of Hank Williams, Blind Lemon Jefferson, Buddy Holly, Woody Guthrie, Elvis Presley and half a dozen obscure blues singers." Christopher Pesce, *The Likeness Monster: Should The Rights of Publicity Protect Against Imitation*, 65 N.Y.U. L. REV. 782, 821 n.265 (1990) (quoting Jon Pareles, *Her Style is Imitable but It's Her Own*, N.Y. TIMES, Nov. 12, 1989, § 2, at 30).

144. The following elements evidence this contribution: Farm Aid; Live Aid; We Are The World—for the famine in Ethiopia; Concert for Bangladesh; and Concerts for the People of Kampuchea, to name but a few. Each of these social causes involved musicians, who were among the major organizers.