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You Can't Always Get What You Want But Digital Sampling Can Get What You Need!

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Wells: You Can't Always Get What You Want
YOU CAN'T ALWAYS GET WHAT YOU WANT¹
BUT DIGITAL SAMPLING CAN GET
WHAT YOU NEED!

INTRODUCTION

Digital sampling sounds like a dream come true for record companies and producers. Digital sampling makes it possible for record producers to record a voice or instrument, either live or from a previous recording, store it on a computer disc and play it back on a keyboard.² Alas, no more expensive studio musicians to contend with for they can be replaced by relatively inexpensive samples readily available on the black market. While record producers and digital sampling are enjoying their honeymoon, the musicians in America are being put out in the cold. Take the case of David Earl Johnson,³ for example. Johnson is provoked,⁴ and in retrospect, one can hardly blame him. Johnson is a percussionist known for his rare instruments and distinctive sounds.⁵ During a session with keyboardist Jan Hammer, Johnson allowed Hammer to digitally sample some of Johnson's work.⁶ Before long, Johnson and the rest of America were hearing Johnson's distinctive sounds being prominently used in the theme for *Miami Vice*.⁷ Johnson did the session as a favor, and had not given Hammer permission to use any of Johnson's work.⁸ Although Johnson received no credit or royalties for his contributions, the *Miami Vice* theme song went on to great popularity.⁹

Johnson's case represents just one example of the dilemma facing musicians today as a result of digital sampling. Depending on your outlook, copyright law can be seen as either helping or hindering these musicians. This comment will examine copyright law, its role in the popular music industry, and its relationship with digital sampling. To lay the groundwork, Part I will examine the function of copyright law as it relates to musical compositions. Part II will then peruse the area of sound recordings. Finally, Part III will take a critical look at digital sound sampling and its legitimacy in relation to present copyright law.

American copyright law originated in the Constitution in which Congress was

¹ "You Can't Always Get What You Want," words and music by Mick Jagger and Keith Richards. Copyright 1969 by Abkco Music Inc., 1700 Broadway, New York, N.Y. 10019.

² DeCurtis, *Who Owns a Sound?*, Rolling Stone, December 4, 1986, at 13.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; *Miami Vice* was a popular television crime-drama which aired on N.B.C. during the 1980's. *Miami Vice* was renowned for its use of contemporary music and high-tech video imagery.

⁸ *Id.*

⁹ *Id.*

given the power to promote science and the arts by granting exclusive rights to writings and discoveries.¹⁰ The underlying goal of copyright law is to strike a balance between protecting original creativity (restricting use) and promoting creative enterprise (permitting use).¹¹ Therefore, pursuant to the power granted to it in the Constitution, Congress developed copyright law to provide artists, composers, writers and inventors with a limited monopoly in their work for a limited time.¹² Early on, Congress extended copyright protection only to intellectual property embodied in books, maps or charts.¹³ As times changed, Congress eventually extended copyright protection to the various types of musical works.¹⁴

Within the realm of popular music,¹⁵ Congress has extended copyright protection to two basic forms of musical works: music compositions and sound recordings.¹⁶

PART I

MUSICAL COMPOSITIONS

The Nature of Copyright in Musical Compositions

For the most part, a musical composition is a song, which in copyright terminology, is called a nondramatic musical work.¹⁷ A song generally consists of one or more of the following basic musical components. First, a person may seek protection for a simple melody - a pleasing progression of notes.¹⁸ The composer of a melody typically seeks copyright protection in relation to its use as a musical signature for a television news show, radio station or public access channel on cable television.¹⁹ Second, a composer may seek protection for a musical arrangement - an arrangement of melody, harmony, rhythm, timbre and spatial organization into what we would recognize as a completed song.²⁰ Third, the lyrics that accompany a melody or arrangement may also be entitled to copyright protection.²¹

¹⁰ U.S. Const. art. 1, § 8, cl. 8 empowers Congress "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."

¹¹ Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 422 (1988).

¹² Note, *Navigating Public Access and Owner Control On the Rough Waters of Popular Music Copyright Law*, 8 LOYOLA ENTERTAINMENT L. J. 369, 379 (1988).

¹³ Latman and Ginsburg, *Let the Sounds of Music Creep Into Our Ears*, 189 N.Y. L. J., May 20, 1983 at 1, col. 1.

¹⁴ In this comment, "musical works" refers primarily to musical compositions and sound recordings.

¹⁵ Commonly called "pop music".

¹⁶ 17 U.S.C. §§ 102(a)(2), 102(a)(7) (1982).

¹⁷ Latman & Ginsburg, *supra* note 13, at 3, col. 1. A dramatic musical composition would be an opera, musical comedy, rock opera, etc., where music is intertwined with dramatic content. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Comment, *supra* note 11, at 433-433.

²¹ Latman & Ginsburg, *supra* note 13, at 3, col. 1.

Normally, one copyright will be sufficient to protect an entire musical composition. However, there are occasions where a composition can require up to three different copyrights belonging to a number of people in order to adequately protect that composition.²² For example, a composer may implement into his or her composition both copyrighted melodies and lyrics belonging to other composers.²³ Thus, within that composition, both the composers of the melodies and the composers of the lyrics would own valid copyrights.²⁴ Moreover, the composer of the completed composition could also seek copyright protection for his or her creative contributions to the composition.²⁵ Needless to say, litigation surrounding copyright infringement of musical compositions can be very complicated and expensive.²⁶

Copyright protection does not extend to mere ideas.²⁷ Instead, copyright protection extends only to original works of authorship *fixed* in any tangible medium of expression.²⁹ A work is "fixed" when its embodiment in a copy³⁰ or phonorecord³¹ is sufficiently permanent to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.³² Consequently, a musical composition is considered fixed for copyright purposes when it is recorded, transcribed into sheet music, or performed live while being simultaneously recorded.³³

²² *Id.*

²³ Such a composition would be considered a derivative work - a work based upon one or more pre-existing works, such as a . . . musical arrangement or sound recording. 17 U.S.C. § 101 (1982). A derivative work is entitled to copyright protection under 17 U.S.C. § 103 (1982). However, such protection does not extend to the pre-existing material. Rather, protection extends only to the material contributed by the author of the derivative work. *Id.*

²⁴ Latman & Ginsburg, *supra* note 13, at 3, col. 1.

²⁵ 17 U.S.C. § 103 (1982).

²⁶ The defense in a music plagiarism suit can cost upwards of \$100,000 in attorney's fees, in addition to time lost by musicians in attending depositions and trial instead of composing, performing or recording. Comment, *supra* note 11, at 424.

²⁷ 17 U.S.C. § 102(b) (1982).

²⁸ Although copyright law requires "originality" in the work, the originality requirement is not difficult to meet. A work is original if the author has created it by his own skills, labor and judgment without directly or evasively limiting the work of another. Unlike patent law, an independently created work is original for copyright purposes even though, by coincidence, it is identical to a prior work. Chisum & Waldbaum, *Acquiring and Protecting Intellectual Property Rights*, § 1.05 (1988).

²⁹ 17 U.S.C. § 102(a) (1982).

³⁰ 17 U.S.C. § 101 (1982) defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object other than a phonorecord, in which the work is first fixed."

³¹ 17 U.S.C. § 101 (1982) defines "phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed."

³² 17 U.S.C. § 101 (1982).

³³ A live performance is not itself "fixed" for copyright purposes and is therefore not entitled to protection. However, under 17 U.S.C. § 101, a live performance that is being simultaneously recorded is sufficiently "fixed" for copyright protection. Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1727 (1987).

Acquisition of a Valid Copyright

Notwithstanding the complexity of infringement suits, the mechanics of gaining copyright protection for a musical composition are relatively simple. For purposes of copyright protection, a person creates a composition when it is fixed for the first time.³⁴ For works created after January 1, 1978, copyright protection exists from the date of creation.³⁵ For works created before January 1, 1978 and copyrighted under the Copyright Act of 1909, copyright protection vested only upon publication - distribution of copies or phonorecords of the work to the public by sale, rental, lease, etc.³⁶ Today, the term of the copyright is typically the life of the author plus 50 years.³⁷ Once this period expires, the composition falls into the public domain.³⁸

The actual procedure for registering a copyright is as follows:

- (1) choosing and completing the correct application for registration of the copyright (applications are available at the Copyright Office, Library of Congress, Washington, D.C.);
- (2) filing the completed application with the prescribed \$10.00 filing fee with the Register of Copyrights;
- (3) submitting with the application and fee, a deposit of the work representing the entire work for which protection is sought;
- (4) waiting for the application to be examined by the Copyright Office to determine whether the work deposited constitutes copyrightable subject matter; and
- (5) Receiving a copy of the Registration Certificate.³⁹

Registering a musical composition for copyright protection is very important for three reasons: (1) a certificate of registration before or within 5 years after publication is prima facie evidence of the validity of the copyright;⁴⁰ (2) registration is a prerequisite to the filing of a copyright infringement suit;⁴¹ and (3) failure to register will limit the monetary damages obtainable for infringement.⁴²

³⁴ Chisum & Waldbaum, *supra* note 28, § 2.03.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 17 U.S.C. § 302(a) (1982).

³⁸ Note, *Music Recording, Publishing and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 382 (1986).

³⁹ Chisum & Waldbaum, *supra* note 28, § 2.05 [2].

⁴⁰ 17 U.S.C. § 410(c) (1982).

⁴¹ 17 U.S.C. § 411(a) (1982).

⁴² 17 U.S.C. § 412 (1982).

Exclusive Rights of a Musical Composition Copyright Owner

The owner of a valid copyright in a musical composition obtains several exclusive rights including: the right to reproduce the work in copies or phonorecords, the right to prepare derivative works based on the copyrighted work, the right to distribute copies or phonorecords of the work to the public, the right to perform the work publicly, and the right to display the work publicly.⁴³ The underlying rationale behind the copyright owner's limited monopoly is that their artistic creativity would be discouraged if Congress did not grant artists the exclusive right to exploit their works for a limited time.⁴⁴ The eventual termination of the artist's limited monopoly assures the public good because it allows the assimilation of artistic works into society, thereby accomplishing the ultimate objective of copyright law.⁴⁵

Limitations on Exclusive Rights

Competing with the policy goal of promoting artistic endeavor is the policy goal of allowing public access to creative works.⁴⁶ In pursuit of this latter goal, Congress has placed limitations on the exclusive rights possessed by a copyright owner.⁴⁷ The most notable limitation on a musical composition copyright owner is the compulsory licensing provision contained in section 115 of the Copyright Act of 1976.⁴⁸ Once a person records a composition and distributes it to the public, others are also entitled to record that composition and distribute phonorecords embodying it to the public.⁴⁹ This privilege is absolute, and is not subject to the wishes or desires of the copyright owner.⁵⁰ The only restrictions imposed on this compulsory license are minimal notice requirements,⁵¹ payment of statutory royalties to the copyright

⁴³ 17 U.S.C. § 106 (1982).

⁴⁴ Note, *supra* note 38, at 383 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

⁴⁵ *Id.*

⁴⁶ Note, *supra* note 38, at 385.

⁴⁷ See 17 U.S.C. §§ 107-116 (1982).

⁴⁸ 17 U.S.C. § 115 (1982).

⁴⁹ 17 U.S.C. § 115(a)(1) (1982).

⁵⁰ See *Heilman v. Bell*, 583 F.2d 373, 376 (7th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

⁵¹ A person wishing to obtain a compulsory license to record a composition need only give notice to the copyright owner before or within 30 days after recording the composition and before phonorecords of the work are distributed. 17 U.S.C. § 115(b)(1) (1982).

owner,⁵² and limitations on the changes in the character of the composition.⁵³

PART II

SOUND RECORDINGS

A sound recording⁵⁴ is the recorded performance of a musical composition resulting from the efforts of a recording artist, record producer and record company.⁵⁵ The musical composition of the song is raw material for a sound recording. Performers, arrangers and engineers are needed to transform this raw material into the unique and distinctive sounds that compose a record.⁵⁶ Pursuant to the Sound Recording Act of 1971, sound recordings fixed after February 15, 1972 are entitled to federal copyright protection.⁵⁷ Sound recordings fixed before February 15, 1972 are not entitled to federal copyright protection, but may be entitled to protection under state law until February 15, 2047.⁵⁸

Pre-1972 Sound Recordings

At the turn of the century, the broadcasting and juke box industries did not

⁵² Presently, the compulsory licensee must pay a statutory royalty to the copyright owner according to the following schedule:

(a) For every phonorecord made and distributed before July 1, 1981, the royalty is two and three-fourths cents per phonorecord, or .5 cent per minute of playing time, whichever is greater. 17 U.S.C. § 115(c)(2) (1982).

(b) For every phonorecord made and distributed on or after July 1, 1981, the royalty is four cents per phonorecord, or .75 cent per minute of playing time, whichever is greater. 37 C.F.R. § 307.2 (1988).

(c) For every phonorecord made and distributed on or after January 1, 1983, the royalty is four and one-fourth cents per phonorecord, or .8 cent per minute of playing time, whichever is greater. 37 C.F.R. § 307.3(a) (1988).

(d) For every phonorecord made and distributed on or after July 1, 1984, the royalty is four and one-half cents per phonorecord, or .85 cent per minute of playing time, whichever is greater. 37 C.F.R. § 307.3(b) (1988).

(e) For every phonorecord made and distributed on or after January 1, 1986, the royalty is five cents per phonorecord, or .95 cent per minute played, whichever is greater. 37 C.F.R. § 307.3(c) (1988).

(f) For every phonorecord made and distributed on or after January 1, 1988, the royalty is five and one-fourth cents per phonorecord, or one cent per minute played, whichever is greater. 37 C.F.R. sec. 307.3(d) (1988).

⁵³ A compulsory license has the privilege of making a musical arrangement of the work necessary to conform it to the licensee's style or manner of interpretation. However, the arrangement cannot change the basic melody or fundamental character of the work. 17 U.S.C. § 115(a)(2) (1982).

⁵⁴ 17 U.S.C. § 101 defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."

⁵⁵ Latman & Ginsburg, *supra* note 13, at 3, col. 1.

⁵⁶ Comment, *Digital Sampling: Old Fashioned Piracy Dressed Up in Sleek New Technology*, 8 LOYOLA ENTERTAINMENT L. J. 297, 307 (1988).

⁵⁷ 17 U.S.C. § 301(c) (1982).

⁵⁸ *Id.*

want to pay new licensing and royalty fees for sound recordings.⁵⁹ Consequently, these special interest groups successfully lobbied Congress to exclude sound recordings from federal copyright protection under the Copyright Act of 1909.⁶⁰ Congress based their early exclusion of sound recordings in large part on the copyright clause of the Constitution.⁶¹ The Constitution refers to copyright protection only in terms of "writings."⁶² Therefore, Congress only extended copyright protection to creations which shared similar characteristics with books or writings.⁶³ Consequently, Congress denied protection to sound recordings because they were recorded on record discs and could not be seen or perceived.⁶⁴

Although pre-1972 sound recordings have no federal protection, a majority of states have adopted some sort of protection based on common law principles of unfair competition, misappropriation or specific anti-piracy statutes.⁶⁵ Nevertheless, the lack of federal protection created serious problems. By the 1960's and early 1970's, virtually one-fourth of all the records and tapes sold in the United States were illegal duplicates.⁶⁶ The debilitating economic effect of this piracy finally united enough entertainment interest groups to successfully lobby Congress to provide federal copyright protection for sound recordings.⁶⁷

Post-1972 Sound Recordings

Sound recordings fixed after February 15, 1972 are governed by the Copyright Act of 1976.⁶⁸ Because the Act recognizes performers and engineers as authors, each performer and engineer has a copyright in the particular sounds he or she contributed to the sound recording.⁶⁹ However, it is common practice for the record company who makes the sound recording to buy the copyrights of each author, thus making the record company the exclusive copyright owner.⁷⁰

⁵⁹ Comment, *supra* note 56, at 301.

⁶⁰ *Id.*

⁶¹ See note 10 *supra* and accompanying text.

⁶² *Id.*

⁶³ Comment, *supra* note 56, at 302. Thus, a musical composer's ideas could be protected because they could be printed as a musical score on sheet music. *Id.* at 303.

⁶⁴ *Id.*

⁶⁵ Hayes, *Performance Rights in Sound Recordings: How Far to the Horizon?*, 27 COPYRIGHT L. SYMP. (ASCAP) 113, 117 (1982). Also, the term "piracy" should be distinguished from the term "plagiarism." "Piracy" involves the production and sale of unauthorized literal copies of a work as distinguished from "plagiarism" which involves false designations of authorship and other unattributed uses of copyrighted material. See also Comment, *supra* note 11, at 422.

⁶⁶ Comment, *supra* note 56, at 304, (citing *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Sub-comm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 25 (1971)).

⁶⁷ *Id.*

⁶⁸ The Sound Recording Act of 1971 originally had a termination date of January 1, 1975, but this date was eventually removed. Protection of sound recordings was continued by the Copyright Act of 1976 when it became effective in 1978. Hayes, *supra* note 65, at 117.

⁶⁹ Comment, *supra* note 56, at 307.

⁷⁰ *Id.*

As with owners of copyrights in musical compositions, the copyright owner of a sound recording has several exclusive rights.⁷¹ First, the copyright owner has the right to make phonorecords which contain the actual sounds fixed in the sound recording.⁷² Second, the owner is entitled to prepare derivative works⁷³ based on the copyrighted sound recording.⁷⁴ Third, the owner has the right to distribute copies or phonorecords of his or her copyrighted work to the public.⁷⁵

Although the copyright protection presently afforded sound recordings is vastly greater than in the past, Congress has imposed considerable limitations on these rights. First, copyright protection extends only to the exact sounds that the owner creates.⁷⁶ Hence, the copyright owner cannot prevent another person from imitating the distinctive sounds contained in the copyrighted sound recording.⁷⁷ To do so, the person would merely have to obtain a compulsory license from the composer of the underlying composition, hire musicians, and record the simulation using his or her own set of sounds.⁷⁸

Another major limitation is the lack of a performance⁷⁹ right in a sound recording.⁸⁰ A "performance right" is the exclusive right of a copyright owner to authorize the public performance of his or her creative work.⁸¹ Current copyright law grants a performance right to the composer of the underlying musical composition.⁸² However, no such right exists for the authors of a sound recording.⁸³ That is, the owner of a copyrighted sound recording cannot prevent others from playing phonorecords embodying the recording in public, nor are they entitled to royalties in that respect.⁸⁴ Consequently, restaurants, night clubs and radio stations reap substantial benefits from playing sound recordings without having to compensate the recording artists, producers and record companies who created the sound recordings.⁸⁵

⁷¹ 17 U.S.C. § 114(a) (1982) limits the exclusive rights of an owner of a copyright in a sound recording to the first three rights enumerated in 17 U.S.C. § 106. The owner of a copyright in a musical composition, on the other hand, is entitled to all five exclusive rights enumerated in 17 U.S.C. § 106.

⁷² 17 U.S.C. § 114(b) (1982).

⁷³ See note 23 *supra*.

⁷⁴ 17 U.S.C. § 114(b) (1982).

⁷⁵ 17 U.S.C. § 106(3) (1982).

⁷⁶ 17 U.S.C. § 114(b) (1982).

⁷⁷ 17 U.S.C. § 114 (1982), Historical Note.

⁷⁸ Comment, *supra* note 56, at 308.

⁷⁹ To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. 17 U.S.C. § 101 (1982).

⁸⁰ 17 U.S.C. § 114(a) (1982).

⁸¹ Hayes, *supra* note 65, at 114.

⁸² 17 U.S.C. § 106(4) (1982).

⁸³ 17 U.S.C. § 114(a) (1982).

⁸⁴ Greenberg, *The Plight of the American Musician: A Study of Comparative Copyright Law and Proposed Performers Protection Act*, 6 LOYOLA ENTERTAINMENT L. J. 31, 34 (1986).

⁸⁵ See Hayes, *supra* note 65, at 135-39.

PART III

DIGITAL SOUND SAMPLING

Digital sampling may be one of the biggest threats to a musician's livelihood, as well as being a potentially enormous source of copyright litigation. Even though digital sampling may be a very recent phenomenon in the music industry, its impact cannot be ignored.

Anyone familiar with "rap" songs has probably heard a digital sample. Rap songs typically implement digital samples of catchy vocal phrases, distinctive instrumental sounds or sequences of sounds from other songs by other musicians. In this respect, digital sampling is distinct from traditional piracy.⁸⁶ Because it was not possible to precisely separate distinct sounds on a record, nor was there a market for small segments of an entire song, pirates generally only duplicated whole songs.⁸⁷ To enable the reader to better understand how digital sampling relates to copyright law, this comment will first define and explain the digital sampling process.

The Digital Sampling Process

Digital sound sampling is a way of appropriating the distinct tonal qualities of a particular vocal or instrumental sound so that it may be used in a different musical context.⁸⁸ Digital sampling involves recycling fragments of sound recorded by other musicians.⁸⁹ The traditional technique of sound recording pirates was to duplicate the sound recording after it was fixed and distributed to the public.⁹⁰ Digital sampling, on the other hand, is a new form of piracy that occurs during the recording phase as part of a new sound recording.⁹¹

Digital sampling occurs in the following manner. First, the digital sampler must convert the sound waves from the sound recording into computer bits intelligible to a digital computer.⁹² When sound waves hit the transducer of a microphone, they cause vibrations which change as the sound wave changes.⁹³ This creates an analog signal, which corresponds constantly with the vibrations of the sound waves as they reach the microphone.⁹⁴ For a sound to be stored in a computer, the analog signal must be converted into bits by an analog-to-digital converter, which measures the voltage of the analog signal at equally spaced intervals in time.⁹⁵

⁸⁶ See note 65 *supra*.

⁸⁷ Comment, *supra* note 56, at 310.

⁸⁸ Note, *supra* note 33, at 1724.

⁸⁹ Comment, *supra* note 11, at 427.

⁹⁰ Comment, *supra* note 56, at 310.

⁹¹ *Id.*

⁹² Note, *supra* note 33, at 1724.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

Each of these intervals (samples) is given a binary numerical code and then recorded in the memory of a computer.⁹⁶ Once stored in digital form, a person can alter and manipulate the sample by replacing and rearranging binary codes.⁹⁷ Consequently, the digital sampler can alter and play back sounds from the original sound recording in an infinite variety of ways.⁹⁸

Application of Digital Sampling in the Music Industry

Digital sampling has instilled itself in the music industry in a variety of ways. First, when a commercially successful sound recording contains a unique instrumental or vocal sound, or sequence of sounds, the digital sampler can clone that sound and feature it on subsequent recordings.⁹⁹ Second, because samples can be stored in the memory of a digital synthesizer, synthesizer players can perform using the sounds of a variety of sampled musicians.¹⁰⁰ Thus, a single synthesizer player can replace several musicians by storing all of their sounds on a single floppy disk.¹⁰¹ Thirdly, a growing black market exists for digital sound samples.¹⁰² Because a sample is less expensive than a real musician, people are buying and selling these samples just like any other product.¹⁰³

Musicians have suffered most from the effects of digital sampling. Many previously sought-after musicians who have created a distinctive sound for themselves are now being undersold by samples of their own work.¹⁰⁴ Single synthesizer players are replacing entire ensembles of musicians.¹⁰⁵ People are now sampling a musician's distinctive sounds and then using those sounds predominantly in successful derivative works without compensating nor seeking permission from the sampled musician.¹⁰⁶ If left unchecked, digital sampling could have a potentially devastating impact on the livelihoods of musicians in the United States. The issue then becomes what role copyright law does or should play in protecting musicians from the effects of digital sampling.

The issue of copyright protection involves two questions: (1) Does copyright protection apply to digital sampling? (2) If so, what test should be used to determine whether a particular sound recording has been illegally sampled?

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Note, *supra* note 33, at 1725.

⁹⁹ Note, *supra* note 33, at 1726.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also DeCurtis, *supra* note 2, at 13, who quoted producer Phil Ramone as saying "People have sampled and are hot selling samples of great players - Jeff Porcaro's foot, Steve Gadd's hi-hat, Phil Collins' snare . . . Musicians are getting frightened."

¹⁰⁵ Note, *supra* note 33, at 1726.

¹⁰⁶ Witness the case of David Earl Johnson, a percussionist whose distinctive sounds were sampled and profitably used. See notes 2-9 *supra* and accompanying text.

Copyright Protection Applies to Digital Sampling

Digital samplers may assert several reasons why copyright law should *not* forbid digital sampling. First, Congress has only extended copyright protection to the actual sounds contained in a sound recording.¹⁰⁷ Congress does not forbid the independent fixation of other sounds, even if those sounds imitate the sounds contained in the protected sound recording.¹⁰⁸ Digital samplers often play samples back through a musical instrument (synthesizer) which is combined with other musical instruments to make up the new recording.¹⁰⁹ Therefore, digital samplers could argue that this process constitutes an independent fixation rather than a copying.¹¹⁰ This argument is weak; a digital synthesizer is more than just an instrument.¹¹¹ A digital synthesizer has the memory capabilities of a computer; therefore, it is equivalent to the recording techniques used by pirates in the past.¹¹²

Second, digital samplers may argue that digital sampling is not illicit copying because the sounds from the sound recording are often manipulated, rearranged, and altered before being played back.¹¹³ *United States v. Taxe*¹¹⁴ seems to lay this argument to rest. Although *Taxe* did not involve digital sampling, it did involve many of the same issues. In *Taxe*, the defendants were pirates who re-recorded commercially popular sound recordings with the following changes: the recording speed was increased or decreased; reverberation or echo was introduced; certain portions of the musical sounds were eliminated or reduced in volume; and additional sounds were produced by synthesizers.¹¹⁵ These re-recordings were then sold to the public.¹¹⁶ Despite the alterations, the *Taxe* court found that the defendants had still illegally duplicated the sound recordings.¹¹⁷ The court found that the defendants' guilt was predicated on the jury's finding of substantial similarity¹¹⁸ between the protected sound recordings and the duplicates.¹¹⁹

Under a *Taxe* analysis, a digital sound sample is still a duplicate because the sample is essentially a computerized clone of the original sound recording. Whether the sample is an illegal duplication would then turn on whether the sample was substantially similar to the sound recording.¹²⁰ Notwithstanding this contingency, it is

¹⁰⁷ 17 U.S.C. § 114 (1982).

¹⁰⁸ 17 U.S.C. § 114 (1982), Historical Note. *Also see* note 77 *supra* and accompanying text.

¹⁰⁹ Note, *supra* note 33, at 1732.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

¹¹⁵ *Id.* at 964.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 965.

¹¹⁸ The concept of "substantial similarity" will be discussed fully in the next section as part of the traditional copyright infringement test, and as part of the test for illicit digital sampling.

¹¹⁹ *Id.*

¹²⁰ *See* note 118 *supra*.

quite clear that copyright law applies to digital sampling.

Test Used to Determine Illegal Digital Sound Sampling

The traditional test used to determine copyright infringement, and specifically musical plagiarism,¹²¹ involves three steps. First, the plaintiff must own a valid copyright in the material alleged to have been plagiarized by the defendant.¹²² Second, the plaintiff must prove that the defendant copied from the plaintiff's copyrighted work.¹²³ The plaintiff can show copying by direct proof (eyewitness testimony or admission by the defendant),¹²⁴ or by circumstantial proof (the defendant's access to the copyrighted work combined with sufficient similarity between the two works to support the trier of fact's finding that the Defendant copied from the Plaintiff.¹²⁵ If the two works are so strikingly similar as to preclude the possibility of independent creation, the Plaintiff may prove copying without showing access.¹²⁶ Third, plaintiff must prove that the Defendant's copying constituted an unlawful infringement on the Plaintiff's copyright - illicit copying.¹²⁷ Exactly what constitutes illicit copying has been a matter of great debate.¹²⁸ The most common definition of illicit copying is whether the Defendant copied so much of what is pleasing to the ears of lay listeners who comprise the audience for whom such popular music is composed, that the Defendant wrongfully appropriated the Plaintiff's work, i.e. substantial similarity.¹²⁹

At first glance, it would appear that the courts should *not* apply the traditional test for copyright infringement to sound recordings. After all, the Act prohibits a musical plagiarist from imitating or simulating a copyrighted composition to the extent that the two works are substantially similar.¹³⁰ However, the Act expressly allows a person to imitate or simulate, even note for note, the sounds embodied in a copyrighted sound recording.¹³¹ Furthermore, because copyright law only protects those sounds actually contained in the sound recording, it would appear that the only question left to answer is whether the defendant rerecorded those sounds from the protected sound recording.¹³² With digital sampling, these statements are not quite true. A digital pirate not only can duplicate the sounds in a sound recording, but can alter and manipulate sampled sounds beyond the point of recognition.¹³³ Therefore,

¹²¹ See note 65 *supra*.

¹²² 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.01 (1987).

¹²³ *Arnstein v. Porter*, 154 F.2d 464, 468 (2nd Cir.1946).

¹²⁴ *Id.*

¹²⁵ *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980).

¹²⁶ *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978).

¹²⁷ *Arnstein*, 154 F.2d at 468.

¹²⁸ See Metzger, *Name That Tune: A Proposal For An Intrinsic Test Of Musical Plagiarism*, 34 COPYRIGHT L. SYMP. 139, 153-71 (1987).

¹²⁹ *Arnstein*, 154 F.2d at 473.

¹³⁰ See *id.*

¹³¹ 17 U.S.C. § 114 (1982), Historical Note.

¹³² Comment, *supra* note 56, at 326.

¹³³ See Note *supra* note 33, at 1725.

pursuant to *Taxe*,¹³⁴ courts should apply the traditional substantial similarity test to digital sampling cases.¹³⁵

First, the plaintiff must prove that he or she owned a valid copyright in the sound recording.¹³⁶ Although the Act generally recognizes each contributing performer and engineer as an author for copyright purposes,¹³⁷ such performers and engineers may not actually own the copyright. As noted earlier, it is common practice for record companies to purchase the copyrights from the participating musicians and engineers, thereby vesting sole ownership of the copyright in the record company.¹³⁸ Also, the nature of the employment relationship between the record company and the performers and engineers will often affect copyright ownership.¹³⁹ If the performer or engineer is considered an employee working within the scope of employment, the employer (producer or record company) is considered the author and thus, owns all copyrights in the sound recording.¹⁴⁰ Performers or engineers will have a valid copyright in their sound recordings only when they are considered independent contractors, or have expressly reserved their copyrights in their employment contract.¹⁴¹

If the performer doesn't own a copyright, he or she can probably expect little help from the actual copyright owner (the record company or producer).¹⁴² The record company or producer may desire to protect the digital sampler rather than the performer because digital samples are cheaper than live musicians.¹⁴³

Second, the plaintiff must prove that the defendant actually copied the plaintiff's sound recording.¹⁴⁴ In other words, the plaintiff must show that the defendant digitally sampled the plaintiff's sound recording rather than independently created the disputed sounds.¹⁴⁵ As with the traditional test, the plaintiff can

¹³⁴ 540 F.2d 961 (1976).

¹³⁵ As discussed earlier, *Taxe* involved a situation where the Defendants re-recorded commercially popular sound recordings with insignificant technical changes. The Defendants hoped that the re-recording with the changes would constitute an independent fixation of sounds, which is allowed pursuant to 17 U.S.C. § 114 (1982). The court found that it was erroneous to characterize all re-recordings as infringements. *Id.* at 965. Instead, only those re-recordings or duplicates that are substantially similar will be infringements. Thus, the traditional substantial similarity test should be applied to sound recording infringement cases. *Id.* Because digital sampling involves the cloning of sounds from a sound recording, digital sampling would only infringe when it is substantially similar to the sampled sound recording.

¹³⁶ Note, *supra* note 33, at 1728-29.

¹³⁷ See note 69 *supra* and accompanying text.

¹³⁸ See note 70 *supra* and accompanying text.

¹³⁹ Note, *supra* note 33, at 1729-30.

¹⁴⁰ Note, *supra* note 33, at 1730.

¹⁴¹ 17 U.S.C. § 201 (1982). Also, see Note, *supra* note 33, at 1730.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Note, *supra* note 33, at 1731.

¹⁴⁵ Pursuant to current copyright law, a person is allowed to imitate or simulate the sounds contained in a sound recording as long as such sounds are independently created. See 17 U.S.C. § 114 (1982), Historical Note.

show copying by direct evidence¹⁴⁶ or by circumstantial evidence.¹⁴⁷ Circumstantially, the plaintiff must show that the defendant had access to the sound recording, and that there was substantial similarity between the sample and the sound recording.¹⁴⁸ Expert testimony would be admissible at this point to aid the trier of fact.¹⁴⁹

Third, the plaintiff must prove that the defendant's sampling constituted an unlawful infringement on the Plaintiff's copyright (illicit copying).¹⁵⁰ At this stage, an interesting theoretical conflict arises. *Taxe* mandates the use of the substantial similarity test in sound recording infringement cases.¹⁵¹ Under *Arnstein v. Porter*, "substantial similarity" refers to that part of the plaintiff's work that is pleasing to the ears of lay listeners who comprise the plaintiff's audience.¹⁵² In other words, substantial similarity is qualitatively measured - was the part duplicated the "meritorious part of the song," "the very part that makes the plaintiff's work popular and valuable," or "that portion of the plaintiff's work upon which its popular appeal, and hence, its commercial success, depends"?¹⁵³

This traditional standard for substantial similarity could lead to inequitable results. A digital pirate could sample the plaintiff's unique sounds, which may be insignificant to the entire sound recording, and then build an entire song around the sampled sound without infringing the plaintiff's copyright.¹⁵⁴ This is plainly contrary to the principles of copyright law. Although it allows imitation and simulation, current copyright law expressly prohibits the duplication by pirates of actual sounds in a sound recording.¹⁵⁵ The Act does not distinguish between entire sound recordings and parts of sound recordings for purposes of copyright protection.¹⁵⁶ Why should a digital pirate get away with copying an exact and unique, although insignificant, sound from a sound recording, and then exploiting that sample for his or her own benefit?

One author has foreseen the potential inequitable results from applying the traditional substantial similarity test, and has proposed a more appropriate variation.¹⁵⁷ Because digital sampling can isolate a single instrument or instrumental sequence, and can alter those sounds in a variety of ways, the courts should deter-

¹⁴⁶ Eyewitness testimony or admission by the Defendant. See *supra* note 124 and accompanying text.

¹⁴⁷ Note, *supra* note 33, at 1731.

¹⁴⁸ *Id.* In digital sampling cases, "access" would mean access to copies of the sound recording and access to digital sampling equipment. *Id.*

¹⁴⁹ See *Arnstein*, 154 F.2d at 468.

¹⁵⁰ See *Id.*

¹⁵¹ *Taxe*, 540 F.2d at 965.

¹⁵² *Arnstein*, 154 F.2d at 473.

¹⁵³ Comment, *supra* note 56, at 323 (citing *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 397 (S.D. N.Y. 1952); *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282, 283 (8th cir. 1939); *Robertson v. Batten, Barton, Durstine & Osborn, Inc.*, 146 F. Supp. 795, 798 (S.D. Cal. 1956)).

¹⁵⁴ See Comment, *supra* note 56, at 330.

¹⁵⁵ 17 U.S.C. § 114(b) (1982).

¹⁵⁶ See *Id.*

¹⁵⁷ Comment, *supra* note 56, at 328-29. This comment was written by J.C. Thom.
<http://ideaexchange.uakron.edu/akronlawreview/vol22/iss4/10>

mine "substantial similarity" by recognizability.¹⁵⁸ In other words, the ultimate test would be whether the defendant's product is in any way recognizable as the copyrighted work found in the plaintiff's product.¹⁵⁹ If so, the courts must find the defendant liable for copyright infringement, no matter how insignificant the sampled sound was to the entire sound recording.¹⁶⁰ Application of this test would go a long way toward protecting the average musician who owns a copyright for his or her contributions to a popular sound recording.

Ultimately, digital samplers are thieves. After all, they are stealing other musicians' distinctive sounds and exploiting those sounds for their own benefit. Although public policy does favor access to an artist's creative work,¹⁶¹ this policy does not justify digital sampling to the extent that samplers are exploiting another's creativity for their own financial gain. The digital sampler does not have an inherent right to usurp the labor of another because the sampler does not seek to express him/herself creatively, but seeks to express another's creativity.¹⁶²

To date, there are no reported copyright infringement cases involving illicit digital sampling. The currency of digital sampling ostensibly has caused this lack of case law rather than a lack of merit in such cases. Nevertheless, digital sampling will undoubtedly make its way to the forefront of the copyright infringement arena. Although digital sampling is a potential Pandora's Box to the music industry, present copyright law appears broad enough to address any problems that digital sampling may cause. Current copyright law protects the appropriation of actual sounds contained in a protected sound recording.¹⁶³ This protection extends to the duplication of parts of songs as well as entire songs. Although digital pirates may legally alter a sampled sound beyond recognition,¹⁶⁴ they should not be able to exploit a sound that is still recognizable as that of another musician.

Sampled musicians have two viable options when battling digital samplers. First, a sampled musician has legal recourse. If such a musician owns a valid copyright for his or her performance in a sound recording, he or she can legally prevent the digital sampling of his or her sounds.¹⁶⁵ Second, the musicians' union needs to protect its constituency by defining a payment standard for sampling sessions and for the use of sampled performances on other sound recordings.¹⁶⁶ This would at least compensate a sampled musician for his or her sampled contributions.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See note 46 *supra* and accompanying text.

¹⁶² Comment, *supra* note 56, at 331 (citing *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974)).

¹⁶³ 17 U.S.C. sec. 114(b) (1982).

¹⁶⁴ See *Taxe*, 540 F.2d at 965.

¹⁶⁵ 17 U.S.C. § 114 (1982).

¹⁶⁶ See *DeCurtis*, *supra* note 2, at 13.

CONCLUSION

Congress promulgated the present body of copyright law to promote artistic creativity by granting the author a limited monopoly over his or her creative work.¹⁶⁷ By the same token, Congress recognized the public policy goal of allowing public access to creative works.¹⁶⁸ As a result, Congress reached a compromise that is embodied in the present copyright law. Congress has granted several exclusive rights to the owners of copyrights of musical compositions and sound recordings.¹⁶⁹ These rights include the right to reproduce phonorecords embodying the copyrighted work,¹⁷⁰ and the right to then distribute them to the public.¹⁷¹ On the other hand, Congress has qualified these exclusive rights by granting compulsory licenses,¹⁷² allowing people to imitate or simulate sound recordings,¹⁷³ and denying performance rights to authors of a sound recording.¹⁷⁴ However, none of these qualifications allow the unrestricted use of digital sampling. Digital sampling is the computerized cloning of sounds contained in a protected sound recording. Digital sampling, if left unchecked, poses a great threat to the livelihoods of musicians in this country. Thankfully, present copyright law, if applied properly, is flexible enough to resolve the many problems created by digital sampling.

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¹⁶⁷ See note 44 *supra*.

¹⁶⁸ See note 46 *supra*.

¹⁶⁹ 17 U.S.C. §§ 106, 114 (1982).

¹⁷⁰ 17 U.S.C. § 106(1) (1982).

¹⁷¹ 17 U.S.C. § 106(3) (1982).

¹⁷² 17 U.S.C. § 115 (1982).

¹⁷³ 17 U.S.C. § 114 (1982), Historical Note.

¹⁷⁴ 17 U.S.C. § 114(a) (1982).