"Give the Drummer Some!" On the Need for Enhanced Protection of Drum Beats

David S. Bloch

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# "GIVE THE DRUMMER SOME!"†
## ON THE NEED FOR ENHANCED PROTECTION OF DRUM BEATS

**David S. Bloch***

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* Bachelor of Arts, Reed College (ΦBK); Master of Public Health, The George Washington University School of Medicine and Health Sciences; Juris Doctor with honors, The George Washington University National Law Center; 1997 Fellow in International Trade Law, University Institute of European Studies, International Labour Organization, Turin, Italy. Member: State Bar of California, Bar Association of the United States District Court for the Northern District of California, Bar Association of the United States Court of Appeals for the Ninth Circuit, American Intellectual Property Law Association. Mr. Bloch is an associate with LYNNCH, GILARDI & GRUMMER, San Francisco, working primarily in the areas of health care and intellectual property. He is also a practicing drummer. Thanks to William Bogdan of Lynch, Gilardi & Grummer for his extensive comments on an earlier draft.

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Q: What do you call a guy who hangs around with musicians?
A: A drummer.

—Nicko McBrain.

I. THE MUSICIAN

On February 23, 1997, Tony Williams died. Williams was one of the titanic figures of modern jazz. He was sitting in at jazz clubs at the age of 11 and first achieved national prominence at 17 as a member of the seminal Miles Davis Quintet of the early 1960s. His career included performances and recordings with some of the most storied names in jazz: Jackie McLean, Art Blakey, Max Roach, John McLaughlin, Wayne Shorter, Herbie Hancock, Sonny Rollins, Wynton Marsalis, Michael Brecker, Pat Metheney. His back catalogue contains thousands of performances, including albums like the Miles Davis Quintet's *Bitches Brew* and a series of well-received recordings by his fusion group, Lifetime. His innovations have influenced countless professional musicians. This host of creative techniques, rhythms and styles is his most important legacy, far more than the modest catalog of songs he wrote. His estate can expect neither royalties nor credit for the bulk of his creative output. He was a drummer.

This article looks at a song's various component parts in light of the new digital media. Though drums are the ostensible focus, the arguments are applicable to any discrete “element” of a larger composition, like a bassline or a chord rhythm. Modern digital technologies allow samplers to isolate tracks or instruments, lifting them out of a song and engrafting them onto some new composition—a development with which intellectual property law has not yet come fully to terms. Digital sampling raises questions

6. "There ain't but one Tony Williams when it comes to playing the drums. . . . There was nobody like him before or since. He's just a motherfucker. Tony played on top of the beat, just a fraction above, and it gave everything an edge because it had a little edge . . . The band revolved around Tony, and Tony loved it when everybody played a little out. . . Tony was the fire, the creative spark." Chip Stern, *Liner Notes*, in MILES DAVIS, *Filles de Kilamanjaro* (Columbia Legacy 1990) (originally released in 1969) (quoting from Miles Davis' autobiography).
about the extent of copyright law, the integrity of musical works, and the social value of the musical contributions made by drummers and other less visible musicians.

II. THE HEART OF ROCK & ROLL: RHYTHM AND MUSIC

The Copyright Act confers protection on "musical works, including any accompanying words." The phrase "musical works" is broad enough to cover all components of what is commonly considered musical expression: lyrics, melodies, harmonies and rhythms. Indeed, "musical work" was deliberately left undefined by the drafters of the 1976 Copyright Act because it has a "fairly settled" meaning. Their confidence was misplaced.

According to the modern gloss, section 102 of the Copyright Act protects lyrics and melody. Though new rhythms are theoretically protectable, treatises and cases treat music as consisting only of the separable elements melody and lyrics. Thus, on "Filles de Kilamanjaro," every line Miles Davis plays is protected—but not a single note by Tony Williams. This is an injustice to those musicians who have developed new and unexpected rhythms or rhythmic styles—precisely the type of creative composers the Constitution envisioned and the Copyright Act was intended to protect.

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14. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.
In the past, this oversight might have been attributable to the belief that most rhythms are essentially the same, or that rhythm is relatively unimportant. Such a view is insupportable now. It is, however, still widely held.\textsuperscript{15} "The sample taken from the live performance of a drummer, using a standard drum set, which is then edited and used as musical structure (i.e., background rhythm) is unlikely to stand on its own as an identifiable work of authorship."\textsuperscript{16} Why not? A "standard drum set" can create rhythms as distinctive as any melody produced by a "standard guitar set-up." That non-musicians find it difficult to parse the distinctions between various rhythms and rhythm musicians by no means suggests that these beats are unidentifiable or that the musicians should not be acknowledged as having created "works of authorship." Drums have taken center stage in modern popular music, particularly in styles like rap and heavy metal. However, this new prominence comes with a substantial cost: the widespread use of sampling technology to misappropriate the intellectual patrimony of a generation of drummers.\textsuperscript{17} There is a substantial gap in the scheme of copyright protection. It should be closed.

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\textsuperscript{17} It is estimated that roughly 99% of all drum samples are used without permission. A. Dean Johnson, Comment, \textit{Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits}, 21 Fla. St. U. L. Rev. 135, 142 n. 51 (1993). A related problem, which I mention here but do not address in detail, is the appropriation of sounds. A musician works hard to develop a unique timbre and tone with his instrument; sampling technology allows others to copy that sound and use it in contexts quite apart from the original work. Consider this anecdote:

The unique sounds of David Earl Johnson's 80 year old African conga drums is utilized in Jan Hammer's synthesizer composition for the "Miami Vice" theme music. The two musicians exchanged favors in the recording studio. Now, Johnson says, "If you listen to the theme music, you'll hear those congas and they 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."

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A. The Mechanics of Music

It is difficult to discuss whether drum beats should be protected by copyright without a rudimentary understanding of musical structure. Though this section will not teach lawyers to read music, it will at least provide a notion of how music works.

In order that musicians can play together, songs are broken into small pieces ("measures") and are written using a standard notation system. In the West, this system consists of a series of four horizontal lines, divided into measures by evenly-spaced vertical lines. Measures are further subdivided into "bars." Within a bar, the musical phrase is depicted by a series of marks ("notes"). Each note is of a predetermined length and corresponds to a predetermined sound. Thus, notes tell musicians what sound to play, when to play it, and how long to hold it, by virtue of its position in the measure relative to the other notes. This lets different musicians reproduce the same song.

A drummer's chief function is to keep time, that is, to ensure that the other musicians in an ensemble perform at the same tempo and thus read musical charts in unison. Absent a time-keeper, each musician would play at his own speed rather than in tandem with the others. Because drums have historically played a supplementary role, drummers have sometimes been seen as metronomes rather than musicians. This perception is partly true; in much American popular music prior to about 1955, drums did not play a significant creative role. A drummer would

pling of entire melodies or rhythms, since the latter form of copying allows the sampler to appropriate both sound and "feel." See A. Dean Johnson, Comment, Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits, 21 FLA. ST. U. L. REV. 135, 140 (1993) (discussing the importance of a musician's "feel" as a reason why sampling will never render musicians obsolete—an argument that only holds if samplers are restricted to copying individual notes, rather than entire rhythms or musical phrases). One commentator concludes that "one note, chord, or sound effect alone cannot be copyrighted." Id. at 141. This is an unfortunate and perhaps unjust result for David Earl Johnson. Compare E. Scott Johnson, Note, Protecting Distinctive Sounds: The Challenge of Digital Sampling, 2 J. L. & TECH. 273, 292 (1987) ("Distinctive sounds repeated throughout a sound recording may become timbral 'hooks' analogous to the musical hooks in popular music."); Thomas D. Arn, Comment, Digital Sampling and Signature Sound: Protection Under Copyright and Non-Copyright Law, 6 U. MIAMI ENT. & SPORTS L. REV. 61 (1989).

18. Percussion charts (for timpani, marimba, etc.) use standard musical notation. In drum set charts, the placement of notes at different levels on the staff denotes a different drum (snare drum, bass drum, etc.), rather than a different tone.

19. The "trap" or "kit" drum is an innovation that first appeared in the 1920s and 1930s. The modern drum set contains, at a minimum, the following pieces:

Bass drum: A large drum resting on its side, operated by means of a foot pedal. The bass drum is the lowest-tuned drum in a kit.
play stock rhythms: swing, bossa nova, polka, waltz, et cetera. Rock and jazz music are based on standard rhythmic forms, often repeated. Rock is generally characterized by a 4/4 pattern, straight [Figure 1] or shuffled [Figure 2]. Traditional jazz is characterized by the swing feel, in 4/4 [Figure 3] or 4/4 [Figure 4].

![Figure 1. Two-bar, one-measure “straight” 4/4 pattern. Hi-hat on top line, snare drum on middle line, bass drum on bottom line.](image)

20. Many rhythmic musical forms recapitulate earlier styles. The slow rock beat of the 1950s is a version of the much older blues 6/8. The re-emergence of polka as youth music is a nice example. Polka is a 2/4 light march rhythm of Northern European origin. Young people today might be surprised to learn that they dance to reworked German drinking songs. Yet the rhythmic backbone of “house,” “techno” and other fast dance music is a 2/4 light march — played at greater volume, to be sure, and with different instruments, but basically a polka nonetheless. Unsurprisingly, “house” and “techno” originated in German and Belgian dance clubs.

21. The conventional system of describing time signatures is complicated. Basically, a “4/4” time signature means that each measure (increment or repeated interval) has four beats, each of which consists of one-fourth of an entire note (a “quarter note”). By way of comparison, in a song written in “2/4” time, each measure only contains two quarter-notes, while in a “6/8” song each measure contains six eighth-notes. Thus, a “6/8” time signature (six eighth-notes per measure) is equivalent to a “3/4” time signature (three quarter-notes per measure).

22. BLAKE NEELY & RICK MATTINGLY, DRUMS1 16 (1997).
Figure 2. Four-bar, one-measure “shuffled” 4/4 pattern. Hi-hat on top line, snare drum on middle line, bass drum on bottom line.\(^\text{23}\)

Figure 3. Two-bar, one-measure 4/4 “swing” pattern. Hi-hat on top line, snare drum on middle line, bass drum on bottom line.\(^\text{24}\)

Figure 4. Four-bar, one-measure “swing” 3/4 pattern. Ride cymbal on top line, snare drum on second line, hi-hat on third line, bass drum on bottom line.\(^\text{25}\)

That is not to say that rhythmic innovation is unknown. Drums have, in the last thirty or forty years, become the driving force behind many forms of popular music. Joe Morello created a sensation with the Dave Brubeck Quartet by playing small-combo swing jazz in odd time signatures like 10/4\(^\text{26}\) and 9/8.\(^\text{27}\) “Take 5,”\(^\text{28}\) in which Morello created a smooth, elegant 5/4 swing to propel Paul Desmond’s saxophone melody, is among the best-selling jazz

\(^{23}\) CRAIG LAURITSEN, PROGRESSIVE DRUM METHOD 66 (1994).

\(^{24}\) Id. at 67.

\(^{25}\) JOE MORELLO, NEW DIRECTIONS IN RHYTHM 25 (1963).

\(^{26}\) THE DAVE BRUBECK QUARTET, Unisphere, on TIME CHANGES (Columbia 1963).

\(^{27}\) THE DAVE BRUBECK QUARTET, Blue Rondo A La Turk, on TIME OUT (Columbia 1959).

\(^{28}\) THE DAVE BRUBECK QUARTET, Take Five, on TIME OUT (Columbia 1959). See also JOE MORELLO, Take Five, on MORELLO STANDARD TIME (DMP 1994).
singles in history. Morello’s extraordinary creativity was recognized by the percussion community (he eventually published a book on odd-time drumming), but little outside it.

Figure 5. Two-bar, one-measure “swing” 5/4 pattern, after Morello on “Take 5.” Ride cymbal on top line, snare drum on second line, hi-hat (foot-operated) on third line, bass drum on bottom line.

Similarly, in the mid-1960s to the early 1970s, James Brown’s drummers, Clyde Stubblefield and John Starks, popularized the “breakbeat,” a form of syncopated 4/4 drum beat. It is difficult to convey the rhythm in words. The breakbeat accents 8th and 16th notes around the third beat of a traditional 2-4 snare drum pulse, and often drops the first beat altogether. Though Stubblefield was not Brown’s first choice, his playing had a significant impact


30. “Never before has there been a drummer with such world wide acclaim and popularity. In an unprecedented clean sweep of four of the world’s leading jazz polls, Joe Morello becomes the No. 1 jazz drummer of our time as selected by jazz buffs, critics, and fellow musicians who continually rave about his fantastic technical ability, his taste, his touch and his ideas.” Joe Morello, New Directions in Rhythm 2 (1963).

31. Id. at 35. See id. at 29-36.

32. The original James Brown beat, however, is attributed to Clayton Fillyau: “The man who invented the ‘James Brown beat’ was Clayton Fillyau. Clayton is one of the most influential ‘unknown’ drummers of our time.” Jim Payne, Give The Drummers Some!: The Great Drummers of R&B, Funk & Soul 18-20 (1996).


on rock and R&B drumming. That may be the best measure of value in a creative art. However, there is a difference between being influenced by a musician and copying him verbatim. Today, Stubblefield’s rhythms are stolen daily by rap groups. The same is true of other seminal drummers like Phil Collins or Led Zeppelin’s John Bonham. With the emergence of widespread digital sampling technology and rap music, copyright protection for drum rhythms begins to make sense.

B. The New Order: Digital Sampling

Sampling technology allows a machine to copy and repeat a digitized snippet of music. "[D]igital sampling is similar to tapping the original composition and reusing it in another context." Anyone can sample sounds using over-the-counter computers or

35. “Clyde Stubblefield created some of the most solid...uncompromising drum grooves ever recorded. He single-handedly extended the boundaries of funk with his incredibly syncopated performance[s]... People had never heard anything like it before, didn’t even think it was possible.” Jim Payne, Give the Drummers Some!: The Great Drummers of R&B, Funk & Soul 58 (1996).


recording devices. Sampling can only become easier as new digital transmission technologies emerge.41

Copyright law is a musician's chief protection against unwanted sampling. It is settled that a melodic musical sample is protected by copyright.42 Using samples is a form of "fragmented literal similarity" infringement.43 Drum samples, however, enjoy no such protection. Is it a surprise that drummers have become primary targets of musical samplers?

Rap music often relies on digitally-sampled drum beats.44 Before the rise of sampling technology, rap groups used turntables and scratched records to achieve the same effect: four or eight bars of a drum beat, constantly repeated.45 These rhythms are rarely attributed to the musicians who created them; royalties are virtually never paid,46 and they should be. While rock and pop music are often highly derivative,47 imitation is not appropriation. A

44. "[R]ap music largely depends on sampling technology. Indeed, this genre has its foundation in the reuse and rearrangement of older songs." A. Dean Johnson, Comment, Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits, 21 FLA. ST. U. L. REV. 135, 136 (1993). Much the same statement could be made about blues and modern dance music. Of course, this excuses nothing. See Grand Upright Music Ltd. v. Warner Bros. Records, 780 F.Supp. 182, 185 n. 2 (S.D.N.Y. 1991) ("The argument suggested by defendants that they should be excused because others in the 'rap music' business are also engaged in illegal activity [sampling] is totally specious. The mere statement of the argument is its own refutation").
45. This article is not intended as an attack on rap music. Rap is discussed in connection with sampling only because "[m]usic sampling is fundamental to rap music." Carl A. Falstrom, Note, Thou Shall Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music," 45 HASTINGS L.J. 359, 372 (1994). Other forms of contemporary music (New Wave, dance music, etc.) also rely heavily on sampling technology.
46. See Falstrom, at 367 n. 58. This is not true of melody. Rap groups generally attribute and pay royalties to songwriters and artists. M.C. Hammer paid for sampling Rick James' "Super Freak" on "U Can't Touch This." Id. at 379 n. 104. 2 Live Crew attempted to secure permission to use Roy Orbison's "Oh Pretty Woman" before parodying it. See Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).
47. Bands like Kingdom Come and Bonham were virtual Led Zeppelin clones. Compare LED ZEPPELIN, LED ZEPPELIN (Atlantic Recording Co. 1969) and LED
drummer playing a beat “inspired” by another’s is almost guaranteed to add his own “artistic” expression to the rhythm. A sampler, by contrast, lifts sounds verbatim; his creative expression manifests only in his rearrangement of others’ music. A sampler who does not acknowledge his sources is essentially a plagiarist. He is using the creative efforts of others without permission, payment or attribution. This is not to say that a sampler’s songs are not copyright-protectable. A combination of samples may well form a separate and distinctive new work, worthy of copyright protection in its own right. However, such a song should be seen at law as a derivative work—a creation that, while new, is subject to the superior rights of the owners of the sampled sounds.

Rap music has certainly been guilty of misappropriating the rhythms of others. However, as the music grows in sophistication, original rap rhythms are themselves pirated by mainstream musicians and other rappers. In a prominent example, the drum beat in Public Enemy’s “Security of the First World” was lifted verbatim by Lenny Kravitz for Madonna’s “Justify My Love.” Kravitz, rather than Public Enemy, was credited with writing the Madonna song. There is no evidence that Public Enemy was com-


48. Carl A. Falstrom, Note, Thou Shall Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music, 45 Hastings L.J. 359, 371 (1994) (“Samplers . . . generally copy small pieces of a work and use them, often combined with samples from many other works, to create a new cohesive whole. In contrast to the pirate, the sampler does not merely duplicate the efforts of the sampled artist; the sampler, by using her creativity, has added something that makes the new song distinct from the original”).

49. A “derivative work” is “a work based upon one or more preexisting works . . . consisting of . . . modifications which, as a whole, represent an original work of authorship.” 17 U.S.C. § 101.

50. Rap group EPMD is a case in point. After their break-up, “[o]utside producers . . . helped themselves to EPMD’s back catalog, scoring multiple hits off the duo’s sacred loops. . . . ‘We don’t have a problem with it as long as you give credit,’ says [EPMD member] Smith. ‘. . . We don’t get mad, throw attitude, chase down producers, chase down samples. We play the game with our heart. Just give us credit.’” Todd Inoue, EPMD: Ten-year rap vets get separation anxiety, Pulse!, Oct. 1997, at 26.

51. Public Enemy, Security of the First World, on It Takes A Nation of Millions To Hold Us Back (Def Jam/Columbia 1988).

pensated in any way for the misappropriation, even after it became public.53

New rhythms are commonly associated with the song and the artist, if not with the drummer himself.54 The song “Walk This Way,” which opens with an unusual and recognizable beat, is certainly associated with Aerosmith, though not necessarily with drummer Joey Kramer.55 In the percussion community, the left-handed beat from Paul Simon’s “50 Ways to Leave Your Lover” is associated with session drummer Steve Gadd.56 Even a simple but uncommon cadence, like Larry Mullin Jr.’s opening riff on U2’s “Sunday Bloody Sunday,” represents a unique artistic creation that is not conceptually different from the (equally simple) melody Bono sings over it.57

C. The Work-for-Hire Doctrine

Viewed expansively, enhanced protection for “musical component works” (like drum rhythms) could undermine the work-for-hire doctrine. It need not. Work-for-hire is completely consistent with a rhythmic copyright.

A “work made for hire” is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.58

The copyright in a musical work-made-for-hire is held by a studio musician’s employer:

53. See, e.g., Patrick Goldstein, Pop Eye, L. A. TIMES, Jan. 27, 1991, at A11 (“Since Public Enemy samples just as many tracks as anyone else, no one’s going to court [over the stolen drum beat in ‘Justify My Love’].”)


55. AEROSMITH, Walk This Way, on TOYS IN THE ATTIC (Columbia Records 1975).

56. PAUL SIMON, 50 Ways to Leave Your Lover, on STILL CRAZY AFTER ALL THESE YEARS (Columbia Records 1975).

57. U2, Sunday Bloody Sunday, on WAR (Island Records 1983).

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of [the Copyright Act], and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. 59

Under work-for-hire rules, a session musician who writes a song pursuant to a contract does not own the copyright to the song. Rather, the copyright is owned by the person who hired the musician. If Clyde Stubblefield is hired by James Brown, James Brown, not Clyde Stubblefield, owns the rights to Stubblefield's performance and his rhythmic composition. In most musical situations, this will be the case: the drummer, no matter how creative, will be a hired gun. But the fact that the drummer's rights are signed away by contract does not imply that no rights exist or that the rights "merge" with those inhering in the larger work. In short, it does not matter (to the argument) whether Tony Williams owns his drum beats or whether Miles Davis owns them. What matters is that the drum beat, individually, should be protectable and can be infringed.

III. GROW OR PAY 60: EXPANDED INTERPRETATIONS OF THE COPYRIGHT ACT

Though an all-percussion orchestral composition is (probably) covered by copyright, the protection for anything less ambitious is uncertain. Some argue that rhythm does not (or should not) enjoy any protection at all. Others contend that anything short of repeating an entire rhythm is not infringement:

Although some believe that sampling even one note or chord of someone's trademark sound constitutes infringement, no infringement occurs in this situation under present copyright law. Sampling complete drum patterns from other's recordings, however, may subject an artist to an infringement suit. Yet, the ease with which technology allows someone to sample the recording of a drum machine, together with the low cost of purchasing a drum machine and replicating the same drum pattern, present significant evidentiary hurdles in infringement suits. Accordingly, unless the plaintiff can prove that the defendant has sampled a copyrightable portion of either the underlying composition or the sound recording, the court may not find the defendant liable.

60. D.A.D., Grow or Pay, on Riskin' It All (Warner Bros. Records 1992).
for copyright infringement. As most of today's samples are of uncopyrightable material, the possibility of infringement remains minimal.61

By implication, a rhythm copied by a drum machine can never infringe. This is an unfortunate but essentially accurate statement of the law today. Drummers have little recourse in the face of repeated sampling and none in the face of drum-machine reproduction. The result clearly favors samplers over the musicians they sample. But it is a self-destructive rule. A sampler's creativity is expressed in the selection and organization of different sounds. His work presupposes a large and growing body of sounds from which to sample. A rule that permits broad sampling without compensating the artist sampled reduces the incentive to create and increases the incentive to sample. The end result is fewer performers and fewer performances—a result that hurts samplers (who have fewer sources to sample from) and musicians alike.

Some form of intellectual property protection would enable drummers to prevent or be compensated for drum sampling or rhythm reproduction. Concededly, this might hinder the development of rap and other mechanically-based music forms. Again, though, the alternative harms both samplers and drummers, eventually. Thus, it is in the interests of the entire industry to strike a fair balance between derivative uses and original creations, and this balance must favor the creators. Accepting the need for an enhanced protection for drum beats, the question then becomes what form this protection should take. This article discusses two ideas: the traditional American copyright and a species of European-style moral right.

A. The Nature of the Beast62: Rhythm Copyrights

A copyright for drum beats would be the simplest solution. The language of the Copyright Act of 1976 is consistent with the protection of original rhythms.63 In fact, the language of the Copyright Act would appear to directly countenance such protec-
"Give the Drummer Some!" On the Need for Enhanced Protection of Drum Rhythms

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.\(^\text{64}\) Such encouragement is as important for drummers as guitarists, and there is no obvious reason to believe that the Congress intended to encourage the pursuit of all instruments except the drums.\(^\text{66}\) It is not unreasonable to assume, therefore, that achieving protection for the originality of drummers is possible under existing law.\(^\text{67}\) All that must change is the judicial gloss. The federal courts could simply adopt an interpretation of the Copyright Act that encompasses drums. (In theory, state common law could also fill the gap, as it did with respect to sound recordings prior to the enactment of the 1976 Copyright Act.\(^\text{68}\) However, even if state protections were not preempted by federal law, the use of state courts to protect rhythms distributed worldwide would create a Babel of conflicting rules.)\(^\text{69}\) Such a reinterpretation of the Copyright Act would have intangible benefits, as well. Copyrights carry a certain moral approval: musicians who choose percussive instruments would be placed on the same level as other musicians with respect to the protection accorded their musical creativity.

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66. It is fairly clear that Congress intended the Copyright Code to expand in scope as intellectual innovation progressed. "The history of copyright law has been one of gradual expansion in the types of works accorded protection. . . . The [Copyright Act of 1976] does not intend either to freeze the scope of copyrightable . . . technology or to allow unlimited expansion into areas completely outside the present congressional intent." H.R. REP. NO. 94-1476 at 51 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5664. Musical works are expressly protected by the Copyright Act of 1976. Drum rhythms are, therefore, within the general ambit of congressional intent. 17 U.S.C. § 102 (a)(2).


69. Jeffery A. Abrahamson, Tuning Up For a New Musical Age: Sound Recording Copyright Protection in a Digital Environment, 25 AIPLA Q. J. 181, 189 n. 17 (1997) ("a regime of state law protection for sound recordings was of limited value since the issue had to be adjudicated on a state-by-state basis which was not only inefficient, but also resulted in inconsistent protections").
One major question is what sort of copyright a drummer would hold. A recorded song is governed by two copyrights: a right protecting the song \(^{70}\) and a right protecting the recording. \(^{71}\) These two copyrights provide their respective holders with different rights. A copyright in the underlying musical work—the right held by the composer—covers the entire range of available protective rights: the right to reproduce the song; the right to distribute copies of the song; the right to prepare other works derived from the initial song; the right to perform the song; and the right to publicly display the song. \(^{72}\) By contrast, the owner of a copyright in a song's sound recording—that is, the owner of rights in a particular performance—only holds three rights: the right to reproduce the recording; the right to distribute copies of the recording; and the right to create derivative works based on the recording. \(^{73}\)

The important distinction here is between composer and performer. If the drummer had a hand in composing the song, either by suggesting a rhythmic structure or by creating an innovative beat, he should be credited as a composer and enjoy all five of the rights listed above. If, by contrast, the drummer performed a rhythm part planned by someone else or if the rhythms he used are in the public domain, then he only deserves rights in the sound recording. If the performance was a work-for-hire, the person who hired the drummer holds the rights. A sample infringes both the sound recording copyright and the composer's copyright, assuming protected elements are taken. \(^{74}\) A reproduction of a beat by mechanical means, however, infringes only on the composer's rights. \(^{75}\)

It is true that the expanded copyright will, by definition, expand the number of copyright-holders. This, in turn, will require a profusion of licenses; where once the entire song could be signed away by one individual, under the new regime several releases would need to be obtained and deals negotiated. However, most music will remain work-for-hire, so the impact is not so great. For the hired musician (who will have no rights), little will
change. The owner's rights will have the same scope; they will just be denominated differently. Existing compulsory licensing mechanisms and licensing combines could function just as effectively with multiple copyrights in each song as with unitary song-rights. Still, there would be an increase in the transaction costs associated with music licensing. That fact should be weighed against the philosophical case for crediting artists with rights in their original works.

1. The Problem of Standard Beats

A more substantial objection to copyrighting rhythms is that protection has the potential to stifle the use of "standard" beats, such as the traditional jazz swing, the New Orleans Bo Diddley groove (actually a modified form of the Latin American clavé, though he claims it as his own), or rock's standard 2-4 backbeat. This concern is also overstated, however, and reflects a misunderstanding of the nature of the instrument. The drums are no less sophisticated than any other musical tool. All Western melodies consist of some combination of 12 tones.76 However, that does not imply that there are too few variations to permit copyright protection. Indeed, copyright protection has clearly fostered innovation, to the extent that many musicians have sought out and incorporated non-Western scales and modes into their repertoire.77 Just as much musical variety can be achieved with the drums as with any other tool. Drums are, after all, the universal (and probably the original) instrument, present in virtually all societies, ancient and modern.78

Judicial interpretation could easily resolve the problem of "stock" beats. Reinterpreted, rules on the scope of the public domain might preclude any intellectual property rights in a standard rhythm.79 Thus, drummers using a universe of commonplace

77. See Led Zeppelin, Kashmir, on PHYSICAL GRAFFITI (Atlantic Recording Company 1975); Queensrÿche, Sign of the Times, on HEAR IN THE NOW FRONTIER (EMI 1997).
79. Protection does not inhere where a musical composition uses public domain sources or "is relatively so simple that the genre itself permits a limited and familiar number of usable elements." Craig Joyce, William Patry, Marshall Leaffer & Peter Jaszi, COPYRIGHT LAW 152 (3d ed. 1994). This may have once been true of
beats and phrases would be insulated from infringement suits. An alternative resolution might hold that a drummer playing a "standard" beat would not enjoy protection because the rhythm is "merged" with (that is, not importantly different from) the underlying "idea" or standard beat. In either version, drummers playing unoriginal beats would not enjoy protection. But it follows from the logic of intellectual property law that those who do pioneer a new rhythm or style should have some intellectual property rights.

In addition, legislation could address the problem of rhythmic similarity—that is, the problem that many drum beats sound alike—by requiring a heightened "originality" standard. It would not be difficult to graft a basic originality analysis onto the 1976 Copyright Act. Of course, anything approaching a patent application would be immediately unworkable in the context of artistic or musical works. However, the patent standards of "novelty" and "nonobviousness" could be used by the Copyright Office and the courts as an aid in determining whether a drummer's works are sufficiently original to be infringed by a sample or another drummer.

2. The Status of Samples

If drum beats are copyrighted, samples are at best derivative works, actionable if unauthorized. A derivative work can secure protection for original elements, but that copyright "does not affect . . . ownership, or subsistence of, any copyright protection in the preexisting material."
There is a case to be made that sampling is itself a creative art. As the primary example, consider rap music. The legal and moral status of rap music is difficult to ascertain. It would seem that any music form that appropriates the musical expression of other performers without attribution or payment of royalties is simply regularized infringement (that is, theft) on a grand scale. On the other hand, several commentators contend that recombined music involving extensive sampling is original creative expression with substantial artistic merit, rather than mere infringement or derivative work. An overly strict protective regime may stifle innovation, rather than foster it.

3. Fair Use and the "Amateur Exception"

Where both the infringer and the right-holder have legitimate interests in the work in question, conflicts are resolved by the "fair use" analysis. The fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."86


The music is generally little more than noise with a beat, the singing is an unmelodic chant, the lyrics often range from the perverse to the mercifully unintelligible. It is difficult to convey just how debased rap is. Not even printing the words adequately expresses that. There have, however, been some noteworthy attempts to get the point across. The music industry, Michael Bywater writes as part of an extended piece of masterful vituperation, 'has somehow reduced humanity's greatest achievement—a near-universal language of pure transcendence—into a knuckle-dragging sub-pidgin of grunts and snarls, capable of fully expressing only the more pointless forms of violence and the more brutal forms of sex.'... The difference between the music produced by Tin Pan Alley and rap is so stark that it is misleading to call them both music.  


86. Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980).
Thus, fair use may offer free artistic expression by samplers while protecting the artists whose works are sampled.

The question of what constitutes fair use is vexing: "the most troublesome in the whole law of copyright." Fair use presents some particularly thorny issues in the context of music and rhythm sampling. Several authors have suggested that fair use provides broad latitude to musical forms that sample intensively (e.g., rap and hip-hop). The definition of fair use is left to the judiciary: Congress provided guidance in the Copyright Act of 1976, but it used language that clearly indicates a large role for judicial discretion and case-by-case analysis. Indeed, fair use is originally a judicial doctrine. The four prongs of the fair use analysis are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Considering each factor in turn, it seems clear that fair use would not ordinarily be a valid defense to rhythm copyright infringement.

87. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). The Second Circuit panel in Dellar included both Hand cousins.
89. 17 U.S.C. § 107 refers to "the fair use of a copyrighted work ... for purposes such as criticism, [etc.]," and later states that "[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include ... [the four factors listed infra]" (emphasis added). The enumeration contained in § 107 is illustrative rather than exhaustive and leaves a wide area for case-by-case decision-making.
92. More accurately, the question is whether or not infringement has occurred. Fair use was originally cast as a defense that rendered an infringing use permissive and thus non-actionable, but did not alter the fact that a use infringed a copyright. Folsom v. Marsh, 9 Fed. Cas. 342, 358 (C.C.D. Mass. 1841) (No. 4,901). Now, however, "the fair use of a copyrighted work ... is not an infringement of copyright." 17 U.S.C. § 107.
The purpose and character of the use. Almost definitionally, pop musical expression is commercial in nature. It is conceivable that a musician would reproduce drum rhythms for pedagogic or religious purposes, but most samplers are rap or electronic-music composers who produce music for profit. The use of a rhythmic performance from one song as part of another song, both intended for commercial consumption, is quite clearly a use "of a commercial nature." This "tends to weigh against a finding of fair use," though it is not dispositive.

The nature of the copyrighted work. In the fair use analysis, creative works are traditionally accorded greater protection than are compilations or works of fact. As discussed, innovative rhythms should be viewed as creative works. Their nature militates against a finding of fair use unless the use in question is of scholarly or academic mien. It is difficult to view the use of another's song or rhythm, in toto or in large part, as some form of socio-musical commentary.

Amount and substantiality of the portion used. The likelihood of finding fair use varies inversely with the quantity of copyrighted material taken. A use that is "quantitatively substantial (e.g., a sampled drum track)" is unlikely to enjoy fair-use protection. The major problem with the fair use doctrine as applied to rhythms is that even a small portion of a drum beat can represent a major misappropriation of the creator's intellectual expression, because drum rhythms are usually repeated. A 4-bar sample may contain the entire rhythmic structure of a song, despite the fact that 4 bars is likely to be only a fraction of the total song's length. Even a small amount of sampling or copying can represent a sub-

93. "[I]t is clear that defendants [rapper Biz Markie and others] knew that they were violating the plaintiff's rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records." Grand Upright Music v. Warner Bros. Records, 780 F.Supp. 182, 185 (S.D.N.Y. 1991).


96. For a contrary view, see, e.g., Carl A. Falstrom, Note, Thou Shall Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music, 45 Hastings L.J. 359, 374 (1994) ("part of the fun of creating and listening to rap music is recognizing and incorporating shared musical experiences. Much of the pleasure of listening to Biz's 'Alone Again' comes from recognizing Gilbert O'Sullivan's 'Alone Again (Naturally)' as the inspiration for it").

stantial portion of the underlying copyrighted work. As such, drum samples are almost never “insubstantial with respect to the infringing work.”

**Effect of the copy on the market for the original.** The effect of a copy on the market for an original work is “undoubtedly the single most important element of fair use.” However, the effect of the sample or copy of a drum beat on the market for the original is difficult to gauge. In a sense, the original musical work and the work incorporating a sample are essentially the same: they are both musical compositions/performances. However, this does not resolve the question. Though both works target the same basic audience—music listeners—they may serve substantially different and non-overlapping genre markets. Moreover, there is evidence that rap songs based on older music have enhanced the market for the original songs. At the same time, there is reason to believe that a drummer’s back catalog is not going to experience a sudden surge of interest after his rhythms are sampled, particularly when he is not credited with creating the rhythm and his contribution is likely to be instantly recognizable only to a relatively small subset of the music-buying public. It is impossible to determine, in blanket form, whether samples help or hurt the market for the songs from which they are taken.

Three of the four fair-use factors resolve against sampling, leading to the conclusion that fair use probably does not protect samplers. A way to protect samplers and the musicians they sample, though not a complete one, would be to formally recognize an unstated component of the infringement/fair use analysis: the amateur exception. In theory, anyone who reproduces or re-per-

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100. Carl A. Falstrom, Note, *Thou Shall Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 373-4 (1994) (“often a sampled artist enjoys a renaissance of interest in her back catalog. Some artists have been rescued from obscurity by samples of their work. Others have seen their careers improbably extended. Still others have enjoyed an unexpected windfall when a sample contributes to a surprise hit”) (footnotes omitted).

101. This raises the separate question of whether some form of “moral rights” are necessary for the protection of drummers, even in the absence of formal copyright protection. The notion of moral rights is discussed in detail below.
forms a song is an infringer. In practice, only professional musicians are held to this standard, and generally only successful musicians, at that. For small-time performers, the copyright law is a sword of Damocles, rarely wielded but always overhead. It should not be so. It would be simple to build in a fair-use threshold before a court can find infringement. For instance, legislation could hold that a performance that generates less than $5,000 is presumptively considered “fair use,” as a non-profit or educational performance. Individuals who sample early in their musical careers—for lack of available musicians, or whatever reason—could still use sampling technologies and could still play cover tunes. They would only be held to infringe when they enter the professional fraternity.

As an aside, an expanded copyright for rhythms and other component parts of songs would allow the judiciary to revisit and rewrite a prominent recent Supreme Court decision. The Supreme Court in *Campbell v. Acuff-Rose Music*[^102] held that parody is fair use, and thus that Roy Orbison could not enjoin the continued manufacture of 2 Live Crew’s parodic version of “Pretty Woman.”[^103] Few would object to the proposition that parody is a species of fair use.[^104] However, the *Acuff-Rose* result remains somewhat unpalatable, because it gives the original artist little recourse in the face of an appropriation (sometimes vicious) of his creative work. Permitting the independent copyrighting of rhythmic elements of music would have given the copyright-holder a different avenue for controlling the parodic or inflammatory use of his works. The 2 Live Crew song “Pretty Woman” “has the same 4/4 drum beat as the original ["Oh, Pretty Woman," by Roy Orbison].”[^105] As such, the unauthorized infringement of the song’s rhythm would have allowed Mr. Orbison to stop the 2 Live Crew in their production.


[^104]: *But see* Dr. Seuss Enterprises, L.P. v. Penguin Books U.S.A. Inc., 109 F.3d 1394 (9th Cir. 1997) (holding that a re-telling of the O.J. Simpson murder trial in the style of Dr. Seuss’ “The Cat in the Hat” was not fair use because the Dr. Seuss book was not the object of the parody).

Crew song's distribution, or at least extract additional compensation, without disturbing the Court's ruling on fair use.

B. Changes: Moral Rights in Rhythms

It can be concluded that fair use is not a viable defense, but that expanded copyright protection might create enforcement problems and stifle musical creativity. Samplers and derivative users play a significant role in modern music. The Copyright Act should not be used to limit musical expression. Moreover, sampling and copying are difficult to police. The optimal solution will protect the rights of drummers while still permitting wide latitude for musical expression. The European concept of moral rights/droit moral might provide a more workable solution.

1. Defining Droit Moral

The Berne Convention for the Protection of Literary and Artistic Works, Article 6bis, guarantees the author's rights of attribution and integrity even after he has sold his economic rights to the work in question. Though the concept of moral rights has long been accepted in most other nations, the United States intellectual property regime is hostile to it. However, there are signs that American sentiments are changing. Some argue that the United States is on its way to embracing the concept that cre-


107. BLACK SABBATH, Changes, on GREATEST HITS (NEMS Records Ltd. 1977). See also works by Tesla and David Bowie.

108. BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, ART. 6bis, 828 U.N.T.S. 221 (September 9, 1886, as amended October 2, 1979); see CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER & PETER JASZI, COPYRIGHT LAW 987 (3d ed. 1994).


At a minimum, a "moral rights" law confers three rights:

1. **the right of integrity**: the right to insist that the work not be mutilated or distorted;
2. **the right of attribution**: the right to be acknowledged as the author of the work and to prevent others from naming anyone else as the creator; and
3. **the right of disclosure**: the right to decide when and in what form the work will be presented to the public.

Though there is an affinity with certain common-law torts, it has been noted (by the author, among others) that "moral rights" on
the European model do not jibe well with American notions of intellectual property ownership. The distinction between copyright as a form of property and droit d'auteur (the French term translates roughly as "copyright law" but is literally "the right of the author") is significant, and complicates the ongoing project of global intellectual property harmonization.

Yet, a moral-rights regime is more readily equipped to deal with rhythmic copyrights and the problem of digital sampling. Under a musical moral-rights law, a drummer (or other musician) whose recordings are sampled or whose rhythms are copied would have the right to insist that he be credited with playing/inventing the beat (the right of attribution). This would serve to enhance his reputation: music listeners (at least, those who read CD liner notes) would repeatedly see names like Clyde Stubblefield, Phil Collins, and Dennis Chambers. Presumably, demand for their original performances would eventually increase.

The rights of disclosure and integrity are interrelated. A drummer could insist that his rhythms not be truncated or altered in such a way as to diminish his reputation. He would also have some input into the final form of any song containing his intellectual property, because he would have the right to refuse permission. Some commentators suggest that this would stifle samplers' creativity. Such an argument is ill-considered. If a drummer's performance has been so altered that it is no longer recognizably his—or so altered that he no longer wishes to claim paternity—then the rationale for actually using his work is slim indeed. A drum machine can reproduce almost any sound, and nearly any rhythm. (Whether it can reproduce a recognizably human "feel" is another question entirely, and outside the scope of this article.) An alteration substantial enough to warrant a drummer's refusal to permit the release of a musical work could


118. This may be happening already, for other musicians if not for drummers. "Admirably, the music industry is heading in the direction of pro forma licensing of samples before they are used in any new composition." A. Dean Johnson, Comment, Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits, 21 FLA. ST. U. L. REV. 135, 164 (1993).

119. Id. at 165.

120. Id. at 142.

121. Id. at 140. The author thinks not.
be reproduced by electronic means without infringing the drummer's rights.

2. A Model Moral Rights Law

Federally, moral rights are confined to visual artists. However, with appropriate modifications, the language of the Visual Artists Rights Act provides a template for rhythmic protection legislation:

(a) Rights of Attribution and Integrity. Subject to section 107 [fair use] and independent of the exclusive rights provided in section 106, the author of a rhythmic work [or, more broadly, a “musical component work”]—

(1) shall have the right—
(A) to claim authorship of that work, and
(B) to prevent the use of his name as the creator of any rhythm or pattern [musical component] that he did not create;
(2) shall have the right to prevent the use of his name as the creator of the rhythm or pattern [musical component] in the event of a distortion or modification of the rhythm or pattern [musical component] that would be prejudicial to his honor or reputation; and
(3) subject to the limitations set forth in section 113(d), shall have the right to prevent any intentional distortion or modification of that rhythm or pattern [musical component] that would be prejudicial to his honor or reputation, and any intentional distortion or modification of that rhythm or pattern is a violation of that right.

(b) Scope and Exercise of Rights. Only the creator of a rhythm or pattern [musical component work] has the rights conferred by subsection (a) in that rhythm or pattern [musical component], whether or not he is the copyright owner.

In some ways, the American version of droit moral is preferable to the European one. Under the Visual Artists Rights Act, moral rights in a work die with its creator. By contrast, Berne Convention droit moral protections are “perpetual, inalienable, and imprescriptible.” The Berne Convention approach fails to

124. Adapted from the text of 17 U.S.C. §§ 106A (a), (b).
acknowledge the "bargain" (disclosure into the public domain in exchange for a time-limited monopoly right) that lies at the center of American intellectual property. Time-limitation of copyrights is both constitutionally mandated and a good policy choice. Limiting musical component work copyrights to the life of the creator—in practice, releasing drum rhythms 50 years before other copyrights become public domain works—allows increased sampling creativity.

Also, European moral rights are too stark. The case for moral rights protections of rhythm and other musical component works lies on a premise that may be subject to question. When faced with a tension between samplers and drummers, it is not unreasonable to side with the party that has engaged in unquestionably creative, non-infringing behavior, i.e., the drummer. That said, intellectual property laws should make an allowance for new forms of expression, though without sacrificing underlying principles. Under the Visual Artists Rights Act, a visual artist may waive his moral rights. A waiver rule, coupled with incentives to permit sampling and copying, would accommodate the legitimate desires of both drummers and samplers.

3. Compulsory Licenses for Moral Rights

A major objection to enhanced protection of rhythm is the possibility that expanded intellectual property rights would have a chilling effect on the development of certain forms of popular musical expression. Some authors suggest that an expanded fair use analysis solves this problem. Others propose expanded compulsory licensing. The latter solution is superior, because it permits "legitimate" sampling, while eliminating the free-rider

127. "The Congress shall have Power... To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries." U. S. CONST. art I, § 8, cl. 8 (emphasis added).

128. Ordinarily, the term of copyright protection under the Copyright Act of 1976 is the life of the author plus 50 years. 17 U.S.C. § 302 (a). H.R. 2589, 105th Cong., 2d Sess. (1998), which has already passed the House, would extend this period by 20 years.


problem inherent in the use of another's artistic expression for commercial purposes.

The compulsory licensing provisions of the Copyright Act of 1976 affect phonorecord copyrights. Unauthorized reproduction is permitted if three conditions are met:

1. The work has been publicly distributed;
2. The licensor files a notice of intent to use with either the copyright owner or the Copyright Office;
3. The licensor pays a licensing royalty fee.

These provisions have worked well in the context of sound recordings. There is no obvious reason to alter them fundamentally in the context of drum rhythms. However, the phonorecord compulsory license does not allow the redistribution of existing works. Instead, it allows musicians to perform cover versions of other musicians' songs. To protect samplers, the rhythmic compulsory license should include mechanical licenses for sampled tracks. For purposes of simplicity, the license's royalty rate would probably be set by the Librarian of Congress and disputes han-

132. 17 U.S.C. § 115. There are also provisions covering secondary transmission by cable networks [17 U.S.C. § 111 (b), 37 C.F.R. § 201.17], public broadcasting entities [17 U.S.C. § 118] and satellite retransmitters [17 U.S.C. § 119]. However, these compulsory licenses are less useful in the context of musical (rhythmic) copyrights, as they are aimed at verbatim television rebroadcast instead of musical reproduction. CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEEFAER & PETER JASZI, COPYRIGHT LAW 488-489 (3d ed. 1994).


134. 17 U.S.C. § 115 (b). This notice is not a request for permission; it merely informs the copyright owner of an intended use. 37 C.F.R. § 201.18 (listing the information that must appear on the Notice of Intention).

135. 17 U.S.C. § 115 (c). 37 C.F.R. § 201.19 (e)(4) lays out a complex system for the calculation of royalties due. See Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1 (D.C. Cir. 1981). This is a difficult task in the context of the reproduction of complete songs; measuring the percentage of song revenues that should be attributed to a sampled drummer is harder still. It is not impossible, however, particularly if a legislative determination sets the relative contribution arbitrarily. Net song licensing revenues could be allocated by track (most recordings have, at a maximum, 48 separate musical tracks) or by type (e.g., one-third of net licensing revenues is dedicated to the rhythm copyright pool). Though neither of these solutions is perfect, any system that compensates drummers for the unauthorized use of their creative expression is superior to the situation as it stands today, from their perspective. See the Audio Home Broadcasting Act of 1992, 17 U.S.C. §§ 1001-1010 (1997), for an alternative method of obtaining a royalty pool for copyright owners. See also CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEEFAER & PETER JASZI, COPYRIGHT LAW 488, 639-646 (3d ed. 1994).


137. CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEEFAER & PETER JASZI, COPYRIGHT LAW 515 (3d ed. 1994).

138. 17 U.S.C. §§ 115 (c), (d).
dled by a Copyright Arbitration Royalty Panel. However, there is no fundamental reason why the royalty could not be set by the market once the protections are in place.

Of course, a compulsory license does violence to the concept of moral rights. To resolve this tension, the law could create a two-track system: copyright-owners can either maintain or waive their rights. A drummer who elects not to waive his moral rights may control the uses to which his rhythms are put. However, one-on-one negotiation for each time a sampler seeks to use a track is unrealistic, so the drummer would be giving up his chance of profiting in the sampling "secondary market." If he waives his moral rights, the drummer can share in the compulsory licensing revenue pool. Given the widespread use of samples, such an aggregation of license fees could be quite substantial. Also, because licensed rhythms would allow artists a "safe harbor," the statute would create a competitive pressure in favor of waiving moral rights and sharing in the revenue pool. Granted, drummers might refuse to waive their moral rights, which would reduce the sampling palette of rappers and others. However, the ability to sample would remain, and the original creators would have the incentive to open their catalogs in exchange for a reasonable royalty.140

Under current American copyright law, a musician can either avail himself of the statutory compulsory license and compensation scheme or use a private licensing organization. The most prominent such organization, the Harry Fox Agency, represents copyright owners who wish to license mechanical reproductions. Similarly, private organizations like SESAC, BMI and ASCAP license the public performance rights of copyright-holders, in particular those whose works are rebroadcast via radio or television. Each provides a blanket license for their music

139. 17 U.S.C. §§ 801-803. Such panels are appointed by the Librarian of Congress. 37 C.F.R. § 251.2 (b).
140. The song royalty, as of January 1, 1998, is 7.15¢ or 1.35¢ per minute of playing time or fraction thereof, whichever is greater. 37 C.F.R. § 255.3 (i). These figures will be increased every two years, reaching 9.1¢/1.75¢ per minute for songs published after January 1, 2006. 37 C.F.R. § 255.3(j)-(m); see 17 U.S.C. § 115(c)(3)(C).
141. CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER & PETER JASZI, COPYRIGHT LAW 516 (3d ed. 1994).
142. Id.
143. The Society of European Stage Actors and Composers.
144. Broadcast Music, Inc.
145. The American Society of Composers, Authors and Publishers.
catalog at a fixed fee, then police rebroadcast outlets to determine
the amount each musician is due. Individual musicians are
paid according to the number of times their music is played on the
air. The proposal for rhythm protections would tap into the same
system. The moral right of attribution would serve to identify the
sources of rhythmic samples. Therefore, it would be relatively
simple for such organizations to license out rhythms and to tabu-
late the amounts due to drummers for the rebroadcast of their
sampled (or copied) beats.

IV. THE END

Rhythm is a vital part of all music. To the extent that we, as
a society, value music, we also value rhythm. America’s intellec-
tual property laws do not, at present, fully recognize the creative
contributions of drummers. In order to ensure that new genera-
tions of musicians will continue to invest time and effort in learning the drums—to equalize the incentives for musical endeavors—
some aspect of the law should change.

Tony Williams defined the drums for a generation of percus-
sion monsters like Ndugu Chancellor and Lenny White. One
eulogist notes: “His dramatic drumming was at the center of such
classic [Miles] Davis recordings as ‘E.S.P.,’ ‘Nefertiti,’ and ‘Filles
de Kilamanjaro,’ which often seemed like drum concertos with the
horns cast as accompaniment.” Another observes that “Wil-
lams’ riveting drumming electrified the jazz world. In his sure
hands, rhythms and dynamics became totally flexible; Williams’
biting ride cymbal and alternately feather-light and nail-hard
snare work drove Davis and his band to new heights of improvisa-
tional and formal innovation.” The rhythms Williams invented
and the beats he created should be accorded the same respect as
the melodic lines Miles Davis played over them. Copyright protec-
tion for the artistic expression of drummers is long overdue.

147. Id. at 565-70 (describing the different sampling mechanisms used by each
organization to arrive at a fair royalty for each copyright owner/member).
148. THE BEATLES, The End, on
151. Futterman, supra note 149, at 34.