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# A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution

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## COMMENTS

# A PIRATE'S PALETTE: THE DILEMMAS OF DIGITAL SOUND SAMPLING AND A PROPOSED COMPULSORY LICENSE SOLUTION

MICHAEL L. BARONI\*

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### I. INTRODUCTION<sup>1</sup>

Digital sound sampling has revolutionized the music scene and fostered ethical controversy, legal ambiguity, ad hoc industry practices, and a plethora of litigation and rancorous settlements. It also poses "excruciatingly difficult legal and moral questions."<sup>2</sup> Sampling is a process whereby one can record, store, and manipulate any sound,<sup>3</sup> either live or lifted from a previous recording. The scope of uses is unlimited: a cooing dove; a Jimi Hendrix guitar riff; the wind; the Beatles singing "She loves you, yeh, yeh, yeh;" a footstep; a brassy horn. Any sound can be isolated and become part of a new recording.<sup>4</sup> For example, sampling makes it possible

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1. The author would like to thank Jeffrey E. Jacobson of Jacobson & Colfin, P.C., in New York, who suggested the idea of a compulsory license for sampling, and Professor Leon Friedman for his inspiration and supervision of this paper.

2. Curt Suplee, *Snapshots of Sound*, THE WASH. POST, Oct. 25, 1987, at C3.

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

4. Jon Pareles, *Digital Technology Changing Music*, N.Y. TIMES, Oct. 18, 1986, at C23, col. 4.

to arrange a single recording featuring Madonna singing, Eric Clapton on guitar, Phil Collins on drums, Louis Armstrong on trumpet, and James Brown's screams as background vocals.<sup>5</sup> With sampling, one can create a symphony of sound and an infinite number of musical arrangements. The unauthorized sampling of others' musical expression from copyrighted sound recordings has developed into a prolific practice in modern pop and rap music.<sup>6</sup>

The two competing concerns surrounding sampling are piracy and artistry. Some view sampling as pure theft,<sup>7</sup> while others view it as an indispensable tool for musical expression and development.<sup>8</sup> The piracy/artistry controversy represents a struggle between the rights of artists to control uses of their own work, and the creative opportunities inherent in the new technology of sampling. In sum, sampling is a "pirate's dream come true and a nightmare for all the artists, musicians, engineers and record manufacturers."<sup>9</sup>

Currently, a lack of definable standards exists for sampling use and infringement. There is great uncertainty in the music industry concerning issues such as whether certain types of sampling are legal, when to seek a license, and how much to pay for a given use. Of the numerous cases to have been filed to date, all but one are still pending or have been settled out of court,<sup>10</sup> and the re-

5. Incidentally, James Brown may be "the most-stolen-from artist in show business" because of sampling. Tom Moon, *Music Sampling or Stealing: Who Owns the Sounds of Music?*, ST. LOUIS POST DISPATCH, Jan. 24, 1988, at 3e.

6. See *infra* text accompanying notes 40-43.

7. Producer Tome Lord-Alge, whose collection of over two thousand samples includes Phil Collins playing drums and James Brown's screams, has stated, "[w]e're all blatantly stealing from every one else . . . [sic] That's just the way it's done in the '80s." Dick Weissman, *Music 1990: Examining Technology Issues*, INT'L MUSICIAN, Dec. 1988, at 7, 18. Peter Paterno, a music attorney representing Guns N' Roses, has stated, "I think every one of those guys who samples is going to lose (in court)." John Horn, *Borrowed Performances May get Rappers in Trouble*, DETROIT FREE PRESS, June 7, 1989, at 1B. The late Frank Zappa thought sampling was pure theft, and had inserted a "no sampling" clause into the standard copyright infringement notice printed on his albums. Moon, *supra* note 5. See also J.C. Thom, Comment, *Digital Sampling: Old-Fashioned Piracy Dressed Up in Sleek New Technology*, 8 LOY. ENT. L.J. 297 (Spring 1988).

8. Some, primarily those who exploit sampled material, regard sampling as a "postmodern artform," an "indispensable tool," and a modern "instrument." Respectively: Jason H. Marcus, *Don't Stop that Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 769 (Summer 1991); Moon, *Supra* note 5; Paul A. Harris, *Politics of Faith (No More, That Is)*, ST. LOUIS POST DISPATCH, Sept. 11, 1992, at 4F.

9. J.C. Thom, Comment, *Digital Sampling: Old-Fashioned Piracy Dressed Up in Sleek New Technology*, 8 LOY. ENT. L.J. 297, 336 (Spring 1988).

10. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (1992). See *infra* text accompanying notes 176-89 for a discussion of this case.

maining case failed to address any of the issues that most need definitive clarification. The "complexities of this new technology show that no easy solutions can be reached. It is necessary to strike a balance"<sup>11</sup> between the need for sampling as an artistic tool and the fact that unauthorized sampling is piracy.

A compulsory license<sup>12</sup> would allow for limited use of samples and require adequate compensation. This strikes an equitable balance between the competing concerns of piracy and artistry, and would solve the legal ambiguity surrounding sampling and the practical problems within the music industry by setting clear, definitive standards.<sup>13</sup> Further, a compulsory license would comport with the Constitutional scheme of promot[ing] "the progress of [the] . . . arts"<sup>14</sup> by enacting legislation, and stay in line with the heart of copyright policy to "foster the creativity of individuals by affording them protection from the appropriation of their work."<sup>15</sup>

The compulsory license proposed in this Comment is premised on four criteria: (1) general notions of fairness that one should be compensated if one's unique talent and labor are stolen; (2) balancing the piracy/artistry dichotomy; (3) promoting the arts; and (4) setting clear, definitive standards to clear up the industry-wide ambiguity and avoid wasted time, money and hassles. Experts agree that with the increased use of digital technology, the dilemmas presented by sampling need to be solved through "clarifying legislation."<sup>16</sup>

11. McGraw, *supra* note 3, at 169.

12. A compulsory license is a statutory provision whereby a copyright owner is compelled to license his copyrighted work to another person upon satisfaction of certain requirements and payment of a set fee. The Copyright Act currently provides for five types of compulsory licenses: cable transmissions of television programs, § 111; satellite transmissions of television programs, § 119; phonorecords, § 115; jukeboxes, § 116; and noncommercial broadcasting, § 118. 17 U.S.C. §§ 101-810 (1991). See *infra* text accompanying notes 211-41 for this Article's compulsory license proposal.

13. The scope of this Article is limited to the sampling of copyrighted sound recordings. A "sound recording" is a work that results from the fixation of a series of any sounds, but does not include the sounds accompanying a motion picture or other audiovisual work. Copyright Act, *supra* note 12, § 101. A composition refers to a written version of a musical work, including any accompanying lyrics. See Act, § 102. A phonorecord is any material object 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. The term "phonorecords" includes the material object in which the sounds are first fixed. Act, § 101.

14. U.S. CONST. art. I, § 8, cl. 8. See *infra* text accompanying notes 60-69 for a discussion of the purpose and scope of this clause.

15. Lori D. Fishman, *Your Sound or Mine?: The Digital Sampling Dilemma*, 4 ST. JOHN'S J. LEGAL COMMENT. 205, 205 (Fall 1989). See *infra* text accompanying notes 71-73 for a discussion of the purpose behind copyright law.

16. See A.B.A. COMM. REP., SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW Sec.

This Comment explains the digital sound sampling process, its history and modern usage, and the effects of sampling on the music industry. It then examines copyright law and argues that although copyright law offers limited protection against sampling, the law is too ambiguous in this context and has failed to solve the dilemmas surrounding sampling. This Comment then examines the current unpredictable, ad hoc music industry licensing practices for sampling, and concludes by presenting a compulsory license proposal. Adoption of this proposal would solve the dilemmas that digital sound sampling currently poses to the music industry.

## II. DIGITAL SOUND SAMPLING

### A. Technical Process

To understand the sampling process, one must comprehend the distinction between analog and digital sound. Analog music is a continuous waveform, similar to all naturally occurring sounds. Natural or acoustic sound waves are created by fluctuations in air pressure, and, through the use of a microphone, sound waves can be reduced to analogous fluctuations in electrical voltage, resulting in a smooth and continuous analog sound. Thus, analog recordings (traditional records and tapes) record and store music waveforms directly and fully.<sup>17</sup>

Digital music is created by recording and storing an outside sound source in a computer system. Whereas an analog sound is a continuous waveform, computers can only operate digitally, using one number at a time. When recording sound waves, therefore, either live or from a sound recording, a digital recording system must record a binary code description of the original analog waveform.<sup>18</sup> This conversion process from analog waveform to binary code is accomplished through an analog-to-digital converter, which measures the voltage of the analog signal at equally spaced intervals in time<sup>19</sup> and generates a digital representation for each

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306-B-1 90:160 at 164. The "lack of caselaw . . . and the increasing use of digital technology . . . presents a situation that would benefit from clarifying legislation." *Id.* Accord Leon Friedman, a solo practitioner in New York, professor of law at Hofstra University and leading copyright authority; Jeffrey E. Jacobson and Bruce E. Colfin of Jacobson & Colfin, P.C., in New York, both of whom are primarily engaged in the practice of music law.

17. Thomas D. Arn, *Digital Sampling and Signature Sound: Protection under Copyright and Non-Copyright Law*, 6 U. MIAMI ENT. & SPORTS L. REV. 61, 64 (Spring 1989).

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

19. *Id.*

recorded interval.<sup>20</sup> The resulting code for each sample is recorded on a digital master tape, and any subsequent copies reproduce those numbers exactly.<sup>21</sup> Because the computer is digitizing sound waves at intervals in time, it is effectively slicing up the original analog sound into thousands of separate samples each second (hence the term "sampling").<sup>22</sup> The sound is represented by numbers at intervals in time, and, therefore, a gap exists between any two digits.<sup>23</sup> This gap is known as the sampling interval. The frequency with which samples are represented along the wavelength is known as the sampling rate.<sup>24</sup> Digital sound sampling operates like a movie camera recording motion: instead of capturing the whole action, a movie camera takes a consecutive series of still photos, that, if taken at small enough intervals and displayed in rapid sequence, will appear to exactly and fully recreate the original motion.<sup>25</sup> The best samplers can sample at the rate of 100,000 times per second,<sup>26</sup> so there is obviously no loss of fidelity, and no aural distinction between the original sound and the sample; the human ear hears the identical music. From the foregoing analysis, it is clear that sampling, by definition, is exact copying.

The computer code can also be fed into a digital-to-analog converter, or "desampler," to duplicate the original sound waves, or, if the computer code has been manipulated, to produce altered sounds when converted to sound waves.<sup>27</sup>

Although digital samplers can manipulate any sounds they record by rearranging or replacing binary codes, the scope of manipulation is limited. "The sounds which digital sampling allows a musician to produce are . . . dependent upon the intricacies of sound captured on the underlying analog recording."<sup>28</sup> So although there is "a range of potential manipulation, the sound that goes in is the sound that comes out."<sup>29</sup> Digital samplers can alter pitch, duration, or sequence of a sampled sound, give it more or less echo,

20. *Id.* at 700.

21. Gerald Seligman, *Saved!! How Classic Rock Tracks are Kept Forever Young on CD*, 482 *ROLLING STONE* 81, 82 (1986).

22. McGraw, *supra* note 3, at 148.

23. Arn, *supra* note 17, at 64-65 n.17 (citing C. Dodge and T. Jerse, *COMPUTER MUSIC: SYNTHESIS, COMPOSITION AND PERFORMANCE* 25-31 (1985)).

24. *Id.*

25. Suplee, *supra* note 2.

26. For example, "She loves you, yeh, yeh, yeh" would be sampled roughly 300,000 times, and the entire two minute, nineteen second song approximately 13,900,000 times.

27. A.B.A. COMM. REP., *supra* note 16, at 160.

28. Arn, *supra* note 17, at 66.

29. *Id.* at 66 n.24.

repeat it in any rhythm, or combine it with other sounds.<sup>30</sup> The sounds produced through sampling, however, are largely dependent on the original sounds because sampling cannot manipulate the timbre (distinctive tonal qualities) of sampled sounds.<sup>31</sup> It is precisely this fact—that sampling clones the unique tonal qualities of a given sound—that makes it such a popular artistic tool.<sup>32</sup> The essential point to remember is that sampled sounds invariably retain their unique qualities.

### B. History and Modern Usage

Digital machinery has advanced quite rapidly. The Fairlight CMI, with synthesizer capabilities and the capacity to digitally record sounds, appeared in 1975 and was the first major digital sampler.<sup>33</sup> The first sampler with keyboard control (giving it the ability to manipulate sampled sounds) appeared in 1981.<sup>34</sup> The first inexpensive sampler, costing approximately \$1700, appeared in 1985, and today, samplers with limited capabilities can be purchased for as low as \$70.<sup>35</sup> Currently, the most advanced digital sampler is the Synclavier (used by the likes of Stevie Wonder and Frank Zappa), which costs over \$300,000 and has a sampling rate of over 100,000 times per second.<sup>36</sup>

The art of sampling, an art born out of poverty, had its birth in the Bronx, New York. It made its debut around the early 1980's, as disc jockeys and mixers were simply piecing together different recordings, and using a variety of other techniques, such as "scratching" and "looping,"<sup>37</sup> to create a new dance atmosphere<sup>38</sup> at parties and playgrounds.<sup>39</sup>

Modern usage of samples is rampant. Sampling has become a "common practice" in "most rap and much pop."<sup>40</sup> It is central to

30. McGraw, *supra* note 3, at 150.

31. Arn, *supra* note 17, at 65.

32. *Id.*

33. McGraw, *supra* note 3, at 148.

34. *Id.*

35. *Id.* at 149.

36. *Id.* at n.15.

37. "Scratching" is the process by which a needle is rapidly scratched over a vinyl record. "Looping" is the process by which a small portion of a cassette tape is cut off and reattached, so that the underlying beat thereon is continually played, or "looped."

38. *Sampling: Fair Play or Foul?*, THE FIRM (Newsletter #9, Jacobson & Colfin, New York, N.Y.), 1991, at 2.

39. Sheila Rule, *Record Companies are Challenging 'Sampling' in Rap*, N.Y. TIMES, Apr. 21, 1992, at C13.

40. John Leland, *The Moper vs. the Rapper: A Lawsuit, Naturally*, NEWSWEEK, Jan. 6, 1992, at 55.

rap, a billion-dollar-a-year industry,<sup>41</sup> and has been a driving force behind the albums of pop stars such as Vanilla Ice and Janet Jackson. Today, "[a]lmost every pop record contains at least one sampled sound"<sup>42</sup> and many albums contain dozens.<sup>43</sup> One genre of music—"House Music"—has sprung up from the night club scene, which is composed entirely of samples.

Sampling has also resulted in whole new professions of electronic music makers and mixers, commonly referred to as "programmers." Programmers are often employed by a record company or album producer to contribute to the recording process. Sometimes they are the sole composer of a musical work. Each programmer seeks "to build a library of sounds on which he can base his commercial viability. . . . [A] programmer is valued by the extent of his library and his ability to manipulate the sounds recorded therein."<sup>44</sup> Programmers acquire their libraries from live studio sessions<sup>45</sup> and preexisting recordings.<sup>46</sup> The demand for samples of popular musicians and distinctive sounds has become so high that a "black market" has emerged in recording studios.<sup>47</sup> "Sound collecting has become a frenzied sport, with engineers swapping sounds like baseball cards."<sup>48</sup>

Some programmers think of their trade as a modern art form. Arthur Baker, one of the "kings" of audio cut and paste, has been quoted as saying that "[sampling] is a new form of music, just like collages. . . . [I]f you like [a] sound, you can have the sound."<sup>49</sup>

The benefits of sampling, as opposed to using live musicians, are enormous. Producers who use samples reap huge benefits, both financially and through increased creative reputation, at little or

41. Rule, *supra* note 39.

42. Moon, *supra* note 5.

43. Leland, *supra* note 40. See also Billboard magazine's album and review sections, where one can find over one hundred references in the last year (11/91-11/92) to samples in newly released recordings. Common descriptors used include "sample laden," "sample happy," "sample ridden," a "mind blowing blitz" of samples and a "dazzling display" of samples.

44. Maura Giannini, *The Substantial Similarity Test and its Use in Determining Copyright Infringement through Digital Sampling*, 16 RUTGERS COMPUTER & TECH. L.J. 509, 511 (Winter 1990).

45. E.g., note the Miami Vice example, *infra* text accompanying notes 52-53.

46. E.g., note the Led Zeppelin example, *infra* text accompanying note 51.

47. Arn, *supra* note 17, at 68, n.34 (citing Steven Dupler, *Digital Sampling: Is it Theft? Technology Raises Copyright Questions*, BILLBOARD, Aug. 2, 1986, at 74, n.33).

48. Moon, *supra* note 5.

49. Miller, *High-Tech Alteration of Sights and Sounds Divides the Arts World*, WALL ST. J., Sept., 1, 1987, at 1, col. 1. Baker's allusion to collages is less fortunate than he might think. Collage artists such as Andy Warhol have been sued for unauthorized use of copyrighted materials in their collages. McGraw, *supra* note 3, at n.38.



no personal expense of time, talent, money, or original artistic creativity.<sup>50</sup> Without sampling technology, a musician or producer searching for a particular sound would have to hire musicians with the right instruments for a studio session and hope to get the right sound. With sampling, however, one can record a string of notes and electronically manipulate the recorded, digitized sounds to closely approximate the sound sought, or simply lift the sound from another recording. Producer/remixer Freddie Bastone has stated,

[i]n some cases, you use a sample because its [sic] a really unique sound you want and it would be impossible to get otherwise, like [John] Bonham's kick drum [from the Led Zeppelin album "Houses of The Holy"]. . . . [Y]ou could probably, with a lot of setup and experimentation, get the sound you are after. But it is so much faster to use a sample.<sup>51</sup>

In another high-profile case of sampling, the sounds of musician David Earl Johnson's eighty year old African conga drums were sampled in a studio by composer Jan Hammer and became prominently featured in the theme song of the hit television show "Miami Vice."<sup>52</sup> Johnson has stated, "[t]hose congas . . . are way up front because they are so unique. I'd like to get paid for that. If your work is used, you should get paid. He's got me and my best sounds for life, and there is no compensation."<sup>53</sup>

The effects of digital sound sampling on music have been dichotomous. Sampling has allowed whole new genres of music to develop, yet it has also been the driving force behind destruction of the artistic base. Sampling has clearly promoted music<sup>54</sup> in the sense that rap and house music would not have developed without it, and sampling has played a very influential role in pop music.<sup>55</sup> Sampling has, however, adversely affected music because it has replaced the need for studio and concert musicians. Furthermore, it has diminished the value of distinctive musical artistry by allowing

50. Thomas C. Moglovkin, *Original Digital: No More Free Samples*, 64 S. CAL. L. REV. 135, 141 (1990).

51. Giannini, *supra* note 41, at 511 n.15 (citing Steven Dupler, *Digital Sampling: Is It Theft? Technology Raises Copyright Question*, BILLBOARD, Aug. 2, 1986, at 74).

52. Giannini, *supra* note 44, at 511, n.10.

53. *Id.*

54. Rule, *supra* note 39.

55. It is important to note that subjective opinions of whether music such as rap or house is "art" are irrelevant in determining the "promotion" of the arts. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (holding that copyrightable "authorship" should not be judged by standards of merit).

sounds to be readily stolen and rendered commonplace. Simply put, "musicians in America are being put out in the cold."<sup>56</sup>

Another by-product of sampling is the creation of the "modern musician." Many of today's "major artists," such as New Kids on the Block, cannot play an instrument, and some do not even sing (remember Milli Vanilli?). Anyone who has ever gone to a pop or rap concert or watched a music awards show has most likely witnessed the use of digitally prerecorded tracks. The result is that many performers have come to rely more on visual presentation and less on musical talent. Sampling "has made it easy for no-talents to steal the creative work and sounds of their betters."<sup>57</sup>

The future effects of sampling seem to be that pop and rap are becoming increasingly redundant. Perhaps all the computer driven, sound-alike music will create a greater desire for authentic music. As one music critic has commented, "[i]n an era when so many acts employ digital sampling and machine-generated rhythms to make music that sounds as if it were written by an oscilloscope, it's a relief to find a band that uses the traditional lineup [of instruments]."<sup>58</sup>

### III. COPYRIGHT LAW AND PROBLEMS WITH PROTECTION AGAINST SAMPLING

Current copyright law as applied to sampling is inherently ambiguous, and fails to solve the dilemmas faced by the music industry. There seems to be a general consensus that "[i]nterpretations of the relevant laws leads [sic] one to unclear and uncertain results."<sup>59</sup> The primary questions are whether individual sounds or short riffs are in and of themselves protectable, and, if another exploits that sound, is it infringement? If the sound is altered unrecognizably, is it infringement?

#### A. *The United States Constitution*

The United States Constitution states that Congress has the

56. Wells, *supra* note 18, at 691. "Many previously sought-after musicians who have created a distinctive sound for themselves are now being undersold by samples of their own work." *Id.* at 700. Sampling has "pushed time honored instruments into the background and put thousands of string, brass and woodwind players out of work." Jonathan Takiff, *High Tech and Art*, ST. LOUIS POST DISPATCH, May 5, 1988, at 4F.

57. Jonathan Takiff, *High Tech and Art*, ST. LOUIS POST DISPATCH, May 5, 1988, at 4F.

58. Mark Jenkins, *Gilded Eternity: Time in a Loop*, THE WASH. POST, Apr. 27, 1990, at p. N25.

59. *Sampling: Fair Play or Foul?*, *supra* note 38.

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."<sup>60</sup> Note that artists do not have a Constitutional right to their works; rights are conferred by Congress, through its power to grant authors limited monopolies.

The courts construe the power to "promote the progress of . . . [the] arts"<sup>61</sup> broadly.<sup>62</sup> The copyright clause does not require that each copyrightable work promote the arts, only that Congress shall promote these ends by its Copyright legislation.<sup>63</sup> "[T]o promote the progress" is a preamble, indicating the purpose of the power, but not a limitation of its exercise.<sup>64</sup> Thus, Congress can enact almost any law in order to further the promotion and progress of the arts.

A question sometimes debated, but never decided, deals with the scope of Congress' power: Is Congress limited to conferring to artists either "the exclusive right" to their creative works or no rights at all?<sup>65</sup> This debate is centered around the compulsory license provisions because these provisions are the primary examples of where Congress has conferred non-exclusive rights.<sup>66</sup> With compulsory licenses, exclusive rights are lost because the owner of a work under one of these provisions is compelled to license his or her work to anyone who complies with the statutory requirements. It seems clear, though, that the power to grant an "exclusive right" is not a limitation of power, but rather a full grant of power to Congress to enact whatever copyright legislation will best "promote the progress of" the arts.<sup>67</sup>

60. U.S. CONST. art. I, § 8, cl.8. The term "writings" is construed broadly, and includes literary, musical, dramatic, pictorial, graphic, sculptural, architectural and audiovisual works. See 17 U.S.C. § 102 (1976). See also *Goldstein v. California*, 412 U.S. 546 (1973) (the first Supreme Court case to expressly state that sound recordings are "writings" in the constitutional sense); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (where the court, in dictum, stated that sound recordings are "writings" in the constitutional sense, capable of copyright); *Schaab v. Kleindienst*, 345 F. Supp. 589 (D.C. Cir. 1972) (holding that sound recordings are "writings" in the constitutional sense). MELVILLE NIMMER, NIMMER ON COPYRIGHT, § 1.08[B] at 1-45, 1-46 (1987).

61. U.S. CONST., art. I, § 8, cl. 8.

62. "[P]rotection of all [copyrightable works], without regard to their content, is a constitutionally permissible means of promoting . . . [the] arts." *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979).

63. MELVILLE NIMMER, NIMMER ON COPYRIGHT, § 1.03[B] at 1-44.17 (1987).

64. *Id.* § 1.03[A] at 1-34.

65. The copyright clause only mentions "exclusive" rights and makes no express mention that Congress can confer limited rights. U.S. CONST. art I, § 8, cl. 8.

66. See *supra* note 12, for a listing of the five compulsory licenses under the Act.

67. NIMMER, *supra* note 63, at p. 1-44.18.

Sampling also fosters a First Amendment controversy. Some samplers attempt to seek sanctuary behind the First Amendment by arguing that they have the right to freely express themselves musically. This position, however, ignores the Copyright Act's protection of copyrighted works. The First Amendment is not a license for theft and exploitation. As the court in *United States v. Bodin*<sup>68</sup> stated, there is no "first amendment right . . . to usurp the benefits of the creative and artistic talent, technical skills and investment necessary to produce a single long-playing record of a musical performance."<sup>69</sup>

### B. *The 1976 Copyright Act*<sup>70</sup>

The 1976 Copyright Act protects "original works of authorship fixed in any tangible medium of expression."<sup>71</sup> The purpose behind copyright law is to "encourage people to devote themselves to intellectual and artistic creation"<sup>72</sup> and protect the authors of copyrightable works from the "theft of the fruits of their labor" (i.e., artistry and piracy).<sup>73</sup> Granting rights in the creator of an artistic work stimulates creative endeavors through an economic incentive.

The originality required for copyright in a work is very low. "[A]lmost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient."<sup>74</sup> To date, however, there has been no judicial interpretation of what constitutes originality in a sound recording.<sup>75</sup> Even so, it is arguable that all sound recordings and sounds therein are unique.<sup>76</sup> Authorship requires that a work be independently, not merely

68. 375 F. Supp. 1265 (W.D. Okla. 1974).

69. *Id.* at 1267 (holding there is no first amendment right to usurp labor of another because a pirate does not seek to express himself creatively, but to express another's creativity).

70. 17 U.S.C. §§ 101-810 (1976) (amended 1991).

71. § 102(a). It is this Comment's position that all unauthorized sampling of copyrighted sound recordings is in violation of current copyright law. Even if one thinks that sampling is not fully protected against under current law, however, this Comment argues that all sound recordings are "original" artistic expression, and as such, all unauthorized sampling should be protected against by enacting a limited compulsory license for the use of samples. See *infra* text accompanying notes 103-07 for the argument that all sound recordings are "original."

72. *Goldstein v. California*, 412 U.S. 546, 555 (1973).

73. NIMMER, *supra* note 63, at 13.03[E][2], p.13-19.

74. *Id.* at 1.08[C][1] p. 1-49.

75. Moglovkin, *supra* note 50, at 152.

76. See *infra* text accompanying notes 103-07 for a discussion of originality in all performances.

mechanically, created.<sup>77</sup> Authorship is also interpreted broadly. In *Goldstein v. California*,<sup>78</sup> for example, the court defined "authorship" as "he to whom anything owes its origin"; originator."<sup>79</sup> The statutory requirement that a work be "fixed" in a "tangible medium of expression" is satisfied by having a sound recorded and stored in a digital sampler.<sup>80</sup> One must understand that copyright only protects artistic expression, and never the underlying ideas.<sup>81</sup>

The Copyright Act is preemptive,<sup>82</sup> meaning that any state law that conflicts with the Act's objectives is invalid. Regarding sound recordings, the Act does not protect pre-February 15, 1972, sound recordings, and so allows state law to protect those works. Section 301(c), however, states that, beginning February 15, 2047, state law will no longer be permitted to protect sound recordings.<sup>83</sup>

The key to understanding copyright protection of musical works is in knowing that there are two distinct types of copyright in music, which confer different sets of rights:<sup>84</sup> one for the underlying composition and another for the sound recording.<sup>85</sup> A copy-

77. See Moglovkin, *supra* note 50, at 144-45.

78. 412 U.S. 546 (1973).

79. Moglovkin, *supra* note 50, at 144.

80. § 102(a) of the Act states that the fixation requirement is satisfied by fixation in "any tangible medium of expression, now known or later developed, from which [a work] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." A sampler qualifies under this definition.

81. § 102(b). For example, copyright will protect an original poem, but does not give the author a monopoly over the words themselves because words are the very tools, or "ideas," with which people commonly express themselves. Likewise, musical compositions are protected, but not the individual notes therein that comprise the composition.

82. 17 U.S.C. § 301.

83. 17 U.S.C. § 301(c) (1976). See *infra* text accompanying notes 88-127 for a discussion of sound recording protection.

84. The rights attaching to a composition, and all other categories of copyrightable works, are delineated under § 106, which grants the exclusive rights to reproduce, prepare derivative works, distribute, perform, and display the copyrighted work. Composition rights are limited by § 115's compulsory license provision, which allows anyone to independently record and distribute phonorecords embodying their own version of a musical composition, provided they comply with certain formalities and payments. Section 114 limits the rights to a sound recording to § 106(1)-(3). The two specific exclusions on the rights to a sound recording are: (1) the owner of a sound recording cannot prevent others from "imitating or simulating" the sound recording; and (2) the owner of a sound recording has no performance rights, meaning that he cannot prevent others from publicly performing the sound recording (e.g., in nightclubs or on the radio) and he is not entitled to collect royalties for any public performances. Further, the sound recording copyright does not confer proprietary rights in the phonorecord in which the recording is embodied.

85. See *supra* note 13, for definitions of "sound recording," "phonorecord" and composition. Most often, the record company that funds the production of the sound recording will buy the copyright of each author, making it the exclusive copyright holder in the sound recording. Authors of a sound recording could be artists, producers, engineers, or anyone who contributes "original authorship" to the work.

right in the composition confers protection in the musical work itself (i.e., the written composition of the work), including any accompanying words.<sup>86</sup> A copyright in a sound recording is completely separate from one in a composition.<sup>87</sup>

Under the Copyright Act, four requirements must be met in order to gain federal copyright protection in a sound: (1) the sound must "result from the fixation of a series of musical, spoken, or other sounds;"<sup>88</sup> (2) the sound must be "fixed" by any method "now known or later developed" in a material object (phonorecords) "from which [the sounds] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device;"<sup>89</sup> (3) the sound must be fixed in a phonorecord on or after February 15, 1972;<sup>90</sup> and (4) the sound must constitute an "original" work.<sup>91</sup>

Historically, sound recordings have suffered from a lack of protection. In the 1960's and 1970's, one-fourth of all records and tapes sold in the U.S. were illegal duplicates.<sup>92</sup> In reaction to this "staggering volume" of record and tape piracy, Congress passed the Sound Recording Amendment<sup>93</sup> to specifically "provide for the creation of a limited copyright in sound recordings."<sup>94</sup> The Sound Recording Amendment of 1971 became effective on February 15, 1972, and in 1974 was made a permanent part of the Copyright Act of 1909.<sup>95</sup> For the first time, statutory copyright was granted to sound recordings.<sup>96</sup>

Although sound recordings fixed prior to February 15, 1972, are ineligible for protection under the Copyright Act, they may remain the subject of common law copyright if unpublished or sub-

86. § 102(a)(2). Lyrics, however, may be separately copyrighted.

87. See § 102(a). The rights in a sound recording are more limited than those in a composition. Section 114(b) allows for the making of a sound recording "that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." Although one may independently imitate a sound recording, one must still obtain a license to use the underlying composition (because compositions are fully covered under § 106), and, in order not to violate trademark and unfair trade practice laws, must disclose that it is not the original sound recording.

88. § 101.

89. § 102(a).

90. § 301(c).

91. § 102(a); A.B.A. COMM. REP., *supra* note 16, at 161.

92. Giannini, *supra* note 44, at 514.

93. NIMMER, *supra* note 63, § 2.10[A], at 2-145, 2-146.

94. KASTENMEIR, PROHIBITING PIRACY OF SOUND RECORDINGS, H.R. REP. NO. 92-487, 92d Cong., 1st Sess. (1971). See A.B.A. COMM. REP., *supra* note 16, at 160.

95. Codified as amended at 17 U.S.C. § 114 (1991).

96. KASTENMEIR, PROHIBITING PIRACY OF SOUND RECORDINGS, H.R. REP. NO. 92-487, 92d Cong., 1st Sess. (1971). See A.B.A. COMM. REP., *supra* note 16, at 160.

ject to other state law protection.<sup>97</sup> Once a pre-February 15, 1972, work is published, the sound recording is protected in most states by anti-record piracy statutes, and by common law doctrines of misappropriation and unfair competition.<sup>98</sup>

It seems illogical and unfair that pre-February 15, 1972, sound recordings are not covered under the Act. Why this vast exclusion? Professor Nimmer offers a convincing and insightful analysis. He states that this exclusion resulted

inadvertently, and as a result of a misconception upon the part of the Department of Justice. . . . The Department of Justice expressed the fear that unless state law protection for such pre-1972 recordings were exempted from federal preemption, the result would be an "immediate resurgence of piracy of pre-February 15, 1972, sound recordings." The Senate adopted this argument, and in order to meet it, added a new section 301(b)(4), which expressly excluded from federal preemption, state laws with respect to "sound recordings fixed prior to February 15, 1972." What both the Justice Department and the Senate overlooked was the fact that a resurgence of record piracy would not have resulted even if state record piracy laws were preempted for the reason that Section 303 of the bill in the form adopted by the Senate would have conferred statutory copyright upon all sound recordings (as well as other works of authorship) that had not theretofore entered the public domain. . . . Thus, even if record piracy of pre-1972 recordings would no longer be prohibited by state law, it would have been prohibited by federal law.<sup>99</sup>

Nonetheless, the House adopted an amendment, Section 301(c), that excludes all pre-February 15, 1972, sound recordings from statutory copyright. Thus, the "Justice Department's mistaken belief that pre-1972 sound recordings were excluded from statutory copyright under the general revision bill led to an amendment which validated that belief."<sup>100</sup>

Although the Act clearly protects post-1972 sound recordings

97. § 301(c). There is no federal preemption here because the Act does not protect this body of works, and therefore state law protection does not conflict with federal law.

98. HOWARD ABRAMS, *THE LAW OF COPYRIGHT*, n.97 at 5-24 (1991). See, e.g., Cal. Penal Code, § 653(h) (West 1988); N.Y. Penal Law, § 275 (McKinney 1989). The scope of this Comment is limited to protection under copyright law, and does not explore potential state remedies for protection against sampling. Those doctrines, however, are limited in scope, are ad hoc and vague, may pose preemption problems, and have failed to solve any of the dilemmas that sampling presents. Clarifying federal legislation is needed. For an analysis of unfair competition as applied to sampling, see Arn, *supra* note 17; of unfair competition, publicity, and the right of attribution, see Moglovkin, *supra* note 50.

99. NIMMER, *supra* note 63, § 2.10[B] at 2-156.

100. *Id.* at 2-157.

from "duplication,"<sup>101</sup> there is considerable controversy and ambiguity over the extent to which they are protected. The problem is that the Sound Recording Amendment was aimed only at traditional record piracy—the duplication of entire works—and did not foresee uses of digital technology, which can lift isolated segments of a work and then manipulate that sound. Sound recording artists are given a very specific and limited realm of protection—the actual sounds fixated on a phonorecord—but sampling threatens to chip away at the limited area of protection that sound recording artists rely on.<sup>102</sup> At the very least, nothing in the Act specifically precludes protection of sampled material.

Even if the Act's language does not expressly protect against sampling, the Act should be amended to do so through a compulsory license provision, because all sound recordings and the sounds therein are inherently unique, artistic expression. As pure expression, and part of a copyrightable work, there is no justification not to protect all sounds in sound recordings. Arguably, each person's creation of sound is an "original" expression subject to copyright protection if duly fixed in a phonorecord.<sup>103</sup> One committee report from the section on Patent, Trademark and Copyright Law of the American Bar Association states:

[E]very musical performance . . . or creation of sound could be considered a work that is original, regardless of duration. . . . Following this analysis, any sound created by a person, whether it be a peep or a symphony, is inherently an "original work of authorship." The performance of one note or any part thereof would be an original work of authorship not because the *note* is original but because the performer's *rendition* of the note is original. Moreover, each sound in a sound recording could be viewed as a separate original work entitled to as much copyright protection as the work as a whole. . . . Thus, it is conceivable that all sound in a sound recording could be entitled to copyright protection from duplication by re-recording. Even a split second would not be deemed *de minimis* in an infringement context.<sup>104</sup>

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101. § 114(b) states that the owner of a copyright in a sound recording has the exclusive right to duplicate the sound recording in the form of phonorecords.

102. Thom, *supra* note 9, at 333.

103. A.B.A. COMM. REP., *supra* note 16, at 161.

104. *Id.* See also *Capitol Records, Inc. v. Mercury Records Corp.*, where Learned Hand, in dissent, stated that the fundamental notes of a composition are distinct from each performance of it, all of which may be "pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation' of the score itself . . ." 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J., dissenting) (the majority was in agreement on this point).



Professor Nimmer has stated also that all sounds within a recording may be protectable by copyright:

[A]ny instrumental performance, . . . be it musical or spoken, contains what Justice Holmes referred to as "something irreducible, which is one man's alone," and which may be the subject of copyright. The emphasis or the shading of a musical note, the tone of voice, the inflection, . . . can all be original with the performer. . . . [Even with nonhuman "performers" such as nature sounds] there may nevertheless be an original contribution by the record producer so as to qualify the recording for copyright.<sup>105</sup>

Composer Jan Hammer,<sup>106</sup> who regularly uses sampled sounds, also admits the essentiality of sampling to obtain unique sounds: "[T]here's no way to re-create what [individual artists] *sound* like—the nuances they bring to music."<sup>107</sup>

Part of the controversy as to whether all sounds are protectable under the Copyright Act centers on Section 101 of the Act. Some argue that Section 101 bars protection for anything less than a "series of sounds." There are three compelling arguments, however, in response: (1) "series" is not defined in the Act; (2) originally, sampled sounds were part of a series of fixed sounds; and (3) the framers of the Act were not aware of the possibilities for infringement inherent in digital technology. Thus, the "series of sounds" requirement should not bar protection for sounds that are embodied in a sound recording.

Another reason for the ambiguity concerning whether sampling is prohibited under the Act is centered on the debate whether sampling can be characterized as imitative (which is not infringing) or duplicative (which is proscribed).<sup>108</sup> In proving infringement, one must prove that the sample is a "duplication."<sup>109</sup>

Law reviews have generally argued that sampling violates Section 114 of the Act, which expressly prohibits duplicating the exact sound in a copyrighted sound recording.<sup>110</sup> The sampling process

105. NIMMER, *supra* note 63, § 2.10[A] at 2-150.

106. Recall the Miami Vice example, *supra* text accompanying notes 52-53.

107. Moon, *supra* note 5.

108. Section 114 proscribes duplication of a sound recording that "directly or indirectly recapture[s] the actual sounds fixed in the recording," but allows for one to "imitate or simulate" the sounds.

109. See *supra* text accompanying notes 17-32 for a discussion of the sampling process showing that sampling is a duplication, not imitation.

110. E.g., Jason H. Marcus, *Don't Stop that Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 770 (Summer 1991). See also Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic*

does not independently create sounds when it re-records from another recording, so by definition the process is not imitative; imitation requires two separate entities where one is capable of independently "following" the actions of another, of "mimicking."<sup>111</sup> Although a modern sampler is capable of imitative behavior if it has a library of sound and synthesizer capabilities, the sampling process itself merely duplicates sound through a mechanical process. A mechanical recapturing is not an independent fixation,<sup>112</sup> and is not capable of obtaining copyright protection.

Nevertheless, arguments that sampling is permissible imitation persist. First, some argue that "[i]nterpreting the statute to proscribe digital sampling would produce results contrary to Congress' intent" because Congress only intended to proscribe record piracy for duplication of all or substantial portions of a recording.<sup>113</sup> Such an interpretation could hardly be contrary to Congress' intent, however, if Congress was not even aware of digital technology and its potentials, which would surface nearly a decade later. Congress was faced with the two extremes of total record piracy or mere imitation; there was no capability of extracting and manipulating isolated sounds from sound recordings. Simply put, any "[u]nauthorized reproduction of a copyright author's sound violates the Act's intent."<sup>114</sup>

A second argument that sampling is not proscribed is that the compilation and manipulation of sounds is enough to create authorship.<sup>115</sup> Even if a sampler's contribution is enough to satisfy copyright's minimal "originality" requirement, however, "originality" never confers copyright where a work is merely mechanically reproduced,<sup>116</sup> and "originality" does not justify the fact that the original material and unique talent and labor have been pirated. Could one gain copyright of a Wallace Stevens poem on the basis of an "original" contribution by making the type face green? Of course not, but that is the extent to which sampling alters the original musical expression—it clones the unique expression and sim-

*Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1732-33 (1987) (arguing that sampling is re-recording, not imitation).

111. THE RANDOM HOUSE COLLEGE DICTIONARY, 663 (Revised edition, 1975).

112. For example, if a programmer were able to independently create a code that, when desampled through a digital-to-analog converter, exactly imitated or simulated the sounds of a sound recording, this fixation would be a copyrightable, independent fixation.

113. Arn, *supra* note 17, at 74.

114. Thom, *supra* note 9, at 309.

115. Arn, *supra* note 17, at 74.

116. *Id.* at 63-64, stating that "[m]ere mechanical reproduction of another's work does not satisfy the originality requirement, no matter how novel the reproducing process."

ply casts it in a different setting.<sup>117</sup>

A third argument that sampling should be considered as imitative is that it offers "creative flexibility to artists," whereas traditional record piracy does not. Sampling is, therefore, "not proscribed under the act."<sup>118</sup> What can be done to a recording after it has been pirated, however, is irrelevant to whether the recording has been pirated in the first place: "creative flexibility" is hardly a basis for copyright. One author has stated that "[c]haracterizing sampling as a rerecording is akin to claiming a photograph is merely a literal duplication of the object photographed."<sup>119</sup> What that argument fails to recognize is that sampling a sound recording cannot be analogized to photographing an original subject because a photograph is merely an image of its natural subject, whereas sampling duplicates not, for example, the orchestra that was recorded, but the original recording. With recorded music, there is no distinction between perceiving a sample and perceiving the original recording, because the aural result is identical, whereas a photograph is clearly a distinct and distinguishable entity from its subject.

A fourth argument that sampling is not proscribed because it is imitative is that sampling only takes "style" from a sound recording and style is "something which Congress never sought to protect in enacting the copyright framework."<sup>120</sup> It is true that copyright does not protect style and that Congress never intended it to. This argument, however, is premised on the assumption that sampling is purely imitative,<sup>121</sup> so the argument cannot be used to show that sampling actually is imitative.

A fifth argument that sampling is permissible because it is imitative is that sampling consists of an independent fixation of sounds.<sup>122</sup> This argument is premised on the fact that samples are

117. The musical medium is different from the written one, though, because music has two practical mediums of expression: written and aural. With sound recording duplication (whether music or literature being read), one is cloning the exact, unique, artistic expression, whereas in the written medium, each typeset word or note on a page is only an unprotectable idea. It is only the combination of these "ideas" that creates authorial expression in the written medium.

118. Arn, *supra* note 17, at 74.

119. *Id.*

120. *Id.* at 80.

121. This argument is circular in its reasoning. Style, by definition, is an intangible concept, and intangible ideas or concepts are expressly unprotected by copyright. See § 102(b). The taking of "style," an abstract concept, implicitly requires imitation. Sampling, however, does far more than imitate the general "style" of another's sounds; it clones the sounds themselves.

122. Sounds that are independently fixed do not infringe the copyright of a sound

played back through a synthesizer (a musical instrument) and are then combined with other musical instruments to make up a new recording.<sup>123</sup> This is a very weak argument, however, because digital samplers have a computer's memory and are therefore more than just instruments. Further, if this argument were accepted, it would mean that any time one merely played back a sound recording and re-recorded it with changes, one could escape infringement on the grounds of independent fixation. Sampling is not imitative, independent fixation because sampled sounds are unique when taken and unique they stay.<sup>124</sup> If sampling were imitative, it would not duplicate the exact, unique sound qualities; because sampling does duplicate unique qualities, it is duplication and proves that sampled sounds are not independently fixed.

Sampling is the mechanical cloning of sound, the mere mechanical reproduction of another's work, and does not satisfy the originality requirement of copyright, no matter how novel the reproducing process.<sup>125</sup> There is no artistic skill in the mere re-recording of a sound recording, and creative post-re-recording manipulation of the sounds is irrelevant. In *United States v. Taxe*,<sup>126</sup> for example, the court instructed the jury that modifications to a re-recording did not constitute an independent fixation.<sup>127</sup>

Although it is arguable that all sounds embodied in a sound recording are protected by current copyright law, controversies still rage as to the extent of that protection. Hence, the scope of protection against sampling afforded by current copyright law remains ambiguous.

### 1. Infringement of Sound Recordings<sup>128</sup>

"Digital sampling is . . . potentially an enormous source of

recording. Section 114 of the Act states that a copyright owner of a sound recording cannot prevent another from making a sound recording that "consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."

123. Wells, *supra* note 18, at 701.

124. See *supra* text accompanying notes 28-32.

125. Arn, *supra* note 17, at 63-64. See also *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980) (holding that copyright originality does not subsist in manufacturing skill, but rather must be the product of artistic skill).

126. 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd*, *vacated and remanded in part*, 540 F.2d 961 (1976), *cert. denied*, 429 U.S. 1040 (1977).

127. *Id.* at 1017.

128. The focus of this section is limited to the infringement of sound recordings, as opposed to compositions, because the legal controversy is centered in this area.

copyright litigation."<sup>129</sup> Music plagiarism litigation of all types has suffered from poor legal and musical analysis,<sup>130</sup> and can be very complicated and expensive. Even a successful defense of copyright infringement can cost \$150,000 or more.<sup>131</sup> Although the same test is applied to sound recordings as for compositions, this test is difficult to apply to sound recordings because of the differences in protection the Act affords to each and the inherent differences in the two mediums.<sup>132</sup>

There are two fundamental elements of copyright infringement: (1) ownership of a valid copyright; and (2) copying of that copyrighted work.<sup>133</sup> This Comment assumes there is ownership of a valid copyright in the sampled sound recording. Copying, because it is rarely witnessed, may be shown indirectly by access to the work and substantial similarity.<sup>134</sup> Access is easily shown with popular musical works because it is generally presumed if a defendant has had a reasonable opportunity to be exposed to the original work.<sup>135</sup> Substantial similarity is likewise an evidentiary device to allow an inference of copying.

Before seeking to protect one's rights, however, one must obviously detect the infringing use. Samples in the infringing work can either be blatant or well disguised, so discovering samples "can be a bit like Easter-egg hunts: some can't be missed, others require a painstaking search."<sup>136</sup>

The substantial similarity standard of infringement is clearly inadequate as applied to sampling. It is ad hoc, vague, and unpredictable. Substantial similarity "presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations."<sup>137</sup> Justice Learned Hand has commented that "wherever [the line] is drawn [to mark substantial

129. Wells, *supra* note 18, at 699. For an analysis of sampling litigation, see Robert G. Sugarman and Joseph P. Salvo, *Sampling Litigation in the Limelight*, N.Y. L.J., March 16, 1992, at 1, col. 1.

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

131. Whitney C. Broussard, *Current and Suggested Business Practices for the Licensing of Digital Samples*, 11 LOY. ENT. L.J. 479, 481 (1991).

132. Giannini, *supra* note 44, at 516.

133. NIMMER, *supra* note 63, § 13.01 at 13-6.

134. *Id.* at § 13.01[B], 13-11. See also Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977).

135. NIMMER, *supra* note 63, § 13.02[A] at 13-17, notes this is the prevailing view. See also Smith v. Little Brown & Co., 245 F. Supp. 451, 458 (S.D.N.Y. 1965).

136. John Horn, *Borrowed Performances May Get Rappers in Trouble*, DETROIT FREE PRESS, June 7, 1989, at 1B.

137. NIMMER, *supra* note 63, § 13.03[A] at 13-27.

similarity] will seem arbitrary.”<sup>138</sup> Although there is widespread uncertainty as to the appropriate test for establishing substantial similarity,<sup>139</sup> all substantial similarity tests revolve around qualitative and quantitative analyses: What portions were taken, how much was taken, and how was the taken material used?

In *United States v. Taxe*,<sup>140</sup> the court held that one seeking to prove infringement of a sound recording must, in addition to showing that the defendant's work is a re-recording and not an imitation, show that the two works are substantially similar.<sup>141</sup> In *Taxe*, the defendants re-recorded hit tapes produced and distributed by major record companies, and mechanically altered them by speeding up or slowing down sounds, deleting frequencies or tones, or adding echoes or sounds from a synthesizer, all in an effort to produce technically altered recordings and thereby circumvent the Sound Recording Act's prohibition on re-recording.<sup>142</sup> Although *Taxe* required a finding of substantial similarity, the case was decided a full decade before the advent of digital technology's capacity to lift individual sounds from a sound recording. Further, *Taxe* did not analyze how substantial similarity should be applied in sound recording cases, and there is “considerable confusion in the courts” on how to do so.<sup>143</sup> Professor Nimmer, whose treatise is the acknowledged standard reference in the copyright field, does not even analyze how it should be applied in sound recording cases as opposed to those cases in the written medium.<sup>144</sup> In addition, because imitation is allowed but rerecording is not, substantial similarity fails to provide any basis from which an inference of actual copying can be made.

There are considerable, perhaps insurmountable, problems with applying substantial similarity to sampling. The substantial similarity standard confers “very uncertain” protection for sampled artists,<sup>145</sup> and application of this standard is necessarily ad hoc and vague. The standard leads to inequitable results because, depending on the nature of the works and how the sample is used, an insignificant taking could be held to be substantially similar,

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138. *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 122 (2d Cir. 1930).

139. McGraw, *supra* note 3, at 160.

140. 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd*, *vacated and remanded in part*, 540 F.2d 961, 965 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

141. *Id.* at 1017.

142. Giannini, *supra* note 44, at 525, 526.

143. A.B.A. COMM. REP., *supra* note 16, at 163.

144. *Id.* See NIMMER, *supra* note 63, at § 13.03.

145. Arn, *supra* note 17, at 77.

whereas a sample of a significant "hook"<sup>146</sup> portion may not be held to be substantially similar. Additionally, one could potentially take an insignificant part of an artist's unique sounds and build an entire song around the sample without infringing the artist's work. This scenario is contrary to copyright law, which expressly prohibits duplication of actual sounds in sound recordings and does not distinguish between a whole sound recording and isolated pieces of it.<sup>147</sup> As Learned Hand stated in *Sheldon v. Metro-Goldwyn Pictures Corp.*, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."<sup>148</sup> Further, a substantial similarity analysis will fail if the sample is altered (which often occurs), because it is unlikely that a jury would find the two works substantially similar. This standard is inadequate as applied to sampling.

The rights violated by sampling can be twofold. First, the initial sampling violates the copyright holder's exclusive right to duplicate the sound in phonorecords,<sup>149</sup> because a digital sampler qualifies as a "phonorecord" — a material object in which sounds can be fixed and reproduced.<sup>150</sup> That right is further infringed upon duplication into albums. Second, if sounds are manipulated, such manipulation constitutes a separate infringement of the copyright owner's exclusive right to prepare a derivative work<sup>151</sup> from the actual sounds of the original sound recording.<sup>152</sup> Thus, whether a pirated sample is altered or not, the copyright owner's rights are violated, but substantial similarity will not always recognize it.

Likewise, alternative infringement standards do not solve the dilemmas of sampling or the legal ambiguity. At least one author has suggested that substantial similarity be replaced by an audience "recognizability test," whereby infringement would be found if the jury found the sample was still recognizable, although part of a new work.<sup>153</sup> This standard represents a slight improvement in that it would confer a broader scope of protection. It is likewise ad hoc and unpredictable, however, and, like the substantial similarity standard, ignores altered samples. Thus, other infringement standards do not solve the dilemmas that sampling presents.

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146. The "hook" of a song is the catchy musical phrase or chorus that grabs the listener. WILLIAM D. HENSLEE, *CAREERS IN ENTERTAINMENT LAW* 67 (1990).

147. Wells, *supra* note 18, at 704.

148. 81 F.2d 49, 56 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936).

149. § 114(b).

150. § 101.

151. § 114(b).

152. A.B.A. COMM. REP., *supra* note 16, 163.

153. Wells, *supra* note 18, at 705.

Even if one suspects sampling, proving it may be difficult. Access and copying are not issues, because by definition sampling is copying. The primary issue is proving direct re-recording. Therefore, "forensic" methods are required.<sup>154</sup> Expert analysis of a sound wave's "fingerprint" can determine if the defendant's sample was taken from the plaintiff's work.<sup>155</sup> One New York based programmer, using a sophisticated digital sampler, has developed a method of proving conclusively that a passage has been lifted from a pre-existing recording and inserted into a new one; if the "musical fingerprints match, a clear case of copying is established."<sup>156</sup>

## 2. The Fair Use Defense to Copyright Infringement

Fair use is an affirmative defense to copyright infringement.<sup>157</sup> Fair use is arguably "the most troublesome [doctrine] in the whole law of copyright,"<sup>158</sup> and, particularly in the music medium, it is highly unpredictable because musicians never know how much and what type of use may be deemed "fair."

There are four primary factors in determining fair use.<sup>159</sup> The first factor is "the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>160</sup> In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>161</sup> the court held that a finding of commercial use results in two rebuttable presumptions against the defendant: (1) no commercial use is a fair use; and (2) every commercial use poses a potential harm to the market for or value of the copyrighted work.<sup>162</sup> Thus, the *Sony* holding would seem to preclude any fair use claim in the sampling context, because sampling is intrinsically commercial and is not used for any nonprofit or educational purpose.<sup>163</sup>

The second factor for determining fair use, "the nature of the

154. See, e.g., Judith Greenberg Finell, *How a Musicologist Views Digital Sampling*, N.Y. L.J., May 22, 1992, at 5, col. 1.

155. David Goldberg & Robert J. Bernstein, *Music Copyright and the New Technologies*, 7 ENT. & SPORTS LAW. 3, at 4 (Summer/Fall 1988).

156. Giannini, *supra* note 44, at 518.

157. Section 107 of the Act, *supra* note 12, states that use of a copyrighted work is not an infringement if used for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

158. McGraw, *supra* note 3, at 166.

159. § 107(1)-(4).

160. § 107(1).

161. 464 U.S. 417 (1984).

162. *Id.* at 451.

163. Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protection Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV., 1723, 1737 (1987).



copyrighted work,"<sup>164</sup> focuses on whether the work is creative or informational. A finding of fair use is more likely when the work copied from is informative in nature, because the public benefits from the free exchange of informational material. Sampling, however, takes purely creative material, and thereby militates against a fair use defense under the second factor.<sup>165</sup>

The third factor for determining fair use is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>166</sup> The third factor focuses on a quantitative and qualitative analysis, and is the basis of the *de minimis* use argument.<sup>167</sup> Although the use of some samples may seem trifling in comparison to the original work, all sound fixed in a recording is original expression arguably capable of copyright protection. This fact, combined with the fact that most samples are either qualitatively significant (the "hook" of the original work) or are quantitatively substantial (e.g., a sampled drum track), also militates against fair use defense.

The fourth factor for determining fair use is "the effect of the use upon the potential market for or value of the copyrighted work."<sup>168</sup> In the pop music business, record producers are constantly looking for new and interesting sounds; a good argument can, therefore, be made that appropriation and exploitation of such unique sounds is likely to dilute their value. The fourth factor, therefore, also militates against a fair use defense. In some cases, however, where the sample is highly distinctive and the "hook" of the sampled song, a defendant could argue that his use actually enhanced the market for the original song.<sup>169</sup>

Thus, the fair use defense may not be applicable at all in the sampling context. Even if the defense was applicable, it would still be highly unpredictable in application, partly because of the flexi-

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164. § 107(2).

165. § 107(2).

166. § 107(3).

167. Some samplers argue that their use is too insubstantial, or *de minimis*, to be considered copyright infringement. The phrase "*de minimis*" comes from the Latin phrase "*de minimis non curat lex*," meaning the law does not take notice of trifling matters. BLACK'S LAW DICTIONARY 431 (1990).

168. § 107(4).

169. For example, it is likely that Vanilla Ice's platinum-selling single "Ice, Ice, Baby" enhanced the market for the David Bowie song "Under Pressure" by its use of a highly distinctive "hook" sample of the latter: The Ice song brought great exposure and recognition to the Bowie song. Suit was filed for the unauthorized use of the sample, and the case was settled for an undisclosed sum. Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 728 (1992) [hereinafter *A New Spin on Music Sampling*].

bility of the doctrine and partly because of the varied use of sampling technology. It is undeniable that the fair use defense has failed to be helpful in settling the dilemmas of sampling.<sup>170</sup> Samplers pirate and exploit the labor, talent, and uniqueness of another's musical expression, and may adversely effect potential markets for the sampled artist's sounds. Certainly, that outcome is anything but "fair."<sup>171</sup>

### 3. Case Law<sup>172</sup>

Generally, the sampler who is taken to court has often sampled the "hook" of a song or some other distinctly recognizable sound.<sup>173</sup> Because all but one case have been settled or are pending,<sup>174</sup> there is a lack of definable legal standards to govern the use of samples. Currently, most disputes are settled by paying a share of the proceeds.<sup>175</sup>

The only case decided to date regarding sampling is *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*,<sup>176</sup> which found rapper Biz Markie guilty of infringement for sampling music from Gilbert O'Sullivan's 1972 hit, "Alone Again (Naturally)."<sup>177</sup> District Judge Kevin Duffy began the decision by quoting from Exodus: "Thou shalt not steal."<sup>178</sup> He halted sales of Markie's album "I Need a Haircut," and ordered it pulled from stores.<sup>179</sup> After stating that defendants' conduct (unauthorized sampling) violated both the Seventh Commandment and applicable copyright laws, Judge Duffy limited the issue of the case to the sole question of

170. Rule, *supra* note 39.

171. There is the slim chance that sampled material that is used for parody could be held fair use. In *Acuff-Rose Music v. Campbell*, 754 F. Supp. 1150, 1158 (M.D. Tenn. 1991), the court held that the rap group 2 Live Crew's unauthorized use of the Roy Orbison song "Oh, Pretty Woman" could be considered fair use because it was used as parody and the intended audience was substantially different, thereby negating any adverse effect on the market value of the original work. In this case, however, the plaintiffs did not claim unauthorized sampling, and it is highly unlikely that, given the commercial nature of the work, a parody defense would have shielded defendants from a finding of infringement if sampling were proven.

172. See Sugarman and Salvo, *supra* note 129, for an analysis of sampling litigation.

173. *Sampling: Fair Play or Foul?*, *supra* note 38.

174. The Beastie Boys, for example, were sued for five million dollars. The case was settled for an undisclosed sum.

175. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 254 (Simon & Schuster) (1991).

176. 780 F. Supp. 182 (S.D.N.Y. 1991).

177. *Id.* at 185.

178. *Id.* at 183.

179. Leland, *supra* note 40.

who owned the valid copyright to the song "Alone Again (Naturally)" and the master recording thereof made by Gilbert O'Sullivan.<sup>180</sup> Key to the decision was the fact that the defendants "knew they were violating . . . the rights of others" and showed "callous disregard for the law."<sup>181</sup> As Judge Duffy stated, "[o]ne would not agree to pay to use material of another [as Biz Markie had] unless there was a valid copyright!"<sup>182</sup> The *Grand Upright* decision, however, "'hasn't resolved any of the issues that everybody's been waiting for,' like fair use, parody, or the use of an indistinct sample."<sup>183</sup>

The defendants argued that, because stealing is rampant in the music business, their conduct should be excused.<sup>184</sup> Judge Duffy, however, stated that the argument that defendants "should be excused because others in the 'rap music' business are also engaged in illegal activity is totally specious. The mere statement of the argument is its own refutation."<sup>185</sup> Furthermore, Judge Duffy warned all would be samplers that "[t]he resolution of any issue left open in this civil matter should have no bearing on the potential criminal liability in the unique circumstances presented here."<sup>186</sup>

The effect of *Grand Upright* is that record companies will now insist that all samples be cleared, which will greatly increase the cost of album production.<sup>187</sup> Because *Grand Upright* did not solve any of the key issues, the current state of the law is left just as uncertain as it was before the decision. Some artists feel, as Frank Zappa did, the need to take the law into their own hands because current law fails to adequately protect their rights; Zappa placed a copyright notice on his albums warning that "unauthorized reproduction sampling is a violation of applicable laws and subject to criminal prosecution."<sup>188</sup> One thing is certain, however: "[S]omething needs to be done" to set clear, definitive standards.<sup>189</sup>

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180. 780 F. Supp. at 183.

181. *Id.* at 185.

182. *Id.* at 184.

183. Leland, *supra* note 40.

184. 780 F. Supp. at 183.

185. *Id.* at 184 n.2.

186. *Id.* at 183 n.3.

187. Leland, *supra* note 40.

188. *Musicians Getting Upset with Free (Digital) Samples*, DETROIT FREE PRESS, Oct. 1, 1987, at 3B.

189. *Id.*

#### IV. CURRENT MUSIC INDUSTRY PRACTICES FOR LICENSING SAMPLES<sup>190</sup>

The "most distressing concern with sampling is the confusion in the industry."<sup>191</sup> The current industry practices are ad hoc, "unpredictable and probably unfair."<sup>192</sup>

Artists often use samples and then get their lawyers to seek permission.<sup>193</sup> There are five standard types of deals in music today for licensing samples:<sup>194</sup> (1) a free license; (2) a flat fee, which is the norm, with fees ranging from \$100 to over \$10,000<sup>195</sup> (in an extreme example, the rap group 2 Live Crew paid roughly \$100,000 to use sampled dialogue from the 1987 movie *Full Metal Jacket* in their single "Me So Horny");<sup>196</sup> (3) a royalty arrangement, which is also frequently used, and generally ranges from between a half cent to three cents per album;<sup>197</sup> (4) co-ownership; and (5) an assignment of rights.

Although those using distinctive samples will often seek a license before distribution of the recording in which it is embodied, one estimate is that 99% of all drum samples are not cleared,<sup>198</sup> because drum beats are often rhythmic and undistinctive, and are thus easily disguised. Likewise, most short samples or those that are altered unrecognizably are often not cleared.

Most successful artists and producers will pay a flat fee or royalty,<sup>199</sup> the amount depending on quantitative and qualitative analyses of the use and whether the sample was cleared before it was used.<sup>200</sup>

190. For suggestions on licensing digital samples, see Colchamiro, *To Clear or Not to Clear: Licensing Digital Samples*, 4 HOFSTRA PROP. L.J. (forthcoming, Fall 1993); Broussard, *supra* note 131, at 502; *A New Spin on Music Sampling*, *supra* note 169. Even these authors admit, however, that any private, ad hoc licensing system would still retain a degree of "uncertainty."

191. Broussard, *supra* note 131, at 502.

192. Note, *A New Spin on Music Sampling*, *supra* note 169, at 729.

193. David Browne, *Settling the Bill: Digital Sampling in the Music Industry*, ENTERTAINMENT WEEKLY, Jan. 24, 1992, at 54. *Accord* Jeffrey E. Jacobson and Bruce E. Colfin, of Jacobson & Colfin, P.C., in New York.

194. Broussard, *supra* note 131, at 498.

195. Stan Soocher, *As Sampling Suits Proliferate, Legal Guidelines are Emerging*, N.Y. L.J., May 1, 1992, at 5, col. 1.

196. Browne, *supra* note 193.

197. *Id.*

198. Rule, *supra* note 39.

199. *Id.*

200. Obviously, fees will be much higher for samples that are not pre-cleared, because of the unauthorized use and because the copyright owner (generally a record company) knows that the sampling artist has already invested a great amount of time and money in recording the album and so will pay a higher fee in order not to be forced to abort the

Music industry practices demonstrate the general acknowledgement that sampling should be compensable. M.C. Hammer, in reference to his unauthorized sampling of Rick James' 1981 hit "Super Freak" for his song "U Can't Touch This," stated: "I said, 'Hey, I gotta pay Rick for this.' I didn't need a lawyer to tell me that."<sup>201</sup> Failing to clear a sample can land a sampler in a multi-million dollar law suit, so even those who do not think sampling is piracy still frequently seek permission.<sup>202</sup>

Liability for unauthorized sampling always lies with the sampling artist, because record companies include a standard indemnification clause in the recording contract that releases the company from all liability regarding the violation of any third party rights.<sup>203</sup> Most recording contracts require artists to tell their label if any material on their album is not "original," a clause that is acknowledged to apply to sampling.<sup>204</sup> The label's lawyer then seeks legal permission, from the label that released the original recording and from the writer and the publisher of the sampled song.<sup>205</sup>

Catching sampling can be an unproductive, time-wasting chore. Regardless, some lawyers undertake the process of listening to all newly released recordings and seeking compensation for clients whose work has been sampled. Some major music publishers and record companies employ a similar practice, buying each pop and rap album that hits the charts and having employees listen for samples that may infringe upon the company's rights.<sup>206</sup>

The problems that sampling creates for the music industry under the current situation are fairly obvious. The clearance of samples can be unpredictable and time consuming, adding tens of thousands of dollars to album production costs.<sup>207</sup> According to Daniel Hoffman, Senior Vice President of Tommy Boy, a leading hip-hop label, the rap group De La Soul's second album featured more than 50 samples and cost over \$100,000 in clearance and legal

project or risk being sued.

201. *A New Spin on Music Sampling*, *supra* note 169, at 726. As a result, M.C. Hammer split the music publishing royalties 50/50 with Jobete Music, the music publisher of "Super Freak." *Sampling: Fair Play or Foul?*, *supra* note 38, at 3.

202. Rule, *supra* note 39.

203. *Sampling: Fair Play or Foul?*, *supra* note 38, at 2.

204. Browne, *supra* note 193.

205. *Id.* Thus, it is common practice to pay both the owner of the sound recording and the owner of the underlying composition.

206. Broussard, *supra* note 131, at 482-83.

207. Some fear that rap may become too costly to produce. Rule, *supra* note 39.

fees.<sup>208</sup> "It's a legal and administrative hassle, and it costs . . . a lot of money."<sup>209</sup> Lawyers have to plan elaborate negotiation strategies based on a number of qualitative and quantitative positions concerning the sampled piece and its use. Further, flat fees are often arbitrary in the sense that they can be wholly unrelated to the number of eventual record sales.<sup>210</sup> Thus, although current industry practices are becoming more uniform, they are still unduly time-wasting, expensive, and unpredictable. Clear, definable standards are needed that would conserve time and money and instill predictability. A new compulsory license provision for samples could provide just that.

## V. A COMPULSORY LICENSE PROPOSAL FOR THE USE OF DIGITAL SAMPLES

### A. *Introduction to the Proposal*

Unauthorized digital sound sampling is theft. It is also clear that sampling has had an enormous influence on popular music and has therefore promoted the arts. Because current law and music industry practices have failed to adequately address the dilemmas that sampling presents, clarifying legislation is needed.<sup>211</sup> A compulsory license is perfectly suited to address the piracy-artistry dichotomy and the other dilemmas of sampling.

The first compulsory license was the "mechanical" compulsory license, enacted in the Copyright Act of 1909.<sup>212</sup> It was enacted out of fear that allowing exclusive recording licenses would create monopolies over music. Historically, where new technologies have given rise to substantial controversies, compulsory licenses have resolved those controversies by stemming litigation and setting standards by which to operate. Because compulsory license provisions are clearly spelled out in the Copyright Act, "they have not given rise to litigation."<sup>213</sup>

208. Browne, *supra* note 193.

209. *Id.*

210. Most flat fee deals, however, will provide for additional flat fee payments upon reaching certain plateaus of record sales.

211. Experts agree that the dilemmas presented by sampling would benefit from clarifying legislation. *Supra* note 16. See also Keyt, *supra* note 130 (suggesting compulsory licenses as a court-ordered remedy); *A New Spin on Music Sampling*, *supra* note 169, at 742 (proposing a statutory licensing scheme and mentioning a compulsory license).

212. 17 U.S.C. § 1(e) (1909 Act). This provision has been carried over into § 115 of the 1976 Copyright Act.

213. ABRAMS, *supra* note 98, at 5.03[C][2][a]. Currently, the Act provides for five types of compulsory licenses: cable and satellite transmissions of television programs, §§ 111 and

Much of this proposal is similar to the current mechanical compulsory license, and so will not address every aspect in explicit detail. The reader may assume that any of the finer aspects not addressed herein are identical to the compulsory license provision under Section 115 of the 1976 Act. This Comment highlights those areas where a compulsory license proposal would spark the most debate and proposes solutions. Also note that this proposal would, if adopted, merely set a standard from which to work, and would not prevent parties from freely negotiating whatever deal they like.

### B. *The Proposal*

1. *Material Scope.* — This compulsory license would give any person the right to sample from any sound recording or audiovisual work that has been distributed to the public in the United States under authority of the copyright owner, and from any publicly broadcast television program (whether received through traditional, cable, or satellite transmissions), and to make and distribute phonorecords embodying such samples. Thus, one could sample from any sound recording, whether it contains, for example, pop, soundtrack,<sup>214</sup> or whale music. Regarding audiovisual recordings, one would be able to sample from any video cassette, laser disc, or any other device now or hereafter known from which an audiovisual work can be perceived. Allowing for samples from soundtracks, audiovisual recordings, and television recognizes the interests in establishing the broadest possible artistic pool from which sampling artists can borrow. Further, there is no compelling reason not to open these markets to the sampling musician.

Voices, however, would be explicitly excluded, because they are part of one's identity and identity is not within the subject matter of copyright.<sup>215</sup> Voices are not part of a composition per se, but are unique to the performer, and are more properly protected by state law claims of publicity, privacy, unfair competition, and Section 43(a) of the Lanham Act.<sup>216</sup>

The compulsory license would allow a person to sample every-

119, respectively; phonorecords, § 115; jukeboxes, § 116; and noncommercial broadcasting, § 118.

214. A soundtrack is defined as "the dialogue, music, and sound effects that accompany the pictures in a visual production." HENSLEE, *supra* note 146, at 68.

215. See *Midler v. Ford Motor Co.*, where the court stated that "[a] voice is as distinctive and personal as a face. . . . To impersonate [one's] voice is to pirate [one's] identity." 849 F.2d 460, 463 (9th Cir. 1988). Thus, appropriating another's actual voice is even more egregious than impersonating one's voice.

216. 15 U.S.C. § 1125 (1993).

thing from a peep to an entire, single instrumental track on a single (e.g., just the guitar track, or just the saxophone). The sampler would be limited to taking sound from a single, distinguishable sound source on a recording. The maximum allowable taking would be one sample per artist or group sampled from for each sampling artist's album. For instance, for a single new album, a person could sample only once from any and all Madonna recordings, once from any and all Led Zeppelin recordings, and so on. To further illustrate, if one sampled Slash's guitar from Guns N' Roses, one would be prohibited from using any other Guns N' Roses sample, or any other Slash sample, for that one album. Where the sound recording does not contain a musical arrangement and the sounds are not readily distinguishable, however, one could sample from all sounds concurrently. For example, in the case of whale music, a sampler would not be limited to sampling from a single whale on the tape; he could sample all sounds concurrently. The purpose of limiting the license to one sample is to prevent a sampler from capturing more than a slim amount of unique sound and talent from any single source.

Some may argue that allowing one to sample an entire single instrumental track from a single is excessive. This is the necessary cut-off point, however, in order to ensure the clarity and predictability of this compulsory license. Any other cut-off point would be arbitrary or unworkable. Also, there are three compelling factors that quell this objection: (1) artists would not want to use lengthy, recognizable samples because of artistic pride and integrity, and because excessive musical "borrowing" can be the quickest way to music business ruin;<sup>217</sup> (2) using a lengthy sample may not conform to the rest of the new song, and if it did, those separate parts of the new song would probably be substantially similar to the work sampled from and thus an infringement of its underlying composition; and (3) the most compelling factor, it would simply cost too much.<sup>218</sup>

The compulsory license would give the sampler an unlimited right of manipulation, in that the sampler could alter the sound in any conceivable manner, now or hereafter known, and make it a part of any musical arrangement. Thus, one could sample a saxophone riff and use digital technology to rearrange and alter it in

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217. Milli Vanilli, for example, was virtually laughed out of the music business when it was revealed that the pair neither wrote nor orally performed any of the music they danced around to.

218. See *infra* text accompanying notes 224-37 for suggestions on fee setting.



such a way as to effectively create an entirely new saxophone composition.

2. **The Primary Purpose Requirement.** — One would be permitted to use only the compulsory license if one's primary purpose was to distribute nondramatic musical phonorecords embodying the sample to the public for private use.

3. **Notice Requirements.** — The person seeking to use the compulsory license would have to serve<sup>219</sup> upon the copyright owner of the sound recording a Notice of Intention to Obtain a Compulsory License for the Use of a Sample in Making and Distributing Phonorecords.<sup>220</sup> Like the mechanical compulsory license, the "amount of information required [would be] rather extensive and [would] undoubtedly discourage the use of the compulsory license procedure."<sup>221</sup> If the compulsory license were law, however, people would be forced to either negotiate the use of the sample or face this procedure.

4. **Payment.** — Each phonorecord distributed to the public that embodies the sample would require payment of the compulsory license fee.<sup>222</sup>

5. **Statements and Payments.** — All phonorecords distributed that embody the sample would require making payments and providing royalty statements on a monthly basis.<sup>223</sup> An annual statement of accounting would also be required. For this proposal, quarterly payments were considered because of their comparative ease for the smaller companies that typically represent the sampler. That idea was rejected, however, because it would lead to the inequitable result that a sampler would be able to earn greater interest on the unpaid royalties than if monthly payments were required. Samplers, as digital pirates, would benefit enough by a compulsory license legalizing sampling.

6. **The Fee.** — As with other compulsory licenses, the fee

219. For specifications on proper service of the Notice for the mechanical compulsory license, see ABRAMS, *supra* note 98, at 5.03[C][2][b]. The Notice for samples would be substantially the same.

220. This is similar to the designation provided for by 37 C.F.R. § 201.18(c) in reference to the mechanical compulsory license.

221. ABRAMS, *supra* note 98, at 5.03[C][2][b]. For specifications on the contents of the current Notice of Intention for a mechanical compulsory license, see ABRAMS at 5.03[C][2][b][i], and 37 C.F.R. § 201.18(d).

222. See ABRAMS, *supra* note 98, at 5.03[C][2][c], for a discussion on determining when a phonorecord is "distributed," as opposed to merely manufactured, and the accounting problems therein.

223. See ABRAMS, *supra* note 98, at 5.03[C][2][e][iii].

would be established by the Copyright Royalty Tribunal.<sup>224</sup> The fee would consist of a base fee and a charge by the second (rounded off) for each sample used. Keeping in mind the rate guidelines under the Act,<sup>225</sup> this proposal's suggestion is that the flat rate be .25 cents (¼ cent) per distributed phonorecord, and an additional cent for each second of the sample's playing time in the original work; thus, samplers would pay for what they take, not for how the sample is used. For example, one could sample a two second drum riff and manipulate it to become a five minute drum track, but the sampler would only pay for the length of the original sample—two seconds. The base fee's purpose is to place a clear and predictable standard for minimal samples that are one second or less in duration. The purpose of an increasing payment schedule (an additional cent for each second of the original sample's playing time) is to place an artificial cap on the taking of lengthy samples. These fees are just suggestions, however, and the determination of a rate is best left to the Copyright Royalty Tribunal. The primary considerations should be a balancing between the reality that some artists use dozens of samples and the desire to limit the length of a single sample to a short duration.

A critical issue is who gets paid. Common music industry practice is to pay both the owner of the sound recording and the owner of the underlying composition for the use of a sample.<sup>226</sup> Most often, the record company that produces the sound recording has exclusive rights to it,<sup>227</sup> and the artist retains the composition rights. Only the owner of the sound recording, and not the owner of the underlying composition, should be paid for the use of samples.

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224. Section 801 of the Act establishes the Tribunal and defines its purpose. It states that royalty rates for compulsory licenses shall be calculated to achieve four objectives:

- (A) To maximize the availability of creative works to the public;
- (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The current royalty rate for a mechanical compulsory license is 6.25 cents per album distributed or 1.2 cents per minute of playing time, whichever is greater.

225. *Supra* note 224.

226. Browne, *supra* note 193.

227. ENTERTAINMENT LAW 18 (Howard Seigel, ed. 1989).

Most samples do not conflict with the composition because they are either too short to be copyrightable on their own,<sup>228</sup> are altered unrecognizably, or are simply not distinctive enough for a jury to find that the sampled work is substantially similar to the original.<sup>229</sup> The real piracy concern that sampling presents is with sound recordings, not compositions. Regardless, a compelling and logical argument can be made that sampling does not violate composition rights at all. The copyrights in a composition and a given sound recording are distinct. Because the composition owner has no claim on the duplication of that specific sound recording, in which the record company generally owns the exclusive rights, the rights of the composition owner cannot be infringed by a work that duplicates a piece of that sound recording. Clearly, only the owner of the sound recording sampled from deserves to be paid for that sampling.<sup>230</sup>

Some may criticize this fee proposal. One argument is that all rates set by the Copyright Royalty Tribunal are arbitrary.<sup>231</sup> The clarity and predictability of a compulsory license standard, however, far outweigh this arbitrariness criticism. The market "value" of all things is of necessity vague, because it always revolves around generalities of what one is willing to pay, and because money is itself an artificial construct.

Another criticism is that a set royalty ignores the individual talents and fame of the artist sampled from. If the sampled sounds are truly appealing, however, it will result in increased sales and the owner of the sampled sound recording will be compensated accordingly; if the sample is not that distinctive, yet the album sells well, it is an added windfall for the owner of the sampled recording; and if the new album does not sell well, no harm is done to either party. In addition, a set fee is far better than getting potentially zero compensation under today's ambiguous industry prac-

228. It should be noted that very small takings which are the "hook" of the original song have been held to infringe the composition copyright, based on a substantial similarity standard. In *Boosey v. Empire Music Co.*, for example, a mere six notes were held to infringe another's composition copyright. 224 F. 646, 647 (S.D.N.Y. 1915). This was a case of merely copying the composition, however, and not a case of duplicating the sound recording.

229. The standard for whether one musical work infringes the rights of another is whether it is "substantially similar" to the other work. See *supra* text accompanying notes 129-56 for a discussion of this standard.

230. Note that if the rest of the new work, excluding the sample, was substantially similar to the original sampled-from work, it would infringe the composition copyright.

231. Paul S. Rosenlund, Note, *Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L.J. 683, 698-702 (1979) (market analysis and criticism of the royalty rate).

tices. A set fee is therefore an equitable solution.

One could also argue that some samples, such as a peep or even several notes, are too de minimis to justify a statutory fee. All sound recording performances, however, are unique artistic expressions,<sup>232</sup> wholly separate from unprotectable ideas, and deserve compensation for that reason alone. In addition, music industry personnel would probably grant free licenses for any use they deemed trivial, because this use would be to everyone's benefit in terms of good will, money, time, and hassle avoidance. Industry personnel have stated they are unlikely to press their rights unless a sample embodies an essential element of the original recording.<sup>233</sup> Thus, a simple phone call would probably clear, *gratis*, any de minimis sample.

The ultimate justification for fixing a statutory payment scheme is the general accord in the industry that sampling should be compensable.<sup>234</sup> "To appropriate the creative endeavors of another and use them for personal gain without compensation . . . is manifestly unfair."<sup>235</sup> "No social purpose is served by having [one] get free some aspect of [another's] that would have market value and for which he would normally pay."<sup>236</sup> Jay Morgenstern, Executive Vice President and General Manager of music publishing giant Warner-Chapper Music, has no objections to sampling, but thinks "if you're going to use somebody else's material, you should pay them a fair amount for it."<sup>237</sup>

7. Termination of the Compulsory License. — If statements and payments were unreasonably overdue, the license would terminate.<sup>238</sup>

8. Label Credit. — A label credit would be an important requirement of the compulsory license for each sampled piece. One would be required to specify the song the sample is used in and the instrument or other sound the sample is composed of, and note the album, song, and artist from which it was derived. This would ensure recognition of true talent. A major dilemma with sampling is that it is deceitful. For example, as one author describes, consum-

232. See *supra* text accompanying notes 103-07.

233. Broussard, *supra* note 131, at 494.

234. This is evidenced by industry practices. See *supra* text accompanying notes 201-02.

235. Moglovkin, *supra* note 50, at 164.

236. *Id.* at 167, citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

237. Horn, *supra* note 136.

238. See ABRAMS, *supra* note 98, 5.03[C][2][f], for a discussion on termination of the mechanical license.

ers hearing the Beastie Boys' song, "She's Crafty," will think they are fantastic guitarists, when in reality the guitar riff is a sample taken from Jimmy Page off the Led Zeppelin song, "The Ocean." Imagine their surprise when they attend their first Beastie Boys' concert and learn that all the music is pre-recorded and none of the Beastie Boys are musicians.<sup>239</sup>

9. Rights of the Sampler. — The sampling artist would have composition and sound recording rights in the new recording because the new work would presumably satisfy the copyright requirements for an original work of authorship.

10. An Amendment to the Copyright Act. — Separate from the compulsory license for samples, Congress should enact an amendment to the 1976 Copyright Act that would confer statutory copyright protection to pre-February 15, 1972, sound recordings. As detailed earlier in this Comment, this vast exclusion of works from protection under the Act is unjustified and was the result of legislative error, not intent.<sup>240</sup> Further, this amendment would be necessary to confer the same scope of protection to all copyrightable sound recordings and provide for the same remedies.<sup>241</sup>

11. Prohibition on Combining with a Mechanical Compulsory License. — One using a mechanical compulsory license would be prohibited from using a compulsory license for samples for the same song. This restriction is necessary in order to limit the amount of original sound that one can take from any single source. For example, if an artist obtained a mechanical license to record the Bob Marley song "Jamming," the artist would be prohibited from using any samples from a recording of that song.

12. Retroactivity. — This provision would not be retroactive, meaning it would not apply to sound recordings using unauthorized samples that have already been produced. Providing for retroactivity would be unworkable and unduly burdensome for all involved parties, and open the litigation floodgates.

### *C. Potential Criticisms of the Proposed Compulsory License*<sup>242</sup>

One could argue against a compulsory license for samples on

239. Thom, *supra* note 7, at 332, n.159.

240. See *supra* text accompanying notes 99-100.

241. The Act provides for: statutory damages and profits, § 504; costs and attorney's fees, § 505; and criminal prosecution, § 506.

242. See Scott L. Bach, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 379-81, for a criticism of the

the grounds that a previous consideration of a compulsory license for sound recordings was emphatically rejected.<sup>243</sup> This rejection, however, was aimed at only a license that would have granted the right to copy entire sound recordings, and was expressed at a time when digital sampling technology had not yet invaded the music scene. Further, those using a sample must still invest their own time, effort, and money into developing and promoting their own album, unlike traditional pirates of entire sound recordings.

Another criticism of the compulsory license could be that it chips away at the already limited rights that a sound recording copyright confers. Limiting rights in this instance, however, is no different from any of the other compulsory licenses. By requiring compensation for the samples, the sound recording owner is not damaged economically because any indirect damage is offset through the compensation. Further, Congress can enact any legislation that best promotes the arts, and a compulsory license for sampling would do just that.<sup>244</sup>

A third argument against the adoption of a compulsory license for samples could be that sampling dilutes the value of the original artist's work because it takes one's "signature sound."<sup>245</sup> It is doubtful, however, that consumers are able to identify most samples with the original performer's recording, and when they are able to do so, it is difficult to see where any harm might result from that association. Further, recognizable "hook" samples, if anything, probably enhance the value of the original work. This license proposal would open a new market for artists' sounds and calls for adequate compensation so that any dilution in value would be offset. In short, the "societal interest in new artworks" weighs in favor of a compulsory license, because the copyright holder of the original work "loses little by the [use]."<sup>246</sup>

A fourth argument against a compulsory license for sampling could be that there is moral harm done to musicians who are compelled to license a piece of their work for use in exceedingly porno-

mechanical license.

243. Giannini, *supra* note 44, at 515, citing H.R. REP. NO. 487, 92d Cong., 1st Sess. The Committee found no justification for granting a compulsory license for sound recordings, because sound recordings are developed and promoted by others, and one should not be allowed to freely exploit the talent, time and money of another. Mechanical compulsory licenses are distinguishable, however, because one must invest one's own time, money, and talent, by independently developing and promoting one's own recorded version of a composition.

244. *Supra* text accompanying notes 60-64.

245. See Arn, *supra* note 17, at 62.

246. Keyt, *supra* note 130 at 461.

graphic or violent music.<sup>247</sup> Admittedly, this is a legitimate concern. Most pornographic or violent music, however, gains limited exposure, so there would rarely be any real harm. Further, one can argue that the rare occasions where real moral harm could result are insignificant in comparison to the huge benefits that a compulsory license could provide. Also, because the proposed license is limited to a single sample for each artist or group sampled from for each new album, any harm would be minimal.

A final potential argument against the compulsory license proposal is of a practical nature: There is an entire profession of programmers who have each compiled extensive libraries of samples, many of which may be untraceable to the original owner, depending on whether the programmer keeps records of his sampling. This problem, however, should not be a bar to enacting legislation that would enforce the rights of those being sampled. Moreover, because programmers generally sample highly distinctive sounds, they will frequently remember where many of them came from, especially because samples of famous or highly distinctive sounding artists are of particular prestige to the programmer. If this proposal were enacted, samplers would be on notice to keep accurate records of their sampling activities.

#### *D. Justifications for the Proposal*

A compulsory license for samples would replace the ad hoc hassles and confusion of current industry practices and ambiguous law by setting clear, definable standards for the use of samples. A compulsory license would promote the arts<sup>248</sup> better than the current situation because it would limit the production costs, legal fees, and settlements inherent in current industry practices, thereby allowing genres such as rap and pop to continue to utilize sampling technology as an artistic tool and further develop. This license would best serve the public good by encouraging alternative forms of creative expression, yet at the same time protect the rights of sound recording owners by ensuring compensation for any use. As with the mechanical compulsory license, it "encourage[s] different [musical] arrangements . . . while still providing fair compensation to the original artist."<sup>249</sup> A compulsory license thus

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247. See Broussard, *supra* note 131, at 497, which notes that many industry figures express an unwillingness to license samples for use in such works.

248. See Moglovkin, *supra* note 50, at 162, which states that protection of samples would "encourag[e] creativity."

249. Fishman, *supra* note 15, at 218. This was the Congressional intent behind the

balances the piracy-artistry dichotomy.

A compulsory license would solve many of the practical dilemmas faced by the music industry as a result of sampling. First, it would negate the devastating situation where an artist seeks clearance after producing an album containing a sample, but is denied permission; the artist is then faced with either scrapping the entire project or risking a potential multi-million dollar law suit if he releases the album. That situation was faced by Terminator X, the DJ for the platinum-selling rap group Public Enemy. He chose the latter route and was hit with a \$500,000 law suit.<sup>250</sup> A compulsory license would recognize the artistic truth that many musicians use the work of others in the heat of inspiration, and hence fail to seek permission until after a work is created. Also, "[m]any performers in the music industry [simply] do not understand the legal and technical ramifications of the burgeoning new art form of digital sampling,"<sup>251</sup> and "release albums with unauthorized samples in hopes that a legal or financial settlement will be reached later."<sup>252</sup>

The compulsory license, because it would spread out payments from the royalty pool, would allow artists to use samples even though they might not have otherwise had the money to clear samples in flat fee buyouts.

The compulsory license would also end most piracy by affirmatively setting in the Copyright Act the standard that all unauthorized sampling or other method of sound recording duplication violates one's rights in the sound recording. Thus, the license would facilitate negotiation and simplify deals by setting a standard from which to work. Lawyers would not need to quarrel over arbitrary quantitative and qualitative analyses of each sample's worth, because the compulsory license would set the payment standard. The license would therefore save time and money, discourage litigation, and foster a more cooperative atmosphere.

Because the compulsory license would require compensation for samples, it would reinstate a value on musicians with unique sounds and on session musicians. Depending on the project, one may wish to pay a live musician a flat fee for a brief studio session rather than face the specifications of the compulsory license or risk

mechanical compulsory license.

250. Terminator X sought permission from Bridgeport Music to sample from "Body Language," a song co-written by funk superstar George Clinton. When Bridgeport refused, Terminator X released his debut solo album anyway, sample included. Janine McAdams, *New Sampling Suit Targets Terminator X*, *BILLBOARD*, Feb. 15, 1992, at 12.

251. Marcus, *supra* note 110, at 768.

252. Browne, *supra* note 193.



a lawsuit with an unauthorized sample, a suit that one would be certain to lose under the proposed license provision. In addition, the uses of sampling that are now "free"—all the disguised, undistinctive, and de minimis samples—would require compensation under the license. Hopefully, as a result of reasonable compensation, the compulsory license would also help to encourage true artistry and discourage all the "filth"<sup>253</sup> and "monoton[y]"<sup>254</sup> that has pervaded popular music in the last decade.

The primary effect of the compulsory license would be to facilitate negotiation. "[C]ompulsory licenses [have] motivated the negotiations that have occurred" and for that reason alone have proved highly useful.<sup>255</sup> The royalty rate of the license sets a standard on which to base negotiation. Thus, the compulsory license for samples would be like the current mechanical compulsory license that is rarely if ever invoked by major record companies because of the burden of monthly statements and payments, and annual certified statements. "The existence of compulsory license rates, however, substantially controls the basic pattern in which the recording industry does business with the music publishing industry."<sup>256</sup>

## VI. CONCLUSION

The proposed compulsory license for samples is in line with the Constitutional purpose behind copyright law of promoting the arts. The proposed license is also in harmony with notions of fairness that people should be duly compensated for their unique talents and labor where another seeks to exploit them for financial gain. The license would balance the artistry-piracy dichotomy and solve the current legal and music industry dilemmas of uncertainty, ambiguity, and needless expense, time and hassle, by setting a clear, predictable standard.

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253. Moira McCormick, *Where is Rap Heading*, BILLBOARD, Nov. 23, 1991, at R-3.

254. BILLBOARD, Oct. 26, 1991, at 82.

255. Ralph Oman, *The Compulsory License Redux: Will it Survive in a Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L.J. 37, 48 (1986) (conveying the usefulness of compulsory licenses).

256. ABRAMS, *supra* note 98, at 5.03[C][2][g] (discussing the effects of the mechanical compulsory license on music industry practices).