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DIGITAL SAMPLING: PUTTING THE PIECES TOGETHER

INTRODUCTION

As technology advances, the level of difficulty of copyright law questions increases.¹ This difficulty is seen in the area of sound recordings. As the new technology of digital sampling becomes more prevalent in the music industry, questions concerning copyrights are beginning to arise. The most basic of these questions is whether it is a violation of a sound recording's copyright to "sample" a small portion of the copyrighted work and use the sample in one's own work.

Recently the first digital sampling case was decided. In *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.*, rap artist Biz Markie sampled from Gilbert O'Sullivan's song *Alone Again (Naturally)*.² Markie used the main chorus (consisting of the three words "alone again, naturally") of O'Sullivan's song as an underlying theme of his rap song. Markie added a drum machine and his own rapping to O'Sullivan's chorus. Markie tried unsuccessfully to obtain a license from O'Sullivan. Apparently, *Alone Again (Naturally)* was O'Sullivan's one claim to fame and he was unwilling to share his creation. Despite the lack of a license, Markie included his version called *Alone Again* on his album. The court held that Markie and his record label violated O'Sullivan's copyright.

Since the defendants admitted that the Biz Markie album contains the rap recording *Alone Again*, which combines three words from O'Sullivan's *Alone Again (Naturally)* with some of the music taken from the O'Sullivan recording, the court reduced the issue to ownership of the copyright to O'Sullivan's song and master recording.³

There was irrefutable evidence that defendants knew they had to obtain a license from O'Sullivan and that when they could not obtain the license, they decided to release the album anyway. Accordingly, the court granted plaintiff's request for an injunction to stop the sale of Markie's record. The court also added that defendants' absolute disregard for the rights of others warranted consideration of criminal prosecution.⁴

Unfortunately, *Grand Upright* raises more questions than it answers. Experts argue over the impact of the case. What if the sample does not consist of the main chorus? Also, what if a shorter sample is used?⁵ The *Grand Upright* ruling seems limited

because the sample from O'Sullivan's sound recording was used throughout Markie's song.

This article will explore and attempt to answer the unresolved questions left by the *Grand Upright* decision. It suggests a way to make the hard decisions involved in digital sampling cases.

DIGITAL SAMPLING AND COPYRIGHT DOCTRINE

One of the main purposes of copyright law is to provide incentives for people to create new works. The copyright laws give people the right to collect rewards for their creative contributions.⁶ These rewards are intended to motivate creative activity and to allow public access to the final results of the creativity.⁷ In order to encourage musicians to share their creative expression with the public, copyright's rewards and protections are a necessity.

Section 102 of the Copyright Act specifically grants copyright protection to sound recordings.⁸ In the digital sampling context, this protection is problematic. In order to fully benefit from copyright protection, the plaintiff in the digital sampling context must not only be able to protect her entire sound recording but also its component parts. Otherwise, the incentive to create new sound recordings will be reduced.

In order for authors of sound recordings to receive copyright protection against unauthorized sampling of their sound recordings, they must satisfy the requirements set forth in the Copyright Act. The Copyright Act protects original works of authorship fixed in a tangible medium of expression.⁹

Accordingly, the Act creates an originality requirement; however, originality determinations are not based on a high standard.¹⁰ The standard is minimal.¹¹ Novelty or uniqueness is not required. The only requirement is that the work's origin is with the author and the work be independently created.¹² Originality requires only the expression needed to distinguish authorship,¹³ and creativity need only be minimal.¹⁴ Even if the work is seen as crude, humble or obvious, almost any labor will be sufficient to satisfy the originality requirement.¹⁵ The amount of effort is not part of the analysis.¹⁶

A plaintiff must show that the sample taken by

the defendant resulted from some creative work.¹⁷ In *Smith v. George E. Muehlebach Brewing Company*,¹⁸ the plaintiff was unable to show that his musical composition satisfied the originality requirement. Plaintiff's musical composition consisted of the words "Tic Toc, Tic Toc, Time for Muehlebach" scored to two musical notes.¹⁹ The court found this musical composition too simple to be given protection. It did not meet the low level of originality required because it lacked the minimal level of creativity—it was a copy of material in the public domain, a clock ticking, and could be reproduced mechanically by a clock.²⁰ This same analysis prevented plaintiff in *Shapiro, Bernstein and Co., Inc. v. Miracle Record Co. Inc.*,²¹ from obtaining copyright protection in his bass line. The court stated that the bass line was too simple, consisting of only basic musical chords.²²

In a more recent case, a plaintiff was able to show the required originality in his musical composition. In *Levine v. McDonald's Corp.*,²³ the court decided that a nine measure musical composition (consisting of a note played 128 consecutive times then a note one step higher played eight times and then back to the first note played eight times) did warrant copyright protection, despite its simple repetitive technique.

In digital sampling, the plaintiff must show the requisite amount of originality in the sample, as opposed to the entire sound recording, to qualify for copyright protection.²⁴

Originality arguments may focus on the sample's creativity, either from a quantitative or qualitative approach. If the inquiry focuses on quantity, one or two notes could have the creativity necessary while four or five bars may not. If the inquiry focuses on quality, a sample taken from the chorus of the original sound recording may warrant greater protection than a sample taken from other parts of the recording. A qualitative analysis may also consider other aspects of composition. For example, notes played on a piano may qualify for a different level of copyright protection than notes played on a synthesized instrument. Arguably, the naked note on a piano requires less creative input by the artist than a highly computerized note on an electronic keyboard because the keyboardist has more choices as to how that note will sound.

Once plaintiff has proved that the sample does meet the standard of creativity (originality) necessary to receive copyright protection, he must show that defendant's sampling was not an "independent fixation." According to section 114 of the Copyright Act, "the exclusive rights of the owner of copyright in a sound recording... do not extend to the making...of sound recordings that consist entirely of an independent fixation of other sounds."²⁵ Defendant digital sampler will argue that digital sampling is within her right to make an independent fixation of sounds that

imitate plaintiff's original work. However, if plaintiff can show sampling does not involve independent fixation, then he can make an infringement claim.

Defendant's argument that sampling does constitute an independent fixation relies on the fact that the sampler is able to alter the sounds once in the computer. The original sound and the sampled sound are different because of the manipulation of the original sound. Sounds are added and subtracted through the sampling process and this changes the components of the original.²⁶ Accordingly, this manipulation makes the sampled sound not merely a reproduction of the original but an independent fixation.²⁷

However, plaintiff will rebut that this argument is flawed because it overlooks the word "independent" in the statute. How can sampling be considered independent when by its nature it involves using another's work as a stepping stone? Digital samples that are rearranged or altered in some way still do not consist entirely of an independent fixation of other sounds. The plaintiff's original sounds are still part of the sample used by the defendant. Defendant's manipulations and alterations of the sample may be independent work, but defendant did not start with an independently created expression. Independent fixation does not result from or begin with copying another's original sounds.

COPYRIGHT INFRINGEMENT

Once a musician plaintiff shows that his sounds are protected and what the sampling defendant took is not an independent fixation according to section 114, the plaintiff must prove copyright infringement has taken place. Plaintiff must show that taking small pieces of a sound recording constitutes infringement according to the copyright law.

Every circuit uses a copyright infringement test, and even though all tests vary, the applications have basic similarities. First, all variations require plaintiff to show ownership of a valid copyright. Second, all of these tests require proof of copying by direct and/or indirect evidence. Third, these tests use a substantial similarity analysis to compare the original work to the alleged infringing work. The following specific tests are illustrative of the variety that exists.

The court in *Arnstein v. Porter*²⁸ articulates the traditional approach to copyright infringement analysis. There are two separate elements plaintiff must prove. First plaintiff must prove that the defendant copied, and second that the copying constituted unlawful appropriation.

Under *Arnstein*, the first element can be proved by direct evidence (defendant's admission of copying) or indirect evidence (access to plaintiff's work and similarity between the works). If no direct evidence is available, evidence of access allows the inference of copying to be made.

There are several ways in which to prove access. Plaintiff can show that defendant had access to a computer with digital sampling capabilities and had the knowledge to operate such a computer. Plaintiff could also show that defendant samples other works as a common way of producing her own sound recordings. All this evidence will show that sampling (copying) must have occurred.

Sufficient similarity between the two works, in addition to access, must also be present to prove defendant copied. Experts' analysis of the two works are used to help the trier of fact determine if the two works are sufficiently similar. If no proof of access is available then the similarities must be "striking" in order to find copying.³⁹

If copying is shown by plaintiff, then the second element of the *Arnstein* test must be proved. The trier of fact decides if the copying is substantial enough to constitute unlawful appropriation. Unlawful appropriation is based on the ordinary lay observer; no expert testimony is used. The trier of fact alone decides if the copying resulted in the two works being substantially similar.⁴⁰

The Ninth Circuit has added extrinsic and intrinsic tests to the *Arnstein* substantial similarity analysis.⁴¹ The extrinsic test separates the ideas from the expression in plaintiff's and defendant's work to determine if the ideas are substantially similar. The intrinsic test allows the ordinary observer's response to determine if the expression of the ideas in both works is substantially similar. The ordinary observer decides if the total look and feel of the works are substantially similar.⁴²

More recently in the Ninth Circuit, these tests have been delineated as an objective and subjective examination of the two works as a whole without separating their ideas from their expression.⁴³ The intrinsic test no longer contains analysis, but is merely a subjective judgment about the similarity of the two works.⁴⁴

The Northern District of Illinois states the analysis slightly differently.⁴⁵ First, plaintiff must prove that he owns a valid copyright. Second, he must prove that illicit copying exists. To prove the illicit copying, plaintiff must establish copying and unlawful appropriation. To prove copying plaintiff must show access and substantial similarity. Substantial similarity involves comparing the two works. Finally, to prove unlawful appropriation plaintiff must show that defendant copied protectable expression.⁴⁶

In all courts, plaintiff must often prove access and substantial similarity to infer copying because direct evidence of copying is not usually available.⁴⁷ The difficulty is that substantial similarity is a nebulous concept without an exact meaning.⁴⁸

To better define substantial similarity, some courts use a quantitative/qualitative analysis. This method is used most often when only a small fragment of the

two works is identical.⁴⁹ Even though the similarity between the two works can be quantitatively small, substantial similarity can still be found if the material is qualitatively important to either work.⁵⁰ This analysis allows copyright laws to protect the expression of ideas and not merely ideas alone.⁵¹

Assuming that plaintiff could show that his sample contained the required amount of creativity to be protected by copyright and that he could also show that defendant's use of the sample was not an independent fixation, plaintiff must now show that infringement occurred. Under traditional copyright law he must show substantial similarity. However, using traditional substantial similarity in the digital sampling context is problematic for several reasons.

As discussed before, under section 114, imitation of a sound recording is not an infringement. Therefore if a sound recording is substantially similar to an original sound recording no infringement exists, unless the actual sounds were used. If a plaintiff shows that his sound recordings substantially similar to defendant's work, the most he has shown is that defendant imitated his sound recording but did not unlawfully copy. In digital sampling, the similarity of expression is obvious and intended.⁵² Therefore, the ultimate determination is at what point does appropriation become infringement of the author's rights.⁵³ In its present form, the substantial similarity test does not answer this question. To say that infringement in digital sampling cases occurs when the trier of fact finds substantial similarity between the two works is to ignore the problem digital sampling presents.

Another problem arises under the substantial similarity test as to what portion of the two works are to be compared. Since sampling only involves taking a small number of sounds, defendant's work with plaintiff's sample probably does not sound anything like plaintiff's entire sound recording. Therefore, if plaintiff's sound recording as a whole is compared to defendant's work as a whole, the two works in a sampling case will not likely be found substantially similar.

However, if comparing sample to sample, the final outcome is different. If the sample defendant took is identical to the sounds in plaintiff's sound recording that correspond to the sample, substantial similarity will always be found because the sounds are one and the same. However, if defendant has altered the sounds sampled from plaintiff's recording, then substantial similarity will not automatically be found.

Similarly, when the issue of substantial similarity in digital sampling cases is reduced to how much the sampler actually took problems arise. Almost all commentators dislike this test for digital sampling cases.⁵⁴ The problem with looking only at the quantity taken is that what is taken becomes secondary to the analysis. The assumption is that six bars,⁵⁵ six notes⁵⁶ or whatever quantity is chosen is substantial enough and

is automatically an infringement. In other words, if the sample is not of the designated length, it cannot be unique enough to be protected.⁴⁷ This analysis ignores the fact that six notes of sound recording “A” could be unique and creative but that six notes of sound recording “B”, the same quantitative amount, could have no uniqueness at all. Under the quantitative analysis both A and B receive the same protection. Copyright protection should not be confined to encompass only the sounds that meet the prerequisite length. The quantity of sound defendants took should not be the primary focus.

Another problem with the quantitative approach is that digital samplers are given an easy safety net. If an arbitrary line is drawn, all a sampler has to do is avoid crossing the line to defend against any infringement suit.⁴⁸ Even if sampling is limited to one sound, the accuracy of the computer allows the sampler to take one half of a sound.⁴⁹

The qualitative approach better defines when substantial similarity occurs. The qualitative test looks not to the length of the sample but to the sample in relationship to the rest of the original sound recording. “In other words, although the amount taken may be small, it may be the unique portion that gives the song quality.”⁵⁰ The qualitative approach sees the whole song damaged when a unique portion is taken.⁵¹ An infringing use can be found even if a short sample of a sound recording is taken, if by comparing the two works it is clear that the sample is recognizable and important to the source.⁵²

This qualitative test is by far the most favored by commentators.⁵³ The following is illustrative of the full analysis. The musician who samples has one purpose. This purpose is to capture a sound and from that sound create her own music. The sampler wants to capture the unique quality of an isolated sound. After the sound is captured, the sampler musician can alter and modify the sound as if she created it herself. Accordingly, the focus of the inquiry should be whether the sound sampled and reproduced is a qualitatively substantial portion of the original work.⁵⁴

The problem with the qualitative approach is that the focus is away from the sample and is instead on the entire, original sound recording. Arguably, this is an improper focus since defendant took only the sample; the entirety of the original sound recording should be irrelevant. In other words, using the qualitative approach, the sample is valued according to its importance relative to the entire sound recording, but the entire sound recording is not the issue here—only the sample is.⁵⁵

Having infringement turn on the importance of the sample to the entire sound recording poses another problem in sampling cases. The sampler is after a distinctive sound that is found in plaintiff’s sound recording. If the sounds that defendant samples are qualitatively important to the original work, plaintiff

can prove infringement. If the sample is not important, plaintiff fails to show infringement.⁵⁶ Plaintiff will argue that although not all sounds are qualitatively important to the original work, the entire work should be protected from sampling. Accordingly, the sampler who takes a sample from a less prominent part of the sound recording should not be less of an infringer than the sampler who takes sounds from the melody. Both did the same deed, but the qualitative test treats them differently.

A NEW APPROACH

Because of the problems involved in applying traditional substantial similarity notions to the digital sampling context, a new approach recommended. Under the new test, the court must decide whether the sample alone is a creative work of authorship worthy of copyright protection. The court’s analysis should be as follows. First, identify and separate out the portion that is in both sound recordings. Then decide whether the sample alone is a creative work of authorship. Both sides will argue why the sampled sounds should or should not be considered protected expression using the traditional copyright standards for originality.

If plaintiff proves originality of the sampled sounds, and therefore copyright protection of those sounds, then the next step is to show that defendant’s use was infringing. Instead of using a substantial similarity analysis to decide this issue the court should adopt a new standard specifically for digital sampling cases.

Digital sampling is unique in that the computer can perfectly separate out individual sounds. By making each individual sound essentially a separate work from the whole sound recording, the individual sounds can survive without or apart from their source. For example, one or two words of a book or one or two brush strokes from a painting cannot stand on their own. They both need a context in which to have meaning. But the fact that samplers take small pieces from sound recordings must mean that somehow the piece (sample) is valuable in and of itself without the context of the rest of the sound recording. Because of this unique aspect of digital sampling, any test that is formulated for infringement must absolutely focus on only the sample, not the entire original sound recording.

With this in mind, the substantial similarity test should drop out of the infringement analysis in digital sampling cases, and with it, the qualitative and quantitative analysis. In its place, a “significant originality” test is proposed. Under this test, the sample itself would be analyzed under the originality inquiry. However, the originality requirement for samples would be increased from the minimal level to a higher level. In other words, this “significant originality”

test would require a heightened showing of creativity in order to find whether infringement of an original sample has occurred.

Accordingly, in order to receive copyright protection against infringement for the sampled parts of an original sound recording, the plaintiff must make two showings. The first showing of originality will qualify the sample for copyright protection under section 102. The second showing will prove that the sample contains "significant" originality in order to protect it against unauthorized sampling. A plaintiff must show that the sample taken by defendant embodies more creativity and originality than what the copyright statute requires for initial protection under section 102. Any unauthorized sampling of a piece that satisfies the "significant" originality standard will be considered an infringement.

Under this analysis, the more creative the sample the more protection it receives from digital sampling. The focus of this test is away from comparing the substantial similarity of the two works and instead looks to the amount of creativity in the sample. The amount of creativity dictates when infringement occurs and the amount of protection from digital sampling a given sample may receive.

In summary, for plaintiff to prove copyright infringement of an original sample, several steps must be taken. First, plaintiff must show that the sample is original and deserves protection. Second, plaintiff must successfully argue that digital sampling does not involve independent fixation of sounds. Third, plaintiff should argue that the traditional substantial similarity test for infringement is not appropriate in the sampling context. If the court is willing to accept the proposed test for infringement in digital sampling cases, plaintiff will then argue the "significant originality" standard to prove the requisite amount of creativity embodied in the sample. If plaintiff can accomplish these steps, a finding of copyright infringement should result.

FAIR USE

Defendant may assert the fair use defense against a claim of infringement.⁵⁷ The fair use defense allows, as an exception to copyright protection, copying and distribution in limited and useful forms.⁵⁸

The Copyright Act names four factors to be used when considering fair use.⁵⁹ These factors are used on a case-by-case analysis.⁶⁰ The factors include: (a) the purpose of the use; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used; and (d) the effect on the potential market.⁶¹ Using the four factors in the statute, digital sampling plaintiffs can successfully argue against defendant's assertion of fair use.

A. The Purpose of the Use

To rebut the defense, plaintiff will argue that the facts applied to the four factors for inquiry set forth in the statute preclude a finding of fair use. The first factor looks to the purpose of the use. This requires looking at the commercial or non-profit character of the use. If the purpose was primarily for private commercial gain as opposed to public benefit, the presumption will be against fair use.⁶²

The difficulty with this first factor is that commercial gain is not defendant's sole purpose. Digital sampling is a form of creative expression.⁶³ The purpose of digital sampling is not merely to sell records, but is also a way to express ideas. However, the Court in *Harper and Row, Publisher, Inc. v. Nation Enterprises*⁶⁴ held that the distinction between commercial and non-commercial is based on whether or not the user will profit without paying the customary price for the use of the copyrighted work. This de-emphasizes the sampler's artistic motive from the analysis and instead focuses on the benefit the sampler receives.

A digital sampler profits from the use in many ways. First, sampling gives the sampler desired sounds without the expense of independently producing the sounds. As a result the production costs are reduced. However, this savings in production has an ultimate effect on musicians, whose services become in less demand. Second, many musicians see sampling as simply another profit-making aspect of the business.⁶⁵ Kris Parker, from the popular rap group Boogie Down Productions, sees the issue as "about money and money and more money."⁶⁶ The economics of sampling cannot be ignored.

The first fair use factor also involves looking to the productivity of the use.⁶⁷ A productive use is one in which the material is used in a different manner or for a different purpose than the original. In *Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod.*, the court had to decide if a musical version of *Gone with the Wind* served the same overall function as the novel and movie.⁶⁸ The court found that both works served to entertain. The musical version was not criticism, comment, reporting or teaching but rather for the same purpose as the original—pure entertainment.⁶⁹ As a result, the court rejected the fair use defense.

This case is analogous to the digital sampling situation. If the focus remains on the purpose of each work, fair use will likely not be found in digital sampling cases. The purpose of the original sound recording is to entertain a listening audience. The purpose of the sound recording that contains the digital sample is also to entertain. Accordingly, the purposes of the works are the same, and the defendant has not shown productive use.

B. The Nature of the Copyrighted Work

The second fair use factor is the nature of the copyrighted work. This includes three different analyses. First is whether the work is published or not.⁷⁰ With respect to unpublished works, the scope of fair use is much narrower.⁷¹

In the typical sampling case this factor will favor defendant. Most samplers use sound recordings that have been released to the public and have had a previous musical life. The samplers want to use the popularity of the older sound recording to their advantage in the promotion of their new sound recording. However, if a plaintiff can show that her sound recording was an unpublished work this factor would then favor plaintiff.

The second analysis looks to whether the copyrighted work is factual. Fair use has a greater application to factual works than non-factual works.⁷² A sound recording is easily categorized as a nonfactual work. The original author, in her sound recording, is expressing her interpretation of the musical composition. The result is a purely creative work. Accordingly, this factor will likely favor plaintiffs.

In matters of public concern, the reason for looking to whether or not the work is factual or not is that the public has a greater right to factual information.⁷³ As applied to digital sampling cases, it is unlikely that public need to access plaintiff's sound recording is so great as to take precedence over the plaintiff's exclusive rights in the work.

A third analysis used to determine the nature of the copyrighted work is whether or not the copyrighted work resulted from a large investment of time and labor with the expected final outcome of financial reward.⁷⁴ Most sound recordings are a result of many hours in the music studio perfecting the quality of sound. If plaintiff can show a significant investment of time involved in producing the sound recording, this factor disfavors a finding of fair use.

C. The Amount and Substantiality of the Portion Used

The third fair use factor looks to the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."⁷⁵ This factor is analyzed with both a quantitative and qualitative evaluation.⁷⁶ In other words, fair use will not be found even though only a small amount was taken if this constitutes the essential part of the copyrighted work.

Plaintiff's argument becomes easier if the sampler took the chorus or the "catchiest" part of the sound recording. Courts have not found fair use when the portion copied was "essentially the heart of the copyrighted work."⁷⁷ Plaintiff need only show that what defendant sampled was the most important or the

most valuable part of the sound recording in order to rebut the fair use defense.⁷⁸

Under a quantitative analysis of the amount of work copied, the defendant will argue that the number of sounds sampled in relation to the entire sound recording is insubstantial. The plaintiff could rely on the *Harper and Row* decision to rebut this. In the *Harper* case the words from the copyrighted work that were actually copied were a small part of the entire book as a whole. However, the *Harper* court then made a qualitative judgment as well by stressing that the copying involved was word for word.⁷⁹

"The fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the original (artist) and to the plagiarist..."⁸⁰ With this in mind, the plaintiff can argue that the portion, despite its small amount, is of value because the actual sounds are copied in the sampling process "word for word."

D. The Effect of the Use on the Potential Market

The fourth fair use factor examines the effect of the use upon the potential market or value of the copyrighted work. This factor has been described by the Supreme Court as the most important element of fair use.⁸¹ A proper analysis of fair use would only apply to copying that does not materially disadvantage the market of the work that was copied.⁸² The statute looks to the potential market of the copyrighted work. Potential market is defined as the immediate or delayed market and includes harm to derivative works.⁸³ The fourth fair use factor implies that the original author has the right to exploit all potential markets for the original sound recording.⁸⁴

A court will consider whether the defendant's sound recording diminishes the potential sale of plaintiff's sound recording.⁸⁵ Most often the original sound recording sampled and the new sound recording containing the sample are not popular at the same time. Accordingly, this type of analysis will probably cut against plaintiff, especially when the sampler's sound recording actually renews interest in the older sound recording.⁸⁶

Potential harm to the plaintiff's market is also mitigated if the potential customers for each work are different sets of people. If this is the case, less competition results and the use is more likely to be fair. For example, when a rap artist samples from a country and western song, the two audiences are completely separate. In this way, if the customer wants the plaintiff's original sound recording, defendant's sound recording does not fulfill that customer's demand. However, plaintiffs will rebut that potential customers include all people who buy records. Therefore, any other sound recording that contains plaintiff's sounds

will compete with the sale of plaintiff's sound recording.

The Court in *Harper and Row* took a slightly different approach. It said that "to negate fair use one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work."⁸⁷ With this analysis, plaintiff has a much better chance of showing harm to a potential market. If the use of the sampled portion of plaintiff's song was widespread, the song may become so common that no one will find the original song appealing thus resulting in plaintiff's lost sales.⁸⁸

E. Non-Statutory Fair Use Factors

Another factor which artists like the one in *Grand Upright* can rely on in fair use analysis is the good faith or bad faith of the sampler. If the plaintiff can show that defendant knew a clearance was necessary but did not obtain one before using the sample, then defendant acted in bad faith. If plaintiff can show that defendant acted without regard for plaintiff's rights in her sound recording, the court may be disinclined to allow defendant to hide behind the fair use doctrine. If a defendant can show that he thought there was a certain amount of sampling that is automatically tolerated and he did not exceed that amount, the court may lend a sympathetic ear. However, considering the level of copyright controversy surrounding sampling in the music industry, this argument is unlikely to succeed.

From a policy perspective, the purpose of copyright law is to reward the artist for his contributions, which in turn will stimulate artistic creativity for the public's benefit.⁸⁹ In fair use, a balance must be struck between the benefit to the public if the use is permitted and personal reward to the artist if the use is denied.⁹⁰ This balance is not always easy to make because, by limiting the right to add on to an earlier work, creative expression is inhibited.⁹¹ If sampling is permitted, creativity will be increased but the ultimate effect of this may be to reduce the incentive for artists to create the original works that could be sampled.

Digital sampling seems far from the intent behind fair use guidelines. The statute gives examples of "criticism, comment, news reporting, teaching, scholarship or research."⁹² These examples imply that fair use requires that the copying have an almost academic or informative purpose. Digital sampling—the copying of actual sounds from an original sound recording for use in one's own sound recording—does not seem to fit within these suggested categories of fair use. Digital sampling is merely repetition of the copyrighted work.

CONCLUSION

The *Grand Upright* case is currently unique in that the plaintiff was unwilling to allow sampling of his work even though compensation was offered. However, if digital sampling continues to increase, the number of plaintiffs who would rather protect their sound recording rather than receive royalties for its use is likely to increase. As a result, the record companies will lose their control over this aspect of the industry and settlements will become less frequent. Less settlements will result in more trials to decide when copyright infringement occurs.

Not every case that arises in the sampling context will be as clear as *Grand Upright*. Courts will eventually have to deal with the general issues of originality of the sample; whether or not the process of sampling constitutes independent fixation; and how the substantial similarity test applies in digital sampling cases. Courts will also have to decide when a finding of fair use is appropriate.

These issues are not easily answered in the digital sampling context. If it is true that copyright law has the ability to adapt to changes in technology,⁹³ then digital sampling will be the cause of its newest metamorphosis. However, clarity in the digital sampling area will not result until these copyright issues are identified and addressed.

— Julie Itahara

1. The Supreme Court of the United States has recognized the relationship between copyright law and technology. The Court stated that from the beginning, advances in technology have impacted the development of copyright law. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).

2. 780 F. Supp. 182 (S.D.N.Y. 1991). O'Sullivan's song was a number one hit in 1972 and was at number one on the Billboard charts for six weeks. It was nominated for two Grammy awards and sold five million copies. REUTER LIBRARY REPORT, Dec. 16, 1991.

3. 780 F. Supp. at 183.

4. *Id.*

5. "What Judge Duffy said is, if you made a decision to ask for a license, then you knew you needed permission to use the same. But this isn't the seminal case everybody wanted,' contends attorney representing another rap artist with a case pending before Judge Duffy." Stan Soocher, *As Sampling Suits Proliferate, Legal Guidelines are Emerging*, N.Y.L.J. May 1, 1992, at 5.

6. *Rockford Map Publ. v. Directory Serv. Co.*, 768 F.2d 145, 148-149 (7th Cir. 1985).

7. *Harper and Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985). See also U.S. Const. art I. § 8.

8. 17 U.S.C.A. § 102 (West Supp. 1992).

9. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, ___ U.S. ___, 111 S.Ct. 1282 (1991); *Levine v. McDonald's Corp.*, 735 F. Supp. 92 (S.D.N.Y. 1990); *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988); *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986); *Weissmann v. Freeman*, 868 F.2d 1313 (2d Cir. 1989).

10. *Id.*

11. *Id.*

12. *Id.*

13. *The Toro Co. v. R&R Products Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986). Random assignment of numbers to machine parts without assignment because of category or type does not meet level of creativity necessary for copyright protection.

14. West Publishing Co., 799 F.2d at 1221.

15. Feist Publications, ___ U.S. at ____, 111 S.Ct. at 1287 and Gaste, 863 F.2d 1066 (stating that virtually any independent creativity will satisfy the requirement).

16. Rockford Map Publ., 768 F.2d at 148. A short new work or a small improvement are subject to equal copyright protection as is a novel that took a lifetime to write. The amount of time spent is irrelevant. Photographs are works of a moment and are copy-rightable.

17. Even though *Feist Publication, Inc. v. Rural Tel. Serv. Co.*, ___ U.S. ____, 111 S. Ct. 1282 (1991) established a relatively low threshold of originality, it specifically rejected the "sweat of the brow" argument. Under this theory copyright infringement was found when a defendant copied information solely to save the time and expense of gathering its own data. So, when the Court rejected this argument, as long as the defendant's work uses a different arrangement of the facts, defendant is free to use the facts from plaintiff's work. Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 349 (1992). According to *Feist*, investments of labor, time and other resources does not constitute "originality". *Id.* at 350.

18. 140 F.Supp. 729 (W.D. Mo. 1956).

19. *Id.* at 730.

20. *Id.* at 731.

21. 91 F. Supp. 473 (N.D. Ill. 1950).

22. *Id.* at 475.

23. 735 F.Supp 92, 99 (S.D.N.Y. 1990).

24. "[T]he sine qua non of copyright is originality...

Originality as the term is used in copyright means only that the work was independently created by the author...and that it possesses at least some minimal degree of creativity." Feist Publications, Inc., ___ U.S. at ____, 111 S.Ct. at 1287.

25. 17 U.S.C.A. §§ 106, 114(a-b) (West Supp. 1992).

26. Thomas D. Arn, Comment, *Digital Sampling and Signature sounds: Protection under copyright and non-copyright law*, 6 U. MIAMI ENT. AND SPORTS L. REV. 61 (1989).

27. *See Id.*

28. 154 F.2d 464 (2d Cir. 1946).

29. *Id.* at 468.

30. *Id.*

31. Sid and Marty Kroft Television Prod. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

32. Narell v. Freeman, 872 F.2d 907, 913 (9th Cir. 1989).

33. Shaw v. Lindheim, 919 F.2d 1353, 1356-1357, (9th Cir. 1990).

34. *Id.*

35. Other variations of the test include: Plaintiff must show ownership of a valid copyright and copying of constituent elements of the work that are original. Feist, ___ U.S. at ____, 111. S. Ct. at 1287. Plaintiff must show ownership of a valid copyright, copying of the protected work by the alleged infringer. Copying shown by establishing that defendant had access to copyrighted work and that the offending and copyrighted works are substantially similar. Substantially similarity refers only to the expression of the artist's concept and not to the underlying ideas. *Concrete Machinery Co. v. Classic Lawn Ornaments*, 843 F.2d 600, 606-605 (1st Cir. 1988).

36. Stillman v. Leo Burnett Co., Inc., 720 F.Supp. 1353, 1358 (N.D. Ill. 1989).

37. *Concrete Machinery Co.*, 843 F.2d at 606.

38. *Id.*

39. Tree Publishing Co. Inc., v. Warner Bros. Records, 785 F.Supp. 1272, 1275 (M.D.Tenn. 1991).

40. Tree Publishing Co., Inc., 785 F.Supp. at 1275 and Narell 872 F.2d at 913.

41. *Id.*

42. Robyn Tinsley, *The Application of Copyright Laws to Digital Sound Sampling*, ENT., PUB. AND THE ARTS HANDBOOK, 1992/93, at 47.

43. *Id.* However, author believes that the substantial similarity test is still appropriate but is "something of a misnomer."

44. Note, *A New Spin on Music Sampling: A Case for Fair*

Play, 105 HARV. L. REV. 726, 227 (1992) [Hereinafter A New Spin]; Arn, *supra* note 26, at 61; Gregory Albright, *Digital Sound Sampling and the Copyright Act of 1976: Are Isolated Sounds Protected?* 38 Copyright Law Symposium (ASCAP) 47, 86-87 (1991); James P. Allen Jr., *Look What They've Done to My Song Ma— Digital Sampling in the 90's: A Legal Challenge to the Music Industry*, 9 U. MIAMI ENT. & SPORTS L. REV. 179 (1992) [hereinafter Allen]; J.C. Thom, *Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology*, 8 LOY. ENT. L. J. 297 (1988) [hereinafter Thom]; Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"*, 37 LOY L.A. L. REV. 879 (1992); Maura Giannini, *The Substantial Similarity Test and Its Use in Determining Copyright Infringement Through Digital Sampling*, 16 RUTGERS COMPUTER AND TECH. L. J. 509 (1990).

45. Mark v. Leo Feist, Inc. 290 F. 2d. 959 (2d Cir. 1923).

46. Boosey v. Empire Music Co, 224 F. 646 (S.D.N.Y. 1915).

47. Thom, *supra* note 47, at 323.

48. A problem that exists is that there is much confusion and too much emphasis on how much of the original sound recording is sampled. There is no safe sampling. Kendall Minter, an entertainment and sports attorney cautioned musicians against relying on a "protective umbrella." If the amount sampled is small, this does not automatically protect against lawsuits. Snippets do not receive different treatment than a huge chunk. He warns against assuming what is safe sampling and what is not. Newman, *Legally, There Are No Free Samples*, BILLBOARD, August 12, 1989, at 24. The fact that this attorney had to explain this fact to a group of musicians attending a convention shows the widespread misapprehensions surrounding sampling.

49. "Truncation allows the technician to isolate a portion of the sound by eliminating unwanted segments at the beginning or end....Trimming off the initial pluck of a note performed on a guitar produces an entirely different effect." Albright, *supra* note 47, at 59.

50. *Id.*

51. *Id.*

52. A New Spin, *supra* note 47, at 727.

53. *See Id.* for commentators who favor the qualitative test.

Copying short sequences of sound recordings can lead to a finding of substantial similarity. If the sampled portion is a small amount but is qualitatively important to the entire sound recording, substantial similarity will be found. A New Spin, *supra* note 47, at 734.

In the digital sampling context, the precise inquiry should focus on the sound that has been reproduced and whether that sound is a qualitatively substantial part of the original sound recording. A reasonable conclusion is that sampling is copying of a substantial portion of a sound recording if the sampled portion was a significant reason for the success or popular appeal of the original sound recording. Albright, *supra* note 47, at 86-87.

54. *Id.* at 86.

55. Thom, *supra* note 47, at 329.

56. Another problematic inquiry is to analyze the importance of the sample to the infringing sound recording or to analyze if defendant's sound recording could keep its identity without the sample. Judith G. Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y.L.J., May 22, 1992, at 5. These inquiries are best left to deciding the monetary value of the sample to both the plaintiff and defendant. *Id.*

57. *Id.*

58. Cable/Home Communication v. Network Prod., 902 F.2d 829, 843 (11th Cir. 1990).

59. *Id.*

60. *Id.*

61. 17 U.S.C.A. § 107 (West Supp. 1992).

62. Sony, 464 U.S. at 451.68. Allen, *supra* note 47, at 182.

63. 471 US 539 (1985).

64. Ressler, *Sampling Amok?*, ROLLING STONE, June 14, 1990, at 103-105.

65. *Id.* Parker also sees sampling as a part of a bigger issue that involves "recycling styles as well as sound" and ethical issues involved. Other artists feel that the sudden legal fights over sam-

pling are racially motivated since the biggest samplers are rap artists, the majority of whom are black. *Id.*

66. Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod., 479 F. Supp. 351, 361 (N.D. Ga. 1979).

67. *Id.*

68. *Id.*

69. Harper and Row Publ., 471 U.S. at 564.

70. *Id.*

71. New Era Publ. v. Carol Publ., 904 F.2d 152, 157 (2d Cir. 1990).

72. Harper and Row Publ., 471 U.S. at 563.

73. MCA Inc., 677 F.2d at 182.

74. 17 U.S.C.A. § 107(3) (West Supp. 1992).

75. Harper and Row Publ., 471 U.S. at 564-65.

76. *Id.*

77. No plagiarist can excuse the wrong by showing how much of the work he did not pirate. Harper and Row Publ., 471 U.S. at 565.

78. *Id.*

79. *Id.*

80. *Id.* at 566.

81. *Id.*

82. Cable/Home Communication, 902 F.2d at 845.

83. Sony Corp., 464 U.S. at 451 (1984).

84. Hustler Magazine Inc. v. Moral Majority, 796 F.2d 1148, 1155 (9th Cir. 1986).

85. A New Spin, *supra* note 47, at 738.

86. Harper and Row Publ., 471 U.S. at 568..

87. *Id.*

88. A New Spin, *supra* note 47, at 738.

89. MCA Inc., 677 F.2d at 183.

90. *Id.*

91. Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative and Paradigmatic Approach*, 9 U. OF MIAMI ENT. AND SPORTS L. REV. 121, 138 (1991-1992).

92. 17 U.S.C.A. § 107 (West. Supp. 1992).

93. See *supra* note 1 and accompanying text.