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Digital Sampling: Creative or Just Plain "CHEEZ-OID?"

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DIGITAL SAMPLING: CREATIVE OR JUST PLAIN "CHEEZ-OID?"[1]

Digital recording technology was introduced to the music industry during the early 1970's,[2] and became popular about ten years later.[3] During the digital sampling process, sounds are taken from a source, either live or recorded, and encoded in binary bits into the computer sampler's memory.[4] The samples can then be edited and stored on floppy disk or hard drive.[5] A musician can use a library of samples to create virtually any type of recording instead of hiring individual instrumentalists to play each part.[6]

While digital sampling technology is an extremely useful tool for many musicians and producers,[7] a large number of musicians feel threatened by it.[8] In addition, this technology, which allows musicians to lift entire phrases from recordings, presents a unique challenge to copyright law Although portions of a recording are often "stolen," these samples can be altered beyond recognition.[9]

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1. Robert Tomsho, *As Sampling Revolutionizes Recording, Debate Grows Over Aesthetics, Copyrights*, WALL ST. J., Nov. 5, 1990, at B1, B4, (quoting Frank Zappa, expressing his distaste for unauthorized digital sampling). The term "cheez-oid," or "cheese-oid" according to the Tomsho article, appears to be derived from the expression "cheesy," which indicates that something is inferior or cheap. *See* THE RANDOM HOUSE DICTIONARY 353 (2d ed. 1987).

2. JOHN EARGLE, HANDBOOK OF RECORDING ENGINEERING 315 (2d ed. 1992). Nippon Columbia Company introduced an eight-channel digital converter in 1972. *Id.*

3. For an explanation of the development of digital sampling and its increased popularity, see generally Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L. J. 147, 149-50 (1989).

4. For a more complete description of the digital sampling process, see CHARLES DODGE & THOMAS A. JERSE, COMPUTER MUSIC: SYNTHESIS, COMPOSITION AND PERFORMANCE 25-31 (1985).

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

6. *Id.* at 152.

7. Digital sampling technology can save time and money during the recording process. It also affords producers and musicians a great deal of flexibility. *See* Tomsho, *supra* note 1, at B1 (describing how a single digital sampling instrument can recreate an entire orchestra).

8. *See infra* notes 30-58 and accompanying text; *see also* H.P. NEWQUIST, MUSIC AND TECHNOLOGY 124 (1989) (discussing fears that musicians whose instruments are easily sampled will be put out of business).

9. *See generally id.* at 147-58 (explaining different types of signal processing and

Many musicians view old recordings as a source of raw material. The producers of the recordings being sampled maintain that they are harmed by these new uses of their recordings.[10]

This note addresses the copyright concerns arising from the development of digital sampling technology and concludes that copyright law should be amended to accommodate the special needs of this technology Part I explains the technology of digital sampling and introduces the issues surrounding it. Part II focuses on copyright law and protection of sound recordings from unauthorized sampling under existing law. Part III discusses defenses available to a musician accused of unauthorized sampling of a sound recording under current law Part IV addresses the need for new copyright legislation addressing digital sampling. Part V proposes new copyright legislation and discusses this proposed legislation in light of the various goals and justifications of copyright.

I. DIGITAL SAMPLING

A. The Technology

In order to understand the controversy surrounding digital sampling, it is helpful to understand the technology In analog recording, the type of recording used most frequently by consumers, the movement of the air which humans perceive as sound is translated through an instrument such as a microphone into electric current called voltage.[11] This current is sent to tape deck heads.[12] When oxide coated tape passes over the heads, the changes in voltage cause the oxide particles to rearrange, thus magnetically encoding the tape for later playback.[13]

Digital recording is a similar process. In digital recording, like analog recording, a sound is captured by a microphone and turned

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their uses which may allow for significant alteration of the original sound recorded).

10. *See* Tomsho, *supra* note 1, at B1 (describing steps taken by representatives of singer/musician James Brown to prevent unauthorized use of original recordings).

11. For a technical description of microphone operation, see generally EARGLE, *supra* note 2, § 2, at 43-69.

12. For a technical description of analog magnetic recording, *see generally id.* § 9.1-9.4, at 296-306.

13. NEWQUIST, *supra* note 8, at 174.

The playback process is essentially the reverse. The signals recorded on the tape are turned back into electric signals by the playback head. *Id.* These signals are sent to an amplifier to be boosted, then on to a loudspeaker where they are turned back into vibrations by the speaker cone. *Id.*

into an electric current.[14] Instead of becoming a magnetic signal, however, the sound is converted to a binary code.[15] During the conversion process, the computer analyzes the sound wave at a particular period in time. The sound wave is assigned a numerical value at each of these discreet times.[16] In order to produce an accurate reproduction of a sound, the sound must be analyzed or sampled around 50,000 times per second.[17] Digital technology allows virtually identical copies of a sound to be created and reproduced relatively easily.[18] Digital technology is said to be superior to analog recording because of its accuracy of reproduction and lack of extraneous noise.[19]

Digital technology has had a very profound effect on the recording industry.[20] This note addresses the copyright concerns resulting from the use of one particular type of digital technology, namely the digital sampler. Digital samplers allow a musician or producer to reproduce a sound with amazing clarity.[21] A digital "sampler" is basically a simplified version of the digital tape decks used in recording studios.[22] Samplers record sounds through the same sampling process as a studio deck, but are limited in the amount of material they are capable of storing.[23]

With a digital sampler, a musician can "sample" a sound from either a live source or a pre-recorded source, such as a digital audio tape (DAT), compact disc (CD) or tape.[24] Sampling is making a short digital recording of a sound.[25] Once the sounds have been encoded into binary bits, the samples can be edited or otherwise altered to change their sound.[26] The samples can then be stored on floppy disk or the hard drive of a computer.[27] These

14. *Id.* at 183-187.

15. This process is known as "sampling." NEWQUIST, *supra* note 8, at 184.

16. For a more detailed description of the sampling process, see DODGE & JERSE, *supra* note 4, at 25-31.

17. *See* EARGLE, *supra* note 2, § 11.3, at 363.

18. DODGE & JERSE, *supra* note 4, at 31.

19. *Id.* at 31.

20. *See* Tomsho, *supra* note 1, at B1.

21. *Id.*

22. *See* NEWQUIST, *supra* note 8, at 184.

23. *Id.*

24. *Id.*; Don Snowden, *Sampling: A Creative Tool or License to Steal?*, L.A. TIMES, Aug. 6, 1989, at 61.

25. *Id.* (describes sampling as the recording of a sound or "an event").

26. NEWQUIST, *supra* note 8, at 184.

27. Curtis Roads, *Introduction in* COMPOSERS AND THE COMPUTER xii (Curtis Roads, ed. 1985).

samples vary in length from milliseconds to a few minutes depending on the sampler's memory capacity,[28] with an average length of a few seconds.[29]

B. The Debate

The use of electronic instruments to replace certain musicians is not a new phenomenon.[30] Since the mid-1960's, synthesizers have been used in recording sessions to replace live musicians and to create new sounds.[31] Digital sampling, however, presents a new problem for musicians because a virtually perfect recording of the actual sound is at a musician's fingertips, not a synthesized or "mimicked" version of it.[32]

The ease of digital sampling and its pervasiveness in the recording industry has many musicians concerned.[33] The controversy surrounding digital sampling extends to both sampling of preexisting sound recordings and sampling of live musicians.[34] This note addresses only the former.

When existing recordings are sampled, a portion of the recording is literally copied from a CD or tape. Some artists, rap groups for example, then take this sample and use it virtually "verbatim" as background for a new song.[35] Rap artist Vanilla Ice[36] did exactly this. Vanilla Ice sampled a portion of the bass guitar line from the Queen recording of the David Bowie composition *Under Pressure*[37] and used it for the bass line of his own song, *Ice, Ice Baby*.[38]

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28. Jeffrey S. Newton, *Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance*, 11 HASTINGS COMM./ENT. L.J. 671, 673 (1989); Snowden, *supra* note 24, at 61.

29. E. Scott Johnson, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 153 (John David Viera et al., eds. 1988).

30. *Id.* at 154.

31. *Id.*

32. *Id.* at 153-54; *see also* NEWQUIST, *supra* note 8, at 112 (describing the limitations of analog synthesis).

33. Tomsho, *supra* note 1, at B1.

34. *See* Jonathan L. Kirk, *Whose Music is it?*, 9 CALIF. LAWYER 28 (Sept. 1989) (describing the legal problems inherent in digital sampling).

35. Tomsho, *supra* note 1, at B4.

36. Vanilla Ice is a controversial rap artist. *See generally* VANILLA ICE, ICE BY ICE (1991) (autobiography of Vanilla Ice discussing his life and the controversies surrounding his rise to fame).

37. QUEEN, *Under Pressure*, *on* HOT SPACE (Elektra 1982).

38. VANILLA ICE, *Ice, Ice Baby*, *on* TO THE EXTREME (SBK Records 1990). Ice was

Other groups, like Art of Noise, take samples and use them in a musical collage setting.[39] This use of digital sampling has its roots back in the late 1940's. During the late 1940's and early 1950's, recording engineers Louis and Bebe Barron collaborated with composer John Cage to create musical works by editing magnetic tape.[40] The composers would edit recordings of various instruments by playing portions backwards, removing portions and juxtaposing segments of the recordings.[41] George Martin, producer of the Beatles, also experimented with editing analog tapes to create new effects during the late 1960's. Martin, with the help of a recording engineer, created a collage of steam organ sounds by cutting tapes of organ music into segments, then splicing them back together in a random order.[42]

Another common practice is to sample only one instrument from a recording, a snare drum or a bass, for example, and use that sample in lieu of using an acoustic instrument to create the sound.[43] For example, during the mid-1980's, Phil Collins' snare drum sound was very popular.[44] Artists sampled this sound to use either during live performances or in their own recordings.[45]

These practices disturb musicians for several reasons. Many musicians resent having spent years developing a personal style, only to have it become commonplace as a result of continuous sampling of their recordings.[46] If a sound is sampled from a re-

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accused of sampling a portion of *Under Pressure* and, after a lawsuit was threatened, gave Bowie and Queen composer credits. Guy Garcia, *Play It Again, Sampler*, TIME, June 3, 1991, at 69.

39. For examples of the style exemplified by Art of Noise, see ART OF NOISE, IN VISIBLE SILENCE (China Records 1988).

40. Peter Manning, ELECTRONIC AND COMPUTER MUSIC (1985).

41. *Id.*

42. This process was used during the recording of the SGT. PEPPER album, for the song *Being for the Benefit of Mr. Kite.* Kirk, *supra* note 34, at 28.

43. This particular practice is controversial because many musicians fear that their acoustical instruments will be completely replaced by digital samplers. NEWQUIST, *supra* note 8, at 124. Substitution of sampling for acoustical instruments has been a concern since drum machines became popular in the early 1980's. *Id.* It is arguable that producers and engineers might prefer to work with live musicians and that a machine cannot perform with the same expression as a live musician. Although this issue is very important, it cannot be addressed within the scope of this note. For additional commentary on musicians' fear of being replaced by sampling, see *id.* at 124.

44. *Id.* at 126.

45. *Id.*

46. For example, Phil Collins' signature snare drum sound was a snare drum with gated reverberation. *Id.* at 126. The irony of the controversy surrounding the heavy sampling of Collins' sound is that Collins himself sampled the sound from a drum machine.

cording, it can be used in a variety of ways without the consent of the artist. Nonetheless, some artists feel that they have a "moral right" to control how their works are used.[47]

Artistic control aside, many musicians object to sampling for economic reasons.[48] Using sampling, an entire symphony orchestra could conceivably be replaced.[49] Some producers may find the ability to reduce production costs and to increase creativity and flexibility through digital technology irresistible.[50] Samples can be stored for later productions or bought and sold like commodities.[51] Many musicians worry that digital technology will soon replace acoustic instrumentalists.[52]

Proponents of digital sampling, however, feel that sampling encourages creativity,[53] and is less expensive than hiring individual musicians to play each part.[54] With the use of MIDI,[55] musi-

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See id. at 126.

47. *See generally* Thomas C. Moglovkin, Note, *Original Digital: No More Free Samples*, 64 S. CAL. L. REV. 135, 170 (1990) (describing moral rights and their application to the digital sampling context).

Control under the moral rights theory need not necessarily be achieved through copyright law. Some states, New York, for example, have state law which prevents certain uses of an artist's work without consent. *See* Wojnarowicz v. American Family Ass'n., 745 F. Supp. 130 (S.D.N.Y. 1990) (holding that a "decency" organization's use of an artist's photographs in an edited fashion, out of their original context, violated a New York state statute, but did not go so far as to constitute defamation). These states have legislated a form of moral rights, independent of copyright law. *See* Moglovkin, *supra*, at 171 n.220 (discussing the unlikelihood of widespread state legislation of moral rights to complement U.S. copyright law).

48. *See* Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1726 (1987) (explaining the possibility that synthesizer players could "undersell acoustic talent" through the use of digital sampling).

49. Tomsho, *supra* note 1, at B4.

50. Johnson, *supra* note 29, at 154.

51. *See* NEWQUIST, *supra* note 8, at 123 (discussing pre-recorded sample libraries).

52. Tomsho, *supra* note 1, at B4 (discussing the concerns of the musicians' union about lost work and lost royalties caused by digital sampling).

53. *See* Steven R. Gordon & Charles J. Sanders, *The Rap on Digital Sampling: Theft, Innovation, or What?*, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 207, 209 (1989) (explaining the view of digital sampling proponents that the prohibition of sampling would have "a severe chilling effect" on the development of new music, particularly rap).

54. McGiverin, *supra* note 48, at 1726.

55. MIDI (Musical Instrument Digital Interface) is a system which allows many electronic instruments to be "locked" together for control and flexibility. MIDI allows an analog signal (from an instrument such as an electric musical instrument or a microphone, which would convert any sound it could pick up into an analog signal) to be converted into a digital signal that can then be used and manipulated by a digital instrument, i.e., a computer. *See* DAVID BASKERVILLE, MUSIC BUSINESS HANDBOOK CAREER GUIDE 212 (4th

cians and producers have flexibility and control not possible with a room full of musicians. Sampling allows a producer to record a sound such as a background vocal only once, and then insert this sound at various places in the recording.[56]

Sampling proponents argue that even the sampling of substantial portions of existing records does not harm the original artists. Rather, proponents argue that these uses are a form of "homage" to the original artists.[57] Further, proponents claim that the use of the samples does not harm the original artist economically, and may even bolster sales of the original recording.[58]

The recording industry and the legal community are faced with a difficult policy decision. Digital technology requires a balancing of the interests of artists in retaining artistic and economic control over their works against the interests of artists in having access to raw material for use in creative works. Legislation is needed to define what types of sampling will be allowed, in what manner these samples may be used, and to what extent the use should be permitted.[59]

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ed. 1985). A sequencer, one of the MIDI instruments, is used as a sort of a "traffic cop in the mapping-out process." Snowden, *supra* note 24, at 61. The sequencer assigns the sounds to specific keys on the keyboard and routes the signals to the correct places at the proper times. *See id.*

56. *Id.*

This creativity and flexibility was not readily obtainable with analog recording techniques. For example, when George Martin created the wash of organ music for the Beatles' *Being for the Benefit of Mr. Kite*, the engineer had to physically cut the tape apart and splice it together in a different order. BEATLES, *Being for the Benefit of Mr. Kite, on* SGT. PEPPER'S LONELY HEART'S CLUB BAND (EMI Records 1967); KIRK, *supra* note 34, at 28.

Actually cutting and splicing tapes is not very precise. EARGLE, *supra* note 2, § 11.1, at 358. For Martin's purposes, the order of the splices was random. KIRK, *supra* note 34, at 28. If Martin had wanted the splices in certain places, the process would have been very difficult and time-consuming, considering the number of edits. Digital technology involves no physical cutting and splicing of the recording; all editing and mixing are done electronically. *See* Jean-Claude Risset, *Digital Techniques and Sound Structure in Music*, in COMPOSERS AND THE COMPUTER, *supra* note 27, at 113 (describing the mixing and editing process of his piece MIRAGES). For a more technical description of the digital editing process, see EARGLE, *supra* note 2, § 11.6, at 368-72.

57. Gordon & Sanders, *supra* note 53, at 209. Some artists consider frequent sampling of their work to be a great honor. *Weekend Edition: Rap Uses Electronics, Pre-Recorded Sound* (National Public Radio broadcast, Oct. 18, 1992).

58. *Id.* The same argument has been made in support of permitting photocopying of literary works. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 235 (1970) (arguing that by allowing photocopying of journals, publishers will not necessarily be injured because photocopying may increase interest in the journal and publishers can raise prices to make up for declining subscriptions).

59. *See generally* Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105

II. COPYRIGHT LAW ANS DIGITAL SAMPLING

A. Statutory Law

1. Constitutional Provision and Policies of Copyright

The United States Constitution provides for copyright protection. Through the Constitution, Congress is empowered "[t]o 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."[60] As a result of this provision, Congress is permitted to grant copyright owners a "limited monopoly" over their work.[61]

The limited monopoly permitted by copyright law is a means to an end.[62] When a copyright is granted to an author, that person is able to "secure a fair return" for the "creative labor" expended.[63] For the artist, the primary benefit of obtaining a copyright for an artistic work is an economic one.[64] The artist is given certain exclusive rights for a limited period of time.[65] The use of this limited monopoly, however, is a means of obtaining the goal of copyright: "to stimulate artistic creativity for public good."[66] The public good is promoted because artists are provided with an incentive to continue creating.[67] These creative works are then accessible to the public after the artist has had a sufficient time to maximize his or her economic benefits.[68]

HARV. L. REV. 726 (1992) (discussing the need for legislation to solve the sampling copyright dilemma and proposing a compulsory licensing scheme as a possible solution).

60. U.S. CONST. art. I, § 8, cl. 8.

61. *See generally* Scott L Bach, Note, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 380-84 (1986) (describing the limited monopoly policy of copyright law).

62. Michael F. Sitzer, Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 391-92 (1981).

63. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

64. Sitzer, *supra* note 62, at 392 ("[C]opyright protection does not exist for the gratification of the artist's ego; it exists for the gratification of the artist's pocketbook.").

65. Bach, *supra* note 61, at 382. Copyright law provides the creator with a 'bundle of rights, but protects only the author's creation, not the underlying ideas or principles. *Id.* This 'bundle of rights' includes the right to reproduce and distribute the work and the right to prepare derivative works. 17 U.S.C. § 106 (1988).

66. *See Twentieth Century*, 422 U.S. at 156.

67. *Id.*

68. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)

2. The Copyright Act of 1976

Although recording technology has been around since the late nineteenth century,[69] sound recordings were not entitled to copyright protection until 1972. The Sound Recording Amendment of 1971 offered the first federal protection of recorded performance.[70] This amendment provided protection for sound recordings "fixed" between February 15, 1972 and December 31, 1974.[71] The Copyright Act of 1976[72] now protects sound recordings "fixed" on or after February 15, 1972.[73]

Copyright owners of sound recordings have the right to reproduce, distribute and prepare derivative works of the copyrighted recording.[74] The protection of a copyright owner is limited to protection against sound recordings "that directly or indirectly recapture the actual sounds fixed in the recording."[75] This limitation means that there is no protection against simulated recordings consisting solely of an "independent fixation" of sounds.[76]

(recognizing that copyright law serves a public need by allowing public access after the period of the artist's exclusive control is over); *see also Twentieth Century*, 422 U.S. at 156 ("The ultimate aim [of copyright law] is to stimulate artistic creativity for the general public good.").

69. Thomas Edison invented the first recorder, the cylinder recorder, in 1877. BASKERVILLE, *supra* note 55, at 251. For a history of recording technology, see id. at 251-53.

70. WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 146 (6th ed. 1986).

71. Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (amended 1976); PATRY, *supra* note 70, at 209; *see also* NEWTON, *supra* note 28, at 699-700 (explaining that sound recording protection resulted from an explosion of record piracy during the late 1960's and early 1970's).

Congress removed the 1974 deadline before it would have expired. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 101, 88 Stat. 1873 (1974) (amended 1976); PATRY, *supra* note 70, at 209.

72. Pub. L. No. 94-553, 90 Stat. 2541 (1976), codified at 17 U.S.C. §§ 101-914 (1988).

73. 17 U.S.C. § 301(c).

74. *Id.* § 106(1)-(3). It is also important to note that the Copyright Act specifically denies owners of copyrights for sound recordings a performance right. *Id.* § 114(a).

75. *Id.* § 114(b).

76. *Id.* Because there is no protection against simulated recording comprised of an independent fixation of sounds, an artist is permitted, under copyright law, to make a recording that sounds like another recording, provided the sound alike is a completely new recording and does not use the recorded sounds of the original. *See id.* §§ 106, 114; *see also* Note, *A Cause of Action for Simulation of Sound Recordings? Yes!: Reflections on the 1976 Copyright Act*, 38 RUTGERS L. REV. 139 (1985) (proposing that Congress enact legislation limiting the right to produce simulated sound recordings)

Although there is no cause of action for an artist against a sound alike under copy-

It seems that digital sampling would be explicitly proscribed by the copyright act. After all, digital samples "directly or indirectly recapture the actual sounds fixed in the recording,"[77] and the samples are not entirely "independent fixation[s]" of new sounds.[78] Congress, however, has not prohibited all copying. The House Report accompanying the Copyright Act of 1976 states that "infringement takes place whenever all or *any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced by repressing, transcribing, recapturing off the air, or *any other method.*"[79] The report indicates that the purpose of the statute was to protect "substantial portions" of a copyrighted piece, rather than individual notes.[80] Digital sampling technology was not readily available at the time this report was released.

B. Proving Infringement

In order to prove an infringement of a copyrighted sound recording under present law, a plaintiff must show three things: ownership, direct copying, and materiality of the copying.[81]

1. Ownership

Ownership of the copyright is the first element of infringement that a plaintiff is required to show Initial ownership of the copyright is granted to the "author or authors of the work."[82] The authors of a sound recording often include the performer, engineer and producer.[83] In reality, however, the artist seldom owns an

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right law, the artist may have recourse under other theories such as right of publicity, defamation, or unfair competition. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (holding that a sound alike commercial violated Midler's right of publicity and that the imitation of Midler's voice was a misappropriation); *see also* Gordon & Sanders, *supra* note 53, at 215-17 (discussing the possible application of unfair competition, right of privacy and right of publicity in the digital sampling context); Moglovkin, *supra* note 47, at 162-69 (analyzing the potential for digital sampling infringement claims under unfair competition and right of publicity).

77. 17 U.S.C. § 117.

78. *Id.*

79. H.R. REPT. NO. 1476, 94th Cong., 2d Sess. 106, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721.

80. *Id.*

81. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.01 [A], at 13-5 (1991).

82. 17 U.S.C. § 201(a).

83. H.R. REP. NO. 487, 92d Cong., 1st Sess. *reprinted in* 1971 U.S.C.C.A.N. 1566,

interest in the copyright. Generally, the artist's rights will be bargained away during the recording contract negotiating process.[84] Similarly, engineers and producers may be involved in a work-for-hire arrangement.[85] In many situations, the record company will be the sole owner of the copyright interest.[86]

2. Copying

In order to be successful in an infringement action, the plaintiff must prove that the defendant copied the plaintiff's work. Copying can be proven either directly or indirectly.[87] Direct proof includes an admissions by the defendant that he or she copied the work, or testimony by someone who sees the defendant copy the work.[88] Indirect proof, on the other hand, requires evidence showing that the defendant had access to the plaintiff's copyrighted work and that the works contain similarities which would not have occurred if the protected work had not been copied.[89]

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84. *See generally* BASKERVILLE, *supra* note 55, at 275-93 (explaining artist recording contracts). The record company may own only the actual sound recording. Ownership of the composition (the song itself) may be vested solely in the composer if the composer has not bargained away those rights. *Id.* at 85-86.

In addition, the record company cannot own a performer's "style," as style cannot be protected under copyright law.

85. *See generally id.* at 88-89 (explaining work made for hire and its applicability in the music industry).

86. *See* McGivern, *supra* note 48, at 1730.

Record company ownership of copyrights presents an interesting situation. The trend in the recording industry between 1962 and 1986 was toward large company ownership and affiliation. DONALD E. BIEDERMAN, ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 204 (1987). In 1987, four major record labels controlled nearly 70% of the market for records distributed in the United States. *Id.* Many of the large record companies release records not only on their own labels, but on smaller affiliate labels as well. *Id.*

With a few companies controlling the market, it is likely that the record companies may actually be sampling from their own albums or the albums of affiliates. *See* Gordon & Sanders, *supra* note 53, at 218 (explaining that "today's plaintiff is often tomorrow's sampler."). There is a strong likelihood that sampling infringement cases will seldom be brought either because a record company sampled from its own recordings or because the person who claims the infringement is unable to bring suit because of the "clean hands doctrine." *Id.* For a discussion of the clean hands doctrine, see *infra* text accompanying notes 161-63.

However, in the past few years many new labels have emerged. Michael Leu, *Can All Those Upstart Record Labels Survive?*, N.Y. TIMES, Jan. 5, 1992, § 3, at 5. The role of these new companies in sampling litigation has yet to be defined.

87. PATRY, *supra* note 70, at 191.

88. *Id.*

89. *Id.*

3. Unlawful Appropriation

Once the plaintiff has successfully established ownership, access and copying, the plaintiff must further show that the defendant's use is "substantial and material enough to constitute an unlawful appropriation "[90] Use of another's work, in some circumstances, is permissible;[91] the plaintiff must show that in his or her particular case it is not permissible.

Under present law, whether the copying is substantial and material so as to constitute an infringement would be determined according to a standard called "substantial similarity "[92] The substantial similarity standard is vague at best.[93] Substantial similarity has been described as "*somewhere* between no similarity and literal similarity "[94] Additionally, one commentator stated that the determination of substantial similarity "presents one of the most difficult questions in copyright law "[95]

Substantial similarity has traditionally been determined by using the impressions of the "lay listener."[96] The test for infringement is more than simply a quantitative analysis, it is also qualitative.[97] The amount of similarity required "depends initially on what is protected in plaintiff's work and then on the impression made by the protected material upon the 'ordinary observer' for whose primary benefit the work has been created."[98] In digital sampling infringement actions, the entire work has not been copied.[99] Usually only a few seconds of the work are sampled.[100]

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90. *Id.* at 196 (discussing standard of proof for infringement cases).

91. Use is permissible in cases where the source is a work in the public domain or where the defendant has independently created the copied work. *But see* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (finding infringement notwithstanding George Harrison's defense of unconscious copying from the song *He's So Fine*).

92. NIMMER & NIMMER, *supra* note 81, § 13.03[A], at 23 (discussing the "general nature of substantial similarity").

93. *Id.* § 13.03[A], at 24.

94. Michael V Francis, Note, *Musical Copyright Infringement: The Replacement of Arnstein v. Porter — A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test*, 17 PEPP. L. REV. 493, 505 (1990) (advocating a "more comprehensive use of expert witnesses in copyright infringement case" *Id.* at 497).

95. NIMMER & NIMMER, *supra* note 81, § 13.03 [A], at 23.

96. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).

97. Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir. 1986) (finding incorporating of 4.3% of quotations from interviews printed in another book fair use), *cert. denied*, 481 U.S. 1059 (1987).

98. PATRY, *supra* note 70, at 199 (discussing the substantiality requirement).

99. Johnson, *supra* note 29, at 165 (asserting that since small quantities of sound are

Most digital sampling infringements would be classified as "fragmented literal similarity."[101] Fragmented literal similarity is a phrase which refers to "verbatim" copying of certain sections of the original work, as opposed to copying the entire work.[102]

The standard used in judging cases involving fragmented literal similarity is usually qualitative. In other words, "[e]ven if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity."[103] One commentator has articulated the standard as follows:

> [T]he court should determine whether the defendant appropriated [1] "the meritorious part of the song," or [2] "material of substance and value in plaintiff's work," or [3] "the very part that makes [the complaining work] popular and valuable," or [4] "that portion of [the complaining work] upon which its popular appeal, and hence, its commercial success depends," or [5] "what is pleasing to the ears of lay listeners." If the most important part of the plaintiff's composition, artistically speaking, is but a short portion of the piece, it would hardly be conducive to the promotion of the arts to deny plaintiff protection for his artistic kernel simply because he surrounded it with a great deal of less artistic chaff.[104]

Commentators have suggested that this standard should be used for digital sampling.[105] The theory behind this standard is that the

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copied, establishing substantial similarity will be the most difficult problem for plaintiffs attempting to prove copyright infringement in sound recordings by digital sampling).

100. *Id.* at 153-54 (stating that samples generally range in length from less than a second to twenty-five seconds).

101. NIMMER & NIMMER, *supra* note 81, § 13.03 [A][2], at 35.

102. *Id.*

103. Feder v. Videotrip Corp., 697 F. Supp. 1165, 1176 (D. Colo. 1988) (granting the defendant's motion for summary judgment, holding that, although the defendant's work was similar to the plaintiff's and the defendant used some of the same words as the plaintiff, an ordinary observer could not find that the defendant's videotapes infringed the plaintiff's copyright on its travel guide).

104. Jeffrey Sherman, Note, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. (ASCAP) 81, 104 (1977) (citing [1] Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 397 (S.D.N.Y. 1952); [2] 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 143.563 (1971); [3] Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282, 283 (8th Cir. 1939); [4] Robertson v. Batten, Barton, Durstein & Osborn, Inc., 146 F. Supp 795, 798 (S.D. Cal. 1944); Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946), *aff'd on rehearing*, 158 F.2d 795 (2d Cir. 1946)).

105. *See* Johnson, *supra* note 29, at 167; *see also* McGraw, *supra* note 3, at 162-65;

copying of even small portions of a piece can harm the plaintiff.[106] One commentator who advocates use of the standard described above, cites the example of distinctive rhythmic patterns called "hooks."[107] Although distinctive rhythms are not copyrightable,[108] the sonic expression of the rhythms is important to the overall recording and are identifiable as a part of that recording.[109] The same commentator expresses the view that "duplicating the identifiable portions of the rhythmic sounds and patterns may constitute an infringement of the sound recording copyright."[110]

Commentators have also proposed a "recognizability test."[111] This test is determined by answering the following question: "Is the defendant's product in any way recognizable to any of the copyrighted works found in the plaintiff's product?"[112] The purpose of this proposed test is to address the issues of fragmented literal similarity and electronic alteration of samples.[113] In theory, the test seems viable. One shortcoming of the test, however, is that if the sample is not recognizable, it is likely the suit will never be brought in the first place.

C. Derivative Work

A right under current copyright law important for determining the fate of digital sampling from preexisting works is the right to prepare derivative works. A derivative work, as defined in section 101 of the Copyright Act, is "a work based upon one or more

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Newton, *supra* note 28, at 705-09; J.C. Thom, Comment, *Digital Sampling: Old Fashioned Piracy Dressed Up in Sleek New Technology,* 8 LOYOLA ENT. L.J. 297, 325-30 (1988). Judith Greenberg Finell, a noted musicologist and expert witness in copyright litigation, advocates a similar standard and explains how it could be used in the digital sampling context. Judith G. Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y. L.J., May 22, 1992, at 5.

106. *Id.* at 328.

107. *See* Johnson, *supra* note 29, at 167.

108. Northern Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952).

109. *See* Johnson, *supra* note 29, at 167.

110. *Id.*

111. Thom, *supra* note 105, at 328-29; *see also* Ronald M. Wells, Comment, *You Can't Always Get What You Want but Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691, 705 (1989) (advocating the recognizability test as a means of protecting the average musician).

112. Thom, *supra* note 105, at 329.

113. Wells, *supra* note 111, at 704-05.

preexisting works, such as a condensation, or any other form in which a work may be recast, transformed, or adapted."[114] Section 114(b)[115] grants the owner of a copyright in a sound recording the exclusive right, under section 106(2),[116] to prepare derivative works of the sound recording.[117]

It has been argued that digital samples taken from preexisting works are derivative works of the sound recording from which they are sampled.[118] In order to escape the derivative work classification, the sample would have to be comprised "entirely of an independent fixation of other sounds,"[119] rather than the sounds on the existing recording. By definition, sounds that are sampled from an existing recording are recorded from that recording.[120] Although these sounds might be altered by the sampling musician before or after the sampling process,[121] this can be of no comfort to the sampling musician because the definition of derivative work specifically recognizes that "[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work' "[122]

It is likely that digital samples may, under present law, be characterized as derivative works. It is possible that the samples may be considered *de minimis* if the sample lengths are short enough.[123] Copyright law should be amended to provide an exception to the derivative work doctrine for digital samples.[124]

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114. 17 U.S.C. § 101.
115. 17 U.S.C. § 114(b).
116. 17 U.S.C. § 106(2).
117. Section 114 provides in pertinent part:

> (b) The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or other wise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

17 U.S.C. § 114(b).
118. Newton, *supra* note 28, at 703.
119. 17 U.S.C. § 114(b).
120. *See supra* notes 11-29 and accompanying text (explaining the digital sampling process).
121. *See* NEWQUIST, *supra* note 8, at 184.
122. 17 U.S.C. § 101.
123. Newton, *supra* note 28, at 705.
124. *See infra* text accompanying notes 178-82.

III. DEFENSES FOR AN INFRINGEMENT ACTION

A. Fair Use

Fair use is an affirmative defense that might be used by defendants in digital sampling infringement actions. Fair use has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without consent, notwithstanding the monopoly granted to the owner."[125] Fair use started out as a common law defense, but the doctrine is now codified in the 1976 Copyright Act.[126] Section 107 of the Copyright Act lists the following non-exclusive factors to be considered when the doctrine is applied:

> (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.[127]

While these factors constitute the minimum considerations allowed when determining fair use, other factors may be considered.

Congress articulated examples falling within the fair use doctrine in the following manner: "[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified for purposes such as criticism, comment, news reporting, teaching , scholarship or research, is not an infringement of copyright."[128] Digital sampling, depending on the context in which the sampling is used, may be difficult to fit into the specified uses. If the sample is used as a commentary or parody, the use might be acceptable under the articulated uses.[129] Congress' use of the words "such as" suggests

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125. HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944). For discussion of the applicability of the fair use doctrine in other types of infringement cases, *see* Sitzer, *supra* note 62, at 394-96.

126. PATRY, *supra* note 70, at 239-40. The Fair Use Doctrine is codified at 17 U.S.C. § 107.

127. *Id.*

128. 17 U.S.C. § 107.

129. Some musicians, such as "Weird Al Yankovic," have performed on musical parody

that the list of uses is a list of examples, not an exhaustive list of permitted purposes for use of a work under the fair use doctrine.

1. Purpose and Character of Use

Defendants accused of illicit sampling who wish to assert a fair use defense are required to explain the purpose and character of the use of the copyrighted material.[130] The fair use provision explicitly distinguishes between primarily commercial uses and scholarly or educational pursuits.[131] Commercial uses will most likely constitute the majority of digital sampling. When the use is commercial, there are two presumptions that the defendant must rebut: (1) every commercial use is not a fair use; and (2) every commercial use results in harm to the potential market for the copyrighted work.[132] It is possible that the defendant could rebut the first presumption by asserting that the use, though commercial, is fair because it "pays homage" to the original work.[133] Another way to rebut the presumption might be to argue that the work has been altered so that it differs radically from the original; as a result, there is no harm to the plaintiff.[134] To rebut the second presumption, the defendant can argue that his or her use of the copyrighted material actually results in market gain, reviving interest and increasing sales of the original work.[135]

2. Nature of the Copyrighted Work

The next factor to be considered in the fair use analysis is the nature of the copyrighted work. The defendant will face difficulties under this factor as well. Generally, creative works are less subject to fair use than informational works.[136] Because the copyrighted

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albums. Yankovic's albums take existing songs and change the lyrics to make the songs humorous. *E.g.* AL YANKOVIC, DARE TO BE STUPID (Rock and Roll Records 1989).

130. 17 U.S.C. § 107.

131. *Id.*

132. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (finding even unauthorized home "timeshifting" of copyrighted programs on videotape records is fair use).

133. *See* Gordon & Sanders, *supra* note 53, at 209.

134. For discussion of electronic alteration, *see infra* text accompanying notes 155-60.

135. *See* Gordon & Sanders, *supra* note 53, at 209.

136. Diamond v. Am-Law Pub., 745 F.2d 142, 148 (2d Cir. 1984); *see also* PATRY, *supra* note 70, at 249 (explaining that although the reasoning for the policy is unclear, the fair use defense is not as readily available for "[w]orks of an entertainment nature ").

work sampled is usually an album that was originally produced for entertainment purposes, a defendant is unlikely to prevail under this factor.

3. Amount and Substantiality of the Portion Used

The third factor considered in assessing a fair use defense is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[137] Because digital samples vary from milliseconds to minutes,[138] the defendant's success may depend upon how much of the underlying work was sampled. Most samples are only a few seconds long.[139] If the defendant used only a few notes, or one instrument of many included on the plaintiff's recording, the defendant may prevail on this factor.

4. Effect on the Market or Value of the Copyrighted Work

The fourth factor considered by the court in a fair use situation is "the effect of the use upon the potential market for or value of the copyrighted work."[140] This factor has been called "the single most important element of fair use."[141] The inquiry made under this factor: "whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work."[142]

The defendant can argue that the use of the sample does not harm the market for the plaintiff's work.[143] In many cases, the defendant's use of the sample is in a completely different context than the plaintiff's original work. For example, a rap artist might use a song of a different genre as a background rhythm in creating a new rap work. Often times, the songs used are several

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137. 17 U.S.C. § 107.

138. *See supra* text accompanying note 28.

139. *See supra* text accompanying note 29.

140. 17 U.S.C. § 107.

141. Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539, 566 (1985).

142. NIMMER & NIMMER, *supra* note 81, § 13.03 [A][4], at 79.

143. *See* Gordon & Sanders, *supra* note 53, at 209 (discussing the claim by one record company executive that sales of James Brown recordings have probably increased since they have become widely sampled); Lionel Bentley, *Sampling and Copyright: Is the Law on the Right Track?* (pt. 2), 1989 J. BUS. L. 405, 412 (arguing that sampling should be permitted because the small amount that is taken does not harm the original creator).

years old and are no longer commercially popular. The rap artist, by using the sample, may actually revive the sampled song's popularity.[144] Given the opposing arguments, the court's task is to balance the interests of the plaintiff and defendant to determine whether the use of the protected material was fair.

B. De Minimis

Even if a plaintiff is able to prove that the defendant copied from the plaintiff's copyrighted work, the defendant may be able to argue that the copying was *de minimis*. If the sample is of a small portion of the plaintiff's work, it may be *de minimis*, and will not be protected under the copyright laws.[145]

The trial court in *United States v. Taxe*[146] indicated that in some cases, "trivial re-recordings might very well be held to be such an insubstantial taking as not to infringe."[147] *Taxe* involved actual re-recordings of entire songs from commercially released albums. The defendants purchased stereo recordings manufactured by major record companies in retail stores.[148] They then took these recordings and re-recorded them making minor changes such as increasing or decreasing the recording speed, adding reverberation, reducing the volume of certain portions and adding additional sounds using synthesizers.[149] The tapes made by the defendants were then sold through a national advertising campaign.[150] These tapes were represented to the public as the original recordings.[151]

The trial court found that the recordings made by the defendants in *Taxe* were not *de minimus* because the entire song was re-recorded.[152] Although the *Taxe* case was decided in the mid-seventies, ten years before digital sampling became popular, the court indicated that *de minimis* copying was not the type of use that

144. *See id. But see* Tomsho, *supra* note 1, at B1 (explaining the process undertaken by PolyGram Records, which owns the rights to many of James Brown's recordings, to police unauthorized sampling uses of the singer's trademark scream).

145. *See* Johnson, *supra* note 29, at 168.

146. 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd in part, vacated and remanded in part*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

147. *Id.* at 1014.

148. United States v. Taxe, 540 F.2d 961, 964 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

149. *Taxe*, 380 F. Supp. at 1012.

150. *Taxe*, 540 F.2d at 964.

151. *Id.*

152. *Taxe*, 380 F. Supp. at 1017.

Congress intended to target with the Sound Recording Amendment.[153] The *Taxe* court recognized that the purpose of the statute was to prevent piracy.[154] Thus, a court today might follow the *Taxe* rationale find that a short digital sample is a *de minimus* use rather than piracy.

C. Alteration of the Sample

A defendant in a copyright infringement suit who has sampled sounds from the plaintiff's copyrighted work, then altered these sounds before using them, may claim that this alteration has changed the sound to the extent that there is no substantial similarity between the two.

Taxe addressed the issue of electronic alteration. The defendants in *Taxe* were convicted of willful infringement of copyrights for profit and conspiracy.[155] The trial court convicted the defendants, holding that there was an infringement because the tapes were re-recordings of copyrighted material.[156] The court further stated, in dictum, that "comprehensive changes might be held to be so far from what Congress intended to prohibit as to not constitute an infringement."[157] It was unnecessary for the court to consider comprehensive alterations in this case because the alterations made by the defendants were intentionally inaudible.[158]

The appellate court, reviewing the trial court's jury instructions, held that the jury instruction "went beyond the law insofar as it purported to characterize any and all re-recordings as infringements."[159] The court also stated that a copyright owner's right "can be infringed" by an unauthorized re-recording which, despite changes in the sounds duplicated, *results in a work of 'substantial similarity.'*"[160]

The statements of both the trial and appellate courts in *Taxe* imply that a defense of alteration exists. In order to prevail under an alteration defense, the defendant's work must not be substantial-

153. *Id.* at 1014.
154. *Id.*
155. *Taxe*, 540 F.2d at 964.
156. *Taxe*, 380 F. Supp. at 1014 ("So long as the allegedly infringing work is a product of re-recording, rather than an independent production, an infringement exists.").
157. *Id.*
158. *Id.* at 1013.
159. *Taxe*, 540 F.2d at 965.
160. *Id.* at 965 n.2 (emphasis added).

ly similar to the copyrighted work.

This defense would be helpful in digital sampling cases. Most digital sampling cases fall into the exceptions laid out by the *Taxe* courts because generally, in digital sampling cases, a sound is sampled, altered and used in a completely different context than the copyrighted work. Digital sampling cases would not include the representation that the work is the original, as did the tapes in *Taxe*.

D. Clean Hands Doctrine

One commentator has suggested the use of a "clean hands" doctrine for copyright infringement cases involving digital sampling.[161] This doctrine would operate as a form of estoppel. Any artist who samples the sounds of other artists without authorization would be estopped from asserting a claim against a person who similarly infringes on that artist's work.[162] This doctrine could also be extended to include record companies that sample other companies' works, because very often the record companies own the copyright interest.[163]

IV A DEFINITE STANDARD NEEDED IN SAMPLING INFRINGEMENT CASES

The standards discussed in this note for determining whether the use of a digital sample violates copyright law are substantial similarity[164] and recognizability.[165] These standards however, do not adequately meet the needs of the music industry These standards do not allow one to predict the consequences of using digital samples because they are applied only during litigation. Many of the samples taken from other artists' works are too short or altered in such a way so that they are no longer recognizable; therefore, a suit may never be brought. Most artists and record companies prefer to avoid the expense and publicity brought by litigation.[166] In order to avoid litigation, artists need a way to predict what types of behavior will subject them to a law suit.[167]

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161. *See* McGraw, *supra* note 3, at 168.
162. *Id.*
163. *See supra* note 86.
164. *See supra* text accompanying notes 92-110.
165. *See supra* text accompanying notes 111-13.
166. Gordon & Sanders, *supra* note 53, at 218.
167. *See* NEWQUIST, *supra* note 8, at 125-27 (explaining the confusion in the music in-

The substantial similarity standard is vague[168] and has never been used in a digital sampling case. The musician subject to a lawsuit must rely on a determination which has been called "one of the most difficult questions in copyright law."[169] Musicians therefore, have no guidance from either the courts or the legislature as to how this test should be applied in the sampling context.

The recognizability test does not offer predictability to the musician either. The recognizability standard would be subject to the musical knowledge and tastes of the jury For example, a jury in New York city may react very differently to a piece, or more readily recognize an artist, than a jury in a less musically diverse area.

The inability of a musician to predict what types of sampling will be permitted and the lack of guiding case law indicate that a new standard is needed.[170] One commentator has suggested that changing copyright and patent law for the new technologies should be developed by the courts, not the legislature.[171] That commentator asserts that the changing technologies do not necessarily require new laws. He identifies the challenge of intellectual property as "not deciding how to treat new creations that are *sui generis*. Rather, it is determining whether a new thing is like an old. Put another way, it is the classic problem of the common law· treating like cases alike."[172]

This problem may necessitate judicial activism because Congress often does not anticipate new technology, or respond rapidly enough once new technology develops.[173] It has been argued that

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dustry as to what sampling uses are allowed).

168. *See supra* notes 93-94 and accompanying text.

169. NIMMER & NIMMER, *supra* note 81, § 13.03 [A], at 23.

170. In Grand Upright Music Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991), the court addressed only the issue of ownership and essentially deemed digital sampling a form of theft without addressing its possible creative merits. *Grand Upright*, however, was a hearing on a preliminary injunction, not an actual trial of the issues. The case later settled. *Grand Upright* also has several unique facts that distinguish it from the typical case. The defendants sought permission to use the underlying work; permission was specifically denied. Further, the sampled portion was a substantial part of the new work. It was used repeatedly throughout the new work and constituted most of the work. *See* Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Lime Light*, N.Y. L.J., Mar. 16, 1992, at 1 (analyzing *Grand Upright*).

171. Dan Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769 (1984).

172. *Id.* at 772.

173. *Id.* at 785 (arguing that the speed of new technology creation necessitates quick legal adaptation).

judicial activism is a first step, then the legislature is free to alter the doctrines set out by the courts.[174]

In the case of digital sampling, the courts have not had much opportunity to act because few suits have actually made it into a courtroom.[175] Digital sampling technology has been in existence since the 1970's and is rapidly growing in popularity as the price of a professional quality sampler has dropped considerably For example, a Fairlight sampler cost $30,000 to $150,000 in 1975 while today one can purchase a comparable unit for less than $1,500.[176] Digital sampling technology is available in inexpensive, unsophisticated samplers for under $100, and it is also used for many electronic products in the home.[177] Digital sampling technology is so pervasive in our society that it cannot be ignored. Congress therefore, must act to define the copyright law standards for the proper use of digital samples.

V PROPOSED CHANGES IN COPYRIGHT LAW

A. The Solution

Determining what types and amounts of digital sampling Congress should allow artists to use is difficult. Any standard is likely to be arbitrary, yet an arbitrary standard is better than no standard at all. An arbitrary standard permitting samples of existing works up to a specified duration enables musicians to use many sources as building blocks for their creativity, while retaining the underlying purposes of copyright.

Congress should change copyright law by creating a new standard that allows digital sampling in limited circumstances. This new law would permit musicians to incorporate short samples of existing works into the musician's original works, without classifying these new works as derivative. In creating a new standard, Congress should enlist the aid of experts in the recording industry

174. *Id.* at 781.

175. Most digital sampling cases settle before trial, if they are even brought. However, the Southern District of New York addressed sampling issues in Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991), in the context of a preliminary injunction hearing. The case later settled. Another case, Turf N' Rumble Management, Inc. v. Def Jam Recordings, Inc., No. 91 Civ. 8637 (LJM) (S.D.N.Y.) was filed December 23, 1991, but has not yet gone to trial.

176. Moglovkin, *supra* note 47, at 140.

177. *Id.*

to help determine the appropriate permissible sample length. Ideally, the sample length should be short, requiring a musician using the sample to expend a substantial amount of labor in order to use the sample in a new work.

This new legislation should also require musicians sampling from other musicians' works to notify the authors of the original works that a sample is being used, and offer the authors the option of having their sampled work acknowledged on the sampling musician's album cover. This notice requirement and album cover credit option will ensure that an artist receives proper artistic credit and will prevent musicians from misrepresenting that the artist whose work was sampled actually performed on, or supported the production of, the album.

B. The Proposed Sampling Act

§1 PERMITTED USE OF SAMPLES FROM EXISTING SOUND RECORDINGS

A sound recording containing one or more portions of not more than three seconds each in duration[178] sampled from one or more existing sound recordings does not infringe on the copyright of the existing sound recording(s) provided that the notice provision of §2, and the album cover credit option provision of §3 are satisfied.

(a) For purposes of this section, the term "sample" refers to copying by either digital or analog means from an existing sound recording.

(b) For purposes of this section, the term "sound recording" refers to any works that result from the fixation of a series of musical, spoken, or other sounds, regardless of the nature of the material objects, such as discs, tapes, or other phonorecords, in which they are embodied.[179]

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178. The sample duration length of three seconds is an estimation of an approximate time. Congress would need to consult with experts in the industry to determine an appropriate duration.

179. This definition is taken from 17 U.S.C. § 101. Note, however, that the words "but not including the sounds accompanying a motion picture or other audiovisual work" have been removed from the original definition for purposes of the proposed section. The exception for motion picture has been removed because it is important to give an artist as much raw material as possible in which to find creative inspiration. *See, e.g.*, Allan Kozinn, *Having Fun with Jack Benny, for Opera's Sake*, N.Y. TIMES, Sept. 27, 1989, C-15 (describing an electronic music opera based on samples taken from episodes of *The Jack Benny Show* composed by John Moran).

(c) Exception to the general rule: A sound recording will infringe on the copyright of an existing sound recording where it consists substantially of samples of one existing sound recording, and is, in effect, a copy of the existing work.

(d) Sound recordings that use samples from an existing sound recording, where such samples exceed three seconds in duration, infringe on the copyright protection of the existing sound recording.

(e) Sound recordings which use samples from an existing sound recording, where such samples are used without the statutorily required notice to the copyright holder of the existing sound recording, infringe on the copyright protection of the existing sound recording.

(f) Sound recordings which use digital samples under this section, shall not be considered to be derivative works of the original sound recording, under section 106 (2) of this title.

§2 NOTICE PROVISION

A person wishing to use samples from an existing sound recording protected by copyright must notify the copyright holder of the intent to use samples from the copyrighted material.

(a) Notice must include the following:

(1) name of the person(s) or entity that sampled the work;

(2) a description of the material sampled; and

(3) a fair explanation of the context in which the sample will be used.[180]

(b) Notice must be given at least sixty days[181] prior to the public exposition or release of the sound recording containing the sample(s).

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180. A "fair explanation" of the context is required. This standard is less onerous than the current "system" where artists essentially are required to record the entire work and send it to the desired licensee. The current system is prohibitively expensive, especially where consent is then refused after tens of thousands of dollars are spent recording. *See* Sheila Rule, *Record Companies Are Challenging 'Sampling In Rap*, N.Y. TIMES, Apr. 21, 1992, at C-13. The proposed requirements would enable the artist to use the existing work without spending thousands to produce a work, only to have permission refused.

181. The 60-day notice provision could be adopted by Congress after consultation with experts from the recording industry in order to meet the needs of the industry. A longer time may be required. The purpose of this provision is to insure that the copyright holder is given adequate notice of the sample's use and will have adequate time to determine if the album cover credit option will be exercised.

§3 ALBUM COVER CREDIT OPTION PROVISION

At the option of the copyright holder of the existing sound recording that has been sampled, the album cover of the sound recording using samples from such recordings must include an acknowledgement of the use of the sample and its source.

(a) The acknowledgement must:

(1) be of a typeface size not smaller than the smallest typeface of the other written material on the album cover,

(2) clearly indicate which recordings have used material sampled from existing sound recordings, and

(3) identify the source of all material sampled from existing sound recordings.

(b) The copyright holder of the existing sound recording may express intent to exercise the option of having the sampled material acknowledged on the album cover until thirty days[182] prior to the public exposition or release of the sound recording containing the sample.

(c) If the intent to exercise the option is not expressed at least thirty days prior to the public exposition or release of the sound recording containing the sample, the option will be considered waived.

C. Justification for the Proposed Legislation

The United States Constitution authorizes Congress to create intellectual property law[183] Intellectual property rights, such as copyrights, are granted "not as rewards but as inducements to authors and inventors to create and disseminate intellectual works."[184] In theory, the limited monopoly granted to creators enables the creation and dissemination of works through mass production to be economically feasible by preventing competition from inexpensive copies of the work once the first production has been released.[185]

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182. The time limit of this provision would be determined by Congress after consultation with experts in the industry. The purpose of this time limit is to give the company releasing the album containing the sample adequate time to design the album cover.

183. U.S. CONST. art. I, § 8, cl. 8. *See also supra* text accompanying notes 60-68.

184. OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 7 (1986).

185. The validity and necessity of this theory has been questioned. *See* Breyer, *supra* note 58, at 281-83 (questioning the justifications for and proposing alternatives to copyright law).

Allowing musicians to sample another artist's work is consistent with this goal of intellectual property When a musician samples a small portion from an existing recording and uses the sample in a different musical piece, the musician is not copying the piece wholesale and passing it off as his own. Rather, the musician is creating an original composition and is simply using the sample as one of the instruments for the new work. The proposed legislation provides for a sample time short enough to ensure that there is no confusion between the sampled and new compositions. By requiring that the author of the sampled works be given the option of album credit, the proposed law also minimizes the risk of misrepresentation or confusion. The proposed legislation therefore, balances the goals of copyright and the interests of the parties. New creations are encouraged because musicians are given a virtually limitless supply of raw material while existing works remain protected from outright pirating of the entire song.

Finally, the proposed legislation is consistent with some of the theories offered to justify intellectual property One commentator suggests that intellectual property can be justified in light of Lockean and Hegelian theories.[186] In the Hughes article, the test applied is "whether traditional theories of property are applicable to the very untraditional field of intellectual goods."[187]

1. Locke's Property Theory

The first theory examined in the article to justify intellectual property is Locke's property theory [188] Locke's property theory begins with the premise that "God" gave the world to all people, or to mankind in common.[189] People have property rights in their own person and the labors of their bodies.[190] Whatever a person removes from its natural state and mixes with that person's labor becomes that person's property [191]

This theory presupposes the availability of adequate comparable

186. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

187. *Id.* at 288.

188. *See id.* at 296-330.

The Lockean theory has also been used as the basis for a discussion of the apportionment of profits in musical composition plagiarism cases. *See* Note, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 447 (1988).

189. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, ¶ 25 (Peter Laslett 2d ed. 1967).

190. *Id.* ¶ 27

191. *Id.*

resources, a state that has been called the "enough and as good condition."[192] The enough and as good condition has been described as "an equal opportunity provision"[193] providing that "each person can get as much as he is willing to work for without creating meritocratic competition against others."[194] Locke's theory however, is limited by what has been called the "non-waste condition"[195] which "prohibits the accumulation of so much property that some is destroyed without being used."[196]

The first part of Locke's theory discussed is the "labor justification theory."[197] This theory is subject to two interpretations: instrumental and normative.[198] The instrumental interpretation is that society *must* reward labor with property in order to get labor.[199] The normative interpretation provides that labor *should* be rewarded.[200]

The first interpretation of the labor justification theory is the "avoidance" view of labor.[201] To proceed under this theory it is necessary to assume that ideas, or intellectual goods require labor to produce.[202] The premise of this interpretation is that labor is unpleasant, and therefore, should be rewarded in order to induce people to perform this labor.[203] This interpretation justifies labor on the individual level. In other words the individual feels justified because he receives something in return for the pains of his labor.[204]

The proposed legislation is consistent with this interpretation. The creator of the original sound recording is being rewarded for performing "labor" on the original work as before. New works, however, are encouraged because the labor required to create these

192. *See id.* (disavowing competing claims for natural resources "at least where there is enough and as good left in common for others").

193. Hughes, *supra* note 186, at 297-98.

194. *Id.* at 298.

195. *Id.* at 298 (emphasis omitted).

196. *Id.*, *see* LOCKE, *supra* note 189, ¶ 37 ("but if [resources] perished in his possession without their due use; if the fruits rotted, or the venison putrefied before he could spend it, he offended against the common law of nature, and was liable to be punished").

197. *See* Hughes, *supra* note 186, at 300-15.

198. *Id.* at 296.

199. *Id.*

200. *Id.*

201. *See id.* at 302-05 (applying the avoidance view of labor to intellectual property).

202. *See id.* at 300-02 (concluding through his analysis that idea production does require labor).

203. *Id.* at 302-03.

204. *Id.* at 310.

works is easier in some ways when sampling is permitted. By allowing a predetermined sample length, the musician will create because there is the assurance of a reward instead of a punishment. At present, because there is no clear definition of what sampling uses are allowed, musicians may be afraid to create freely for fear of breaking the law.[205] In addition, if a musician is permitted to use existing works, there will be more raw material to inspire creativity, thereby making the creative process less labor-intensive.

Locke's labor justification theory is also examined under an interpretation called the "labor desert" or "value added" theory.[206] The premise of the value added theory is that "labor often creates *social* value, and it is this production of social value that 'deserves' reward, not the labor that produced it."[207] This theory is an instrumentalist argument which justifies property on a social level.[208] It states that people will contribute to the good of society, or the "common," if they personally receive some of the value.[209] In other words, society must reward people in order to motivate them to contribute to the common.

When justifying copyright in terms of the value added theory, it is necessary to note that copyright as a whole may be inconsistent with this theory because there is no requirement of "value" for copyrighted works.[210] An author can copyright a work that is never disseminated to the public, and therefore never becomes part of the "common."[211] If it does not add a "social value," then, under an instrumentalist theory it does not have to be rewarded.[212]

It has been suggested that intellectual property might nevertheless be justified under the value added theory if the "net gain" achieved by allowing copyright of works is examined.[213] In other words, some individual works of intellectual property may be socially valueless, but as long as the intellectual property system as a

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205. This fear has become more realistic in light of Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991). In that case, the judge referred the matter to the United States Attorney for possible criminal prosecution. For analysis of the possible criminal prosecution, see Sugarman & Salvo, *supra* note 170.

206. *Id.* at 305-10.

207. *Id.* at 305.

208. *Id.*

209. *Id.* at 305-06.

210. *Id.* at 308-09.

211. *Id.*

212. *See id.* at 306-09 (relating the value added theory to intellectual property and determining that it can nevertheless be applicable even if the creation has no "value").

213. *Id.* at 310.

whole contributes a net gain to society, then the system is worthwhile.[214]

The proposed legislation can be justified under the value added theory as well. The goal of the value added theory is to reward and encourage activities that add social value. The proposed law encourages the creation of new works, and in the end, is likely to increase the number of sound recordings created. It is unlikely that musicians currently creating new works will stop recording if digital sampling of existing works is permitted. They will continue to record even if their works can be sampled because they too will receive benefits.

In his article, Professor Breyer suggests that if copyright were abolished in the publishing industry, book production would not be seriously threatened because there remain advantages to publishing, even without copyright protection.[215] Similarly, if sampling were permitted, musicians would continue to record in order to receive benefits such as economic gain, artistic achievement, social stature, and personal satisfaction.

The musicians who currently record are likely to continue to record and new musicians are being encouraged to record; as a result, there is likely to be a "net gain" in the number of works produced and disseminated to the public, thereby adding to the common. This is consistent with the purpose of copyright under the value added theory The musicians who created the underlying works will continue to create because they will receive benefits from their creations. In addition, new musicians will begin to create because they will be permitted to use the tools they desire (existing works). With the advantage of predictability from a predetermined permissible sample length, musicians can conform their behavior to the law so that they can create without fear of punishment.

2. Hegel's Personality Theory

Hegel's personality theory is also used to justify intellectual property[216] Hegelian philosophy regards the individual's will as

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214. *Id.*

215. Breyer, *supra* note 58, at 293-308 (suggesting that countervailing forces such as the advantage of lead time would encourage publishers to publish books before their competitors).

216. *See generally* Hughes, *supra* note 186, at 331-65 (analyzing intellectual property in light of Hegel's personality theory).

the center of her existence.[217] Personality, under this philosophy, is an outward (external) manifestation of will, or "the will's struggle to actualize itself."[218]

Under the personality theory, "[p]roperty becomes [an] expression of the will, a part of personality "[219] The Hegelian theory prescribes that "labor is often the means by which the will occupies an object,"[220] but that labor is not necessary[221] The three ways in which will may occupy an object are by "physically seizing it, imposing a form upon it, and marking it."[222] Rather than focusing solely on labor, the personality theory "focuses on where a commodity ends up, not where and how it starts out "[223] This focus reflects the "subjective relationship between the holder and the thing, not the objective arrangements surrounding production of the thing."[224]

The theory becomes somewhat more complicated when applied to intangibles such as scholarship, talent or spirituality[225] Hegel states that "[a]ttainments, eruditions, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them."[226] These alienations are the creations on which intellectual property is based. These alienations are problematic under Hegelian philosophy because Hegel believed that a person could not alienate or surrender a universal element of that person's self.[227]

Hegel maintained that when an artistic work is copied by another artist, the copy "is essentially a product of the copyist's own mental and technical ability "[228] This copy is not considered by Hegel to infringe on the original artist's property right. A distinction is drawn, however, between hand-made copies of artistic

217. *Id.* at 331.
218. *Id.*
219. *Id.* at 333.
220. *Id.* at 334.
221. *Id.*
222. *Id.* at 335.
223. *Id.* (quoting Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982)).
224. *Id.*
225. *See id.* at 337 (quoting Hegel's relation of personality and mental traits to will).
226. GEORG HEGEL, PHILOSOPHY OF RIGHT § 43 (T.M. Knox Trans. 1967).
227. Hughes, *supra* note 186, at 339.
228. HEGEL, *supra* note 226, at § 68.

works and mechanical reproductions of books.[229] Hegel concluded that when an author alienates or releases one copy of a work, the author retains the right to produce duplicate copies.[230] This right is given to the author because "such reproduction is one of the 'universal ways and means of expression which belong to [the author].'"[231] The copy is sold to the buyer for the personal consumption of the buyer.[232] The buyer acquires a copy, then "incorporate[s] these ideas into his 'self' "[233]

Hegel's theory would support a limited use of digital sampling, as set out in the proposed legislation. The proposed law imposes such a limitation on the allowed amount of sampling that a musician is forced to add in a substantial amount of originality, or personality The new work will not be merely a mechanical reproduction of the original work, but an entirely new piece. This type of use is supported by Hegel because the mental and technical abilities of the new author are embodied in the work. The author of the underlying work still retains the right to make facsimiles of the original work. The new author, however, incorporates the ideas into a new work reflecting that author's self, rather than making an exact duplicate of the original work.

One problem encountered when trying to apply Hegel's personality theory to intellectual property is that some creations seem to reflect little or none of their creator's personality[234] Some may argue that when a musician uses a sample of an existing work, none of that musician's personality is reflected in the sample, and that under the personality theory, the sample rightfully belongs to the original artist and cannot be used by anyone but that artist.

This argument however, can be countered by analogy Some have argued that maps are devoid of personality, and therefore, not entitled to protection under intellectual property law[235] One commentator however, argues that even though maps consist mostly of generic, informational material, there are certain factors which differ from map to map.[236] These factors, which include color,

229. Hughes, *supra* note 186, at 338.
230. *Id.*
231. *Id.* (quoting HEGEL, *supra* note 226, § 69 (T. M. Knox Translation 1967) (alterations in original)).
232. *Id.*
233. *Id.*
234. *Id.* at 339.
235. *See id.* at 341 (determining that maps have the requisite personality for protection).
236. *Id.*

identifying symbols and presentation of information, make up the "personality" of the map.[237]

The same can be said for digital sampling. At first glance, it appears that copying sounds from an existing recording would not require the use of personality, but there are many variables in recording. The sample could be electronically processed using a number of different signal processing devices, producing effects such as delay, reverberation and harmonization.[238] Another way to express personality is through composition. Although the sounds that are sampled might sound the same, it is not the same composition. A short portion of a preexisting recording may be used in a different song, and even in a different style of music.

VI. CONCLUSION

An important policy debate lies ahead concerning digital sampling. Present copyright law does not adequately address the concerns of this new technology The existing standard, substantial similarity, is too vague to be of any aid to musicians who wish to conform their behavior to the law and avoid litigation. Another proposed standard, recognizability, is also inadequate because it is very subjective and does not help a musician to predict what uses would be allowed by the courts.

Congress must balance the goals of copyright against the interests of the parties. By adopting the legislation proposed here, Congress can achieve this balance while allowing musicians to sample small portions of existing works for use as raw material in new works. The proposed legislation advocates the use of short digital samples. While encouraging the creation of new works and protecting the integrity of existing works, the proposed legislation also provides predictability to composers currently unable to assess whether the use of digital samples is legal.

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237. *Id.*

238. *See generally* EARGLE *supra* note 2, at 183-231 (explaining signal processing devices and their application).