Your Sound or Mine?: The Digital Sampling Dilemma

Lori D. Fishman

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YOUR SOUND OR MINE?: THE DIGITAL SAMPLING DILEMMA

A basic tenet of the copyright clause in the United States Constitution fosters the creativity of individuals by affording them protection from the appropriation of their work. Although quite broad in its terms, nothing in the copyright provision demands uniqueness or novelty within the subject matter sought to be copyrighted. Additionally, the freedom of speech and press clause of the first amendment of the Constitution encourages a myriad of expressions. However, by also establishing a property interest in

1 U.S. Const. art. 1, § 8, cl. 8. The copyright clause provides in pertinent part that Congress shall have the power "[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." Id. The copyright provision in article I combines the substantive power of Congress to grant copyright protection to the creator of a work with a specific constitutional objective of promoting scientific and artistic progress. Id. See A. Latman, The Copyright Law: Howell's Copyright Law Revised and the 1976 Act 15 (5th ed. 1979).

It follows that the copyright provision is based on the economic philosophy that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" Mazer v. Stein, 347 U.S. 201, 219 (1954). The copyright belonging to "authors has been solemnly adjudged . . . to be a right of common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals." The Federalist No. 43, at 288 (J. Madison) (J. Cooke ed. 1961).

The traditional notions underlying the copyright law continue to emanate through modern day legislation which recognizes that copyright protection is a necessary condition to promote the level of creativity necessary to benefit the public. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). The Court in Twentieth Century reiterated the well settled principle that "[t]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Id. at 156. See also Harper & Row Publishers Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (copyright protection is "economic incentive to create and disseminate ideas"); Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984) (copyright protection intended to motivate creative activity of authors by provision of special reward). See generally 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.03[A] (1988).

2 U.S. Const. art. 1, § 8, cl. 8. See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) ("original" with regard to copyright means work owes its origin to particular author); Baker v. Selden, 101 U.S. 99, 102 (1879) (copyright valid without regard to subject matter's novelty); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 101 (2d Cir. 1951) (legislation imposes minimal standards in copyright cases because nothing in Constitution dictates material seeking copyright protection be unique or novel); see also A. Latman, supra note 1, at 20 (no minimal constitutional standards for copyright material).

3 U.S. Const. amend. 1. The first amendment provides in pertinent part that: "Congress
a work, copyright protection created a paradoxical tension between an individual's right to freedom of expression and the prohibition against using another artist's copyrighted work. The confusion was exacerbated by the extensive history and comprehensive revisions of former copyright legislation, which inevitably shall make no law . . . abridging the freedom of speech, or of the press . . . .” 4

4 See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977). A copyright interest insures the creator a right to sell the copyrighted material and to receive fair compensation for the labor invested. Id. Therefore, copyright protection provides the necessary economic incentive for a creator to produce valuable copyrightable material and protect such material from commercial appropriation. Id. See generally 1 M. Nimmer, supra note 1, at § 1.10[A][B]; Comment, Copyright and the First Amendment, Where Lies the Public Interest?, 59 Tul. L. Rev. 135 (1984) (discussing public dissemination under fair use doctrine).

Because of the dichotomy between the first amendment encouraging free communication and the 1976 Copyright Act protecting an author's expression, the Supreme Court has employed a balancing test between society's beneficial interest in the speech sought to be protected and the individual's countervailing property interest to protect a copyright. See Harper & Row, 471 U.S. at 556. In Harper & Row, the Court stated that there must be "a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." Id. The Court further stated that a copyright only protects an author's form of expression and not the facts or ideas that were expressed. Id. Thus, there exists a "definitional balance under which ideas per se fall on the free speech side of the line, while the statement of an idea in specific form, as well as the selection and arrangement of ideas, fall on the copyright side of the line." 1 M. Nimmer, supra note 1, at § 1.10[B].

5 See H. Howell, The Copyright Law: An Analysis of the Law of the United States Governing Registration and Protection of Copyright Works, Including Prints and Labels 1-10 (3d ed. 1952). The entire scheme of copyright law is a product of English law, dating back to the time when the printing press was invented, allowing literary and artistic works to be reproduced for circulation. Id. at 1-2. In 1556, a royal decree established commercial monopolies, called the Stationers' Company, to oversee the whole printing business. Id. In 1694, the ban on unlicensed printing was dispensed with and the Statute of Anne established the first law to recognize a property right of authors in their work. Id. at 2-3. The Act of 1790 assured protection to an author or his assignees of any "book, map or chart" for 14 years, with a privilege of renewal. Act of May 31, 1790, ch. 15, 1 Stat. 24 (1790).

The following years produced drastic revisions and enlarged the scope of protection. See H. Howell, supra, at 5-6. A subsequent revision of the Act of 1870, encompassed all amendments to the 1790 Act, and centralized the copyright process in the Library of Congress. See Act of July 8, 1870, ch. 230, 16 Stat. 198 (1870). Thereafter, the Copyright Act of 1909 expanded existing copyright law in the United States; however, poor draftsmanship resulted in a lack of clarity and cohesiveness in sections throughout the Act. See A. Latman, supra note 1, at 9. Furthermore, there existed a lack of uniformity in its application to the cases. Id.
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led to the enactment of the Copyright Act of 1976.\textsuperscript{6} Digital sampling is the borrowing of pre-recorded sounds through the use of a digital synthesizer to ultimately create a new, "original" sound recording.\textsuperscript{7} Although this practice has become one of the most controversial issues in modern copyright law, courts have been silent on whether or not sampling constitutes copyright infringement.\textsuperscript{8} It is submitted that without legislative


\textsuperscript{7} See \textquotesingle Sampling\textquotesingle Raises Hot Legal Issues, 6 ENT. LAW & FIN. 1 (1988) [hereinafter Legal Issues]. Digital sound sampling allows any sound to be recorded and subsequently manipulated by computer to generate the borrowed sound in new contexts. See Pareles, Digital Technology Changing Music: Who's the Owner of a Tune "Cloned" from Single Note?, N.Y. Times, Oct. 16, 1986, at C23, col. 4. “Sampling can be compared to cloning an entire organism from a single cell.” \textit{Id.} Furthermore, sampling devices enable musicians to "borrow" instrumental or vocal sounds of another artist which may represent the personal style or a type of "signature" of that artist. Dupler, Digital Sampling: Is it Theft? Technology Raises Copyright Questions, BILLBOARD, Aug. 2, 1986, at 1. According to some commentators, digital sampling is a catalyst of "musical plagiarism, capable of aiding and abetting an infringement [of a musician's work] by sampling sounds from one sound-recording and reproducing them in straight forward or derivative formats on a second sound recording." Goldberg & Bernstein, Music Copyrights and the New Technologies, 199 N.Y.L.J. 1 (1988). Ultimately, the only limitations to digital sampling are those of the artist's imagination. \textit{Id.} at 2.

Digital sound sampling is accomplished through the use of digital synthesizers, which can store sounds by analyzing them into distinct component parts and then translating each component into separate binary numerical values. B. Schrader, \textit{An Introduction to Electro-Acoustic Music} 140-58 (1982). \textit{See generally} C. Dodge & T. Jerse, \textit{Computer Music: Synthesis, Composition and Performance} (1985) (describing process of digital sound sampling): R. Runstein, \textit{Modern Recording Techniques} (1974) (same).\textsuperscript{6} See \textit{Legal Issues}, supra note 7, at 1. Although sampling has become one of the most controversial areas of copyright law, the courts have not decided whether sampling is a form of infringement because most claims have been settled. \textit{Id.} See, \textsl{e.g.}, Island Records, Inc. v. Next Plateau Records, Inc., No. 87 Civ. 8165 (S.D.N.Y. Nov. 17, 1987) (defendants agreed not to distribute records and to recall records previously distributed); Thomas v. Diamond, No. 87 Civ. 7048 (S.D.N.Y. Oct. 1, 1987) (action against Beastie Boys over use of samples in their album "Licensed to Ill"). Presently, however, cases are pending in which various forms of sampling are claimed to be copyright infringement. See Castor v. Def Jam Records, No. 87 Civ. 6159 (S.D.N.Y. Aug. 25, 1987) (where David Earl Johnson's distinct conga sound was sampled by Jan Hammer's synthesizer and used in theme from "Miami-Vice").

For an analysis of the approaches taken by the courts with respect to the closely related issue of musical plagiarism, see Metzger, \textit{Name that Tune: Proposal for an Intrinsic Test of Musical Plagiarism}, 34 COPYRIGHT L. SYMP. (ASCAP) 193 (1987).
action or judicial attention, the increasing use of digital sampling will result in economic hardship for artists. It is also submitted that a further disadvantage will be the listening public's inability to recognize individual artists.

This Article will focus directly on the controversy generated by digital sampling and its effects upon the entertainment industry. Furthermore, it will examine the common law, state and federal copyright laws, privacy statutes and the Lanham Act. It will propose that the common law of copyrights, as enforced by the states, is best suited for resolving the sampling dilemma. Finally, this Article will set forth possible defenses to a sampling claim.

I. THE SAMPLING CONTROVERSY: ITS EFFECTS ON THE MUSIC INDUSTRY

Digital sampling may be successfully undertaken anywhere, from a state-of-the-art recording studio to the basement of a home. Depending upon the instruments sampled, a digital sampler can generate sounds ranging from a simple solo melody to an orchestral ensemble. Once a sample is stored in digitally analyzed components, the sound can be manipulated, perfected and sold.

As a result of the simplicity of this form of appropriation, digital

9 See Blauner, Free Samples?, FAST TRACK, Oct. 20, 1986, at 32; see also Dupler, supra note 7, at 74 (sampling conga drums in recording session). In an interview of musician David Earl Johnson, conducted by Steven Dupler, Johnson explained how he "exchanged favors" in the recording studio with synthesist Jan Hammer while Hammer was writing the theme to the television hit series "Miami-Vice." Id. (quoting Johnson). Johnson stated, "He [Hammer] helped me mix a tune, and I let him sample my congas and some very unique 80-year-old African drums with the Fairlight, [a type of digital sampling device]." Id.

10 Neuman, An American Sampler, Artificial Intelligence, OMNI, May, 1988, at 20. Neuman's investigations of digital sampling resulted in the discovery of a music program-mer, who demonstrated how digital sampling makes stealing sounds possible in the privacy of his basement. Id.

11 Pareles, supra note 7, at C23, col. 2. The practical impact of sound sampling by a sampler operator who has the power to electronically fabricate a performance of sounds from "John Coltrane's saxophone, Gene Krupa's drums, Paul McCartney's electric bass, Murry Perakia's piano and the voices of Enrico Caruso and Sarah Vaughan," is his or her ability to formulate a composition in which these artists never contemplated. Id.

The first digital sampler, the Fairlight, appeared on the market in 1975, with an average cost of $30,000. Id. at C23, col. 5. Now, as a result of the decline in cost of computer memory chips, all the major keyboard manufacturers can afford to distribute digital samplers at reasonable prices. Id. (quoting Dominic Milano, editor of KEYBOARD MAGAZINE).

12 Note, Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic
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sound sampling has become both profitable and controversial within the music industry.\(^1\)

Because synthesizer operators appropriate the artists' original sound works without fair compensation, one consequence of digital sampling may be that performing musicians will find themselves smothered by its adverse economic effects.\(^2\) According to one commentator, "[w]ith the realistic sound of strings, winds, orchestras and choirs at a single player's disposal, there is less need to hire musicians on the individual instruments."\(^3\) Moreover, the loss of the artists' professional identity and individual recognition is inevitable because of the unlimited production capabilities of digital samplers.\(^4\)

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\(^1\) Appropriation of Sounds, 87 Colum. L. Rev. 1723, 1725-26 (1987). Music programmers are no longer merely perfecting sounds, but have progressed to building large libraries of individual sounds. See Neuman, supra note 10, at 20. This abuse has resulted in a growing black market of sampled music from which programmers build sound libraries with sounds sampled from compact discs. Id.; see also Note, supra, at 1726 (describing growing number of black market recording engineers who keep "libraries of samples to use in lieu of flesh and blood performers"); DeCurtis, Who Owns a Sound?, Rolling Stone, Dec. 4, 1986, at 13 (popularity of sampling has created black market for digital samples). But cf. Pareles, supra note 7, at C23, col. 5 (acknowledging that producer Trevor Horn, who sampled drum sound of Alan White, drummer of rock group Yes, for composition "Beat Box" by The Art of Noise, compensated Mr. White).

\(^2\) See Dupler, supra note 7, at 74 (digital sampling raises difficult copyright questions); see also Note, supra note 12, at 1724 (sampling in music industry is as widespread as it is controversial and damaging); DeCurtis, supra note 12, at 13 (sampling is pervasive recording technique and litigation could proliferate if industry standards are not set).

\(^3\) See Pareles, supra note 7, at C23, col. 4. Economically, sampling threatens the employment of studio and concert performers. Id. In reaction to Jan Hammer's sampling of David Earl Johnson's playing of his conga drums, Johnson declared, "[i]f you listen to the theme music [from "Miami-Vice"], you'll hear those congas and they're way up front. Jan wanted those sounds because they're so unique. Now I'd like to get paid for that. He's got me and my best sounds for life, and there's no compensation." Dupler, supra note 7, at 74 (quoting Johnson). See generally Note, supra note 12, at 1726-27, ("[p]erformers working hard to get an edge in a competitive recording industry by using distinct, interesting sound find their exact sound appearing on competing recordings" for which they were never paid).

\(^4\) See Pareles, supra note 7, at C23, col. 4. "A single synthesizer player can replace several acoustic musicians because he can hold trumpet, string, drum, bass and vocal sounds all on a single floppy disk and thus undersell acoustic talent." Note, supra note 12, at 1726.

\(^5\) Dupler, supra note 7, at 74. An author has an interest in protecting his unique identity, not only where the general public is concerned, but also where the record producers who hire performers are concerned. See Note, supra note 12, at 1726-30, 1738-43. This is true because "instead of hiring one musician over another, producers are beginning to select among competing samples." Id. at 1727.
II. THE COPYRIGHT LAWS

A. Common Law Copyright and State Privacy Statutes

1. The Common Law

Common law copyright protection was perpetuated by the states and extended to unpublished works at their inception. Upon publication, these common law rights terminated and the only remaining protection had to be predicated upon federal statutory copyright. In the past, this procedural requirement of publication delineated the separation between common law protection and statutory protection for copyright. The potentially problematic dual system of copyright protection was virtually eliminated with the addition of a preemption provision in the fed-


Although most states protected the unpublished works of authors and artists under the common law, California alternatively predicated protection of these works under statute. See Cal. Civil Code, § 980(a)(1) (Deering 1988) ("author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or in the expression thereof").

18 See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834). The author under a common law scheme maintained exclusive rights in his manuscript until publication, whereupon all these rights terminated forever, unless he or she was in strict compliance with the copyright provisions governing rights to future publications. Id. at 664; see also Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102, 1109, 198 Cal. Rptr. 296, 300 (1984) (common law rights pertaining to unpublished works will continue until creator allows "general" publication of his work); Hemingway, 23 N.Y.2d at 346 n.1, 244 N.E.2d at 254 n.1, 296 N.Y.S.2d at 776 n.1 ("Although common-law copyright in an unpublished work lasts indefinitely, it is extinguished immediately upon publication of the work by the author."). See generally A. Latman, supra note 1, at 5 (exclusive rights terminate at common law upon publication unless author abides by requirements of Copyright Act).

19 See A. Latman, supra note 1, at 65, 110. The concept of publication evolved under the 1909 Act largely in response to the dichotomy which existed between common law and statutory copyright. I M. Nimmer, supra note 1, at § 4.01. In contrast to the 1909 Act, where the courts were required to define the term through the use of case law, the current Copyright Act defines "publication" as:

[the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.

Consequently, the sole protection now afforded by the common law copyright doctrine inures to works which do not constitute a "work of authorship" within the meaning of the Copyright Act and works which are not fixed within a tangible medium of expression so as to satisfy the "writing" condition of the Constitution. Therefore, works which do not fit within the above federal categories are not preempted and are properly protected under the common law. It is asserted that since states have the power to provide protection to an unfixed

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20 17 U.S.C. § 301(a) (1982). This preemption provision applies to rights asserted in works "whether published or unpublished" and thus adopts a single system of federal statutory copyright protection. Id. As a result of § 301(a), state law is preempted by federal law and common law copyright is no longer applicable to "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by" the copyright law and fixed as of January 1, 1978. Id. This section exclusively governs "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . ." Id. Consequently, any work which falls within the statutory definition of "subject matter," and which is properly "fixed," is afforded its sole protection under the terms of the federal law. Id.

If the work is not properly "fixed," nor the proper "subject matter" in accordance with the terms of the statute, it is immune from federal preemption and afforded copyright protection under the common law. 17 U.S.C. § 301(b)(1) (1982). Section 301(b)(1) preserved certain "rights or remedies under the common law or statutes of any state" with respect to "subject matter that does not come within the subject matter" defined by the statute as "including works of authorship not fixed in any tangible medium" or with respect to activity that does not violate the "exclusive rights within the general scope of copyright." Id. Therefore, the states have the power to protect certain works under the common law doctrine of copyright. See generally 1 M. Nimmer, supra note 1, at § 2.02 (discussing common law copyright protection).

21 17 U.S.C. § 102(a) (1982). Section 102(a) of the Act provides in pertinent part that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated" and a work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or communicated for a period of more than transitory duration. Id.

22 See U.S. Const. art. I, § 8, cl. 8. The "writing" requirement under Article I, section eight compels a work to be of some tangible form capable of identification, thus recognizing "fixation" as a statutory condition, as well as a constitutional necessity. Id. Unless an artist's work is reduced to tangible form, it cannot be recognized as a "writing" within the text of the Constitution. See O'Brien v. RKO Radio Pictures, 68 F. Supp. 13, 14 (S.D.N.Y. 1946). See generally 1 M. Nimmer, supra note 1, at §§ 1.08[A], [C] (discussing liberal construction given by courts to term "writings" but noting requirements of intellectual labor and tangible form in order for work to constitute a writing).

work, any sound sampled from a “live performance” is the proper subject of common law copyright protection.24

Courts have recognized a common law property right in an artist’s voice25 and face26 based on his unique style of performing.27

24 See Note, supra, note 12, at 1744 (live performance not preempted and thus subject to state law).
25 See Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). In Midler, the court stated that a “voice is not copyrightable” and thus Midler’s claim was not preempted by federal copyright law. Id. at 462. The Ninth Circuit held that an advertiser’s use of Bette Midler’s voice, performed by a sound-alike as part of a commercial advertisement, constituted unauthorized misappropriation of Midler’s property rights in her distinctive vocal sound and paralleled the behavior of an average thief. Id. at 463-64. The court declared that “[t]he singer manifests herself in the song. To impersonate her voice is to pirate her identity.” Id. at 463. Additionally, the court stated that the defendants invaded a proprietary interest found within Midler’s voice. Id. at 463-64.

While imitation of one’s distinct sound constitutes an appropriation of another’s property which courts have deemed tortious conduct, imitation without identification will not give rise to a cause of action. See, e.g., Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 235-36 (1964) (need for capacity to identify and create confusion required for recovery); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 826-27 (9th Cir. 1974) (court indicated that as a matter of law, if “plaintiff is not identifiable...then in no sense has plaintiff’s identity been misappropriated nor his interest violated”); Price v. Worldvision Enters., 455 F. Supp. 252, 258 (S.D.N.Y. 1978) (dicta) (mere imitation of unidentifiable voice does not constitute infringement), aff’d, 603 F.2d 214 (2d Cir. 1979); see also Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 348 (S.D.N.Y. 1973) (imitation alone does not constitute unfair competition under New York law); Davis v. Trans World Airlines, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969) (anonymous imitation of plaintiff’s recorded performance does not give rise to cause of action).

26 See Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985). In Woody Allen’s action against an advertising company and a “Woody Allen look-alike,” who were both involved in representing Allen’s face in a commercial endorsement, the court noted that the plaintiff had cultivated a valuable property interest in his unique public image. Id. at 622. The court declared that Allen had invested time and energy in manifesting a unique performing style and recognized the appropriation of Allen’s likeness for defendant’s commercial advantage. Id.

Courts in the past have held that attributes of a celebrity’s identity are protected by the common law. See, e.g., Carson v. Here’s Johnny Portable Toilet, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (celebrity has property interest in his identity that may be protected from unauthorized commercial exploitation of that identity); Estate of Presley v. Russen, 513 F. Supp. 1399, 1357-59 (D.N.J. 1981) (liability for impersonating late Elvis Presley in paid performances); Worldvision, 455 F. Supp. at 257 (liability for use of name and likeness of Laurel and Hardy); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 App. Div. 2d 620, 622, 396 N.Y.S.2d 661, 664 (2d Dep’t 1977) (liability for portraying Guy Lombardo based on exploitation of property interest in his personality).

27 See Midler, 849 F.2d at 463. The Midler decision expanded the rights granted to performers in look-alike cases to performers in sound-alike cases and increased the breadth of application of the common law and privacy statutes. Speech by Felix Kent at Sardi’s Restaurant (New York City), Partner at Hall, Dickler, Lawler, Kent & Friedman (November 11, 1988). Midler may ultimately result in an opening of the floodgates or a “pandora’s box” for actions which did not previously fit within the protection of existing law—e.g. Jack Benny’s routine of saying “well” while placing his hand on his chin and Michael Jack-
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Such claims were proper subjects of common law protection since the artists were not claiming infringement based on copyright, but merely infringement upon elements which cannot be "fixed in [a] tangible medium" so as to be afforded protection under the Act.26 It is asserted that, with respect to digital sampling, the federal Copyright Act likewise fails to provide adequate protection to an individual sound produced by an artist within a composition.29 Since courts have acknowledged a common law property right in an individual's voice and face, it is submitted that by analogy the same rights should be afforded to vocal artists and musicians who invest their time to develop an individual and recognizable performing style which is later consciously appropriated by digital samplers.

2. State Privacy Statutes

It is suggested that a second action which may successfully be asserted against digital samplers is based on a violation of a state's right-of-privacy statute. One such statute, promulgated under the

son's single white glove. Id. In addition to recognizing a performer through a unique style he maintains, there exists an "ability to recognize . . . the distinctive chords and arrangement styles of various groups and performers [which] is not limited to rock aficionados, but is the shared vocabulary of an entire generation." Marks, The Bette Midler Case: Judiciary Finally Listens to Sound Alike Claim, 200 N.Y.L.J. 7 (1988). Moreover, because artists have expended the "sweat equity" in achieving distinction, they maintain a strong interest in preventing look-aliases and sound-aliases from profiting by the commercial exploitation of their unique style. Id.

An inherent element of the creative process is the fact that composers, artists and writers develop new works that "bare the stamp of their own distinctive style . . . ." N.Y. Times, Nov. 11, 1988, at B5, col. 3. (quoting musician John Fogarty).

26 See 17 U.S.C. § 102(a) (1982). For a work to be considered "fixed" in order to receive copyright protection, it must denote some capable form of identification with a permanent endurance. Columbia Broadcasting Sys. v. DeCosta, 377 F.2d 315, 320 (1st Cir.), cert. denied, 389 U.S. 1007 (1967). The court in DeCosta declared that to the extent a creation may be ineffable, it is ineligible for copyright protection. Id. From this it follows that one's voice or face is not a proper candidate for copyright protection, but this must be distinguished from an owner's copyright interest in the underlying work the voice or face represents. 1 M. Nimmer, supra note 1, at § 1.081c.

29 See generally DeCurtis, supra note 12, at 13 (while copyright laws protect specific performances, it is unclear whether artist's sounds are protected); Dupler, supra note 7, at 1 ("copyright laws only cover the sequence of notes in a composition, not the actual notes within that sequence") (quoting William Krasilovsky, Esq.); Note, supra note 12, at 1727 (unfixed performance does not constitute "writing" under article 1, section eight and may not be subject to copyright protection).
California Civil Rights Code,\(^{30}\) includes a provision which prohibits the taking of one's "likeness, in any manner," for commercial purposes.\(^{31}\) Similarly, the New York right-of-privacy statute protects against misappropriation of another's "name . . . or picture" for commercial or trade use; however, unlike the California statute, the New York statute does not explicitly include the term "likeness" within the text.\(^{32}\) Notwithstanding the omission, courts have included by implication the term "likeness" in the New York statute in order to further the legislative intent to protect an artist's proprietary right to profit from his or her own identity.\(^{33}\) It is


\(^{31}\) Id. The code prohibits the use of "another's name, voice, signature, photograph, or likeness, in any manner . . . " for commercial purposes without the individual's consent. Id. Skepticism casts doubt upon the court's limiting the term "likeness" in the California privacy statute to visual images. Marks, supra note 27, at 7. Experts assert that the judiciary today would be apt to determine that an entertainer is as readily identifiable from the uniqueness of his voice, as from his own individual image. Id. But cf. Booth v. Colgate-Palmolive Co., 362 F. Supp. 543, 547 (S.D.N.Y. 1973) (actress Shirley Booth precluded from asserting sound-alike claim against defendant using Booth's voice in commercial).

Copyright experts suggest that the practice of digital sound sampling may be in violation of state statutes which include the term "likeness" in the statute. Hollander & Dupler, Digital Technology May Violate Copyright Law: Experts Doubt the Legality of Sampling, Billboard, Aug. 9, 1986, at 4.

\(^{32}\) See N.Y. Civ. Rights §§ 50-51 (McKinney 1987). The code prohibits the unauthorized use of "another's name, portrait or picture . . . " for commercial or trade purposes. Id. It has been suggested that the terms "voice" and "likeness" were left out of the statute as a possible legislative oversight, "since the possibility of reproducing and disseminating the sound of a voice was not contemplated in 1903 when sections fifty and fifty-one were first enacted." Onassis v. Christian-Dior, 122 Misc. 2d 603, 609, 472 N.Y.S.2d 254, 259 (Sup. Ct. N.Y. County 1984).

\(^{33}\) See, e.g., Ali v. Playgirl, Inc., 447 F. Supp. 723, 725-26 (S.D.N.Y. 1978) (terms "portrait or picture," in New York privacy statute includes all recognizable representations of an individual); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 845 (S.D.N.Y. 1975) (actor had property rights in his name and likeness, which were inheritable by heir); Onassis, 122 Misc. 2d at 608, 472 N.Y.S.2d at 259 (noting that phrase "portrait and picture" in section fifty-one was not restricted to actual photographs, but comprised any representations which are recognized as "likenesses" of individual). But see, e.g., Lahr v. Adell Chem. Co., 300 F.2d 256, 258 (1st Cir. 1962) (New York statute cannot protect infringement of sound-alike because it is limited to "name, portrait or picture"); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 App. Div. 2d 620, 622, 396 N.Y.S.2d 661, 664 (2d Dep't 1977) (court deemed "right-of-privacy" statute cannot be construed to include "image" or "likeness").

submitted that a sampling claim, based on an individual's right to profit from his own identity, as represented by his music, would be successful under the state privacy statutes in New York and California.

B. The Copyright Act of 1976

Despite the flexibility of common law copyright and state statutes in combating the exploitations provoked by new technology, it is necessary to focus on applicable federal law to determine the extent of protection potentially afforded in the area of digital sampling. The Copyright Act of 1976 (the "Act")\(^4\) protects "original works of authorship"\(^5\) which are "fixed in any tangible


\(^{5}\) Id. at § 102 (1982). Section 102 provides copyright protection to "original works of authorship." Id. A prerequisite for copyright protection to be afforded to any type of subject matter is that the work must be "original." Durham Indus. v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980). In defining the term "original," which both the 1909 Act and the 1976 Act fail to do, judicial construction has recognized that "originality" merely calls for independent creation, not novelty. E. Mishan & Sons, Inc. v. Marycana, Inc., 662 F. Supp. 1359, 1342-43 (S.D.N.Y. 1987). In addition, nothing in the Constitution demands uniqueness or novelty in the copyrighted work. L. Battin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.), cert. denied, 429 U.S. 857 (1976). A work may be deemed "original," even if it is identical to a separate work, provided it was an independent creation by the author and not copied from the original. Alfred Bell & Co. v. Cataldi Fine Arts, Inc., 191 F.2d 99, 102-05 (2d Cir. 1951).

According to Judge Learned Hand, the underlying principles as to what constitutes "originality" would hypothetically lead to a situation in which "if by some magic a man who had never known it were to compose a new Keats' Ode On a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats." Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), cert. denied, 298 U.S. 669 (1936). However, the liberal standard for copyright protection will not substitute as justification for plagiarism. Id. at 56.

Under the copyright law, any "distinguishable variation" will constitute sufficient originality. Id. (citing Alfred Bell, 191 F.2d at 102). "No matter how poor artistically the 'author's' addition, it is enough if it be his own." Alfred Bell, 191 F.2d at 103 (citing Bleinstein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903)); see also Gerlach-Barklow Co. v. Morris & Bendien, 23 F.2d 159, 161 (2d Cir. 1927) (distinguishable variation will protect work from being copied, even if it has same theme). See generally 1 M. Nimmer, supra note 1, at § 2-2[B] (discussing degree of originality required under copyright act).

The meaning of "works of authorship" within the Act is not confined to its literal meaning of "a writing" as evidenced by expressly enumerated protection for, "literary works; musical works . . . dramatic works . . . pantomines . . . pictorial, graphic and sculptural works; motion pictures . . . and sound recordings." 17 U.S.C. § 102(a) (1982). In addition, the statute is flexible enough to include new forms of expression developed through technology. See International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) ("writing" as used in Constitution read expansively); Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981) (same); Deutsch v. Arnold, 98 F.2d 686, 688 (2d Cir. 1938) (same). See
medium of expression." By focusing on the statutory language in light of the congressional view towards musical reproduction and the courts' deferential perspective toward the Act, it is submitted that statutory copyright protects an artist against unlawful sound sampling.

In order for an artist to successfully assert a claim under the Act, he or she must demonstrate ownership, reproduction and substantial similarity to the original work. The determination of ownership is based upon whether the person claiming copyright protection is the creator of the work. If the artist is not the copyright owner, any possible statutory protection afforded against sound sampling will depend entirely upon whether the actual owner has an interest in protecting the musician or the development of the sampling technique. After ownership has been established, it must be determined whether the alleged infringer has in fact sampled the original artist's sound by merely altering the sequence or quality of the original recording. Ultimately, the

generally 1 M. Nimmer, supra note 1, at § 2.03[A] (discussing meaning and interpretation of "writing").

36 17 U.S.C. § 102(a) (1982). For a work to be considered "fixed," it must be "em bod[ied] in a copy or phonorecord . . . permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Id. § 101. Accordingly, courts have determined that in order for a work to become protected under the statute, it must have at least some independent material form which is identifiable and distinguishable. See, e.g., Durham Indus. v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980) (work must have "distinguishable variation from preexisting work"); Columbia Broadcasting Sys. v. DeCosta, 377 F.2d 315, 319-20 (1st Cir.) (work must be of some identifiable form), cert. denied, 389 U.S. 1007 (1967).

37 17 U.S.C. § 201(a) (1982). The statutory copyright interest within a work "vests initially in the author or authors of the work." Id. Furthermore, an individual may be deemed the owner of a work as an assignee of the author's rights. See Van Cleef & Arbels, Inc. v. Schechter, 308 F. Supp. 674, 676 (S.D.N.Y. 1969). But see Ripley v. Findlay Galleries, 155 F.2d 955, 957 (7th Cir.) (once author assigns his work, he or she gives up the right to claim copyright protection), cert. denied, 329 U.S. 775 (1946); S. Shemel & W. Krasilovsky, This Business of Music 65-66 (5th ed. 1985) (artist who is employee for hire never had copyright interest; artist can contract for higher percentage in royalties from producer in consideration for his copyright interest). See generally 1 M. Nimmer, supra note 1, at § 5[A] (discussing possible theories of copyright ownership).

38 See Note, supra note 12, at 1730. If the actual owner of the copyright is the record company, the protection interests of the respective parties will ultimately differ because after the record company weighs the "reduction of production costs offered by sampling against the maintenance of good studio/musician relations, . . . its long-term interest lies in protecting sampling rather than live musicians." Id. (footnote omitted).

39 See United States v. Taxe, 380 F. Supp. 1010, 1013 (C.D. Cal. 1974), aff'd in part, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977). In Taxe, the defendants re-
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artist must demonstrate that the sampler's act rises to the level of unlawful infringement by proving that the resulting recording is substantially similar and may be recognized as the same performance.46

Congress and the courts have given some insight into their perception of the inappropriate use of an artist's work without compensation. Through an examination of the legislative history un-

recorded the copyrighted compositions with changes in the speed of the sounds by deleting certain frequencies and tones and adding sounds from a synthesizer. Id. The court stated that "[t]o constitute an infringement, there must be a re-recording of more than a trivial part of the copyrighted recording" and the final product must be recognizable as the same performance as the original. Id. at 1017. The court held that despite changes of speed and frequency in the re-recording, the final product was recognizable as the original performance, and therefore there was willful infringement of plaintiff's copyright protection. Id. 46 See, e.g., Warner Bros. v. American Broadcasting Cos., 654 F.2d 204, 208 (2d Cir. 1981) (where works have similarities which go beyond "mere generalized ideas or themes," infringement occurs); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir.) ("[n]o plagiarist can excuse the wrong by showing how much of his work he did not pirate"), cert. denied, 298 U.S. 669 (1936). But see Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 501 (2d Cir. 1982) ("defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of the plaintiff's") (citation omitted).

The quantitative aspect of infringement is certainly important, however, if there is substantial qualitative copying, the alleged infringement may be deemed substantially similar. See 3 M. Nimmer, supra note 1, at § 13.03 (A)(2). When the portion copied is of great importance to the work as a whole, the copying can rise to a level of substantial similarity because the value of the original work becomes substantially diminished. Id. See, e.g., Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir.) (recognizing doctrine of "fragmented literary similarity"), cert. denied, 476 U.S. 1159 (1986); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 361 (9th Cir. 1947) (whole work need not be taken to constitute copyright infringement; merely enough to diminish value of original); Werlin v. Reader's Digest Ass'n, 558 F. Supp. 451, 463 (S.D.N.Y. 1981) (copying can rise to level of "fragmented literary similarity" and diminish value of work). Thus, the analysis of substantial similarity must be both quantitative and qualitative. See Silverman v. Columbia Broadcasting Sys., 632 F. Supp. 1344, 1352 (S.D.N.Y. 1986); Werlin, 558 F. Supp. at 463-64.

For a discussion of the substantial similarity requirement for copyright protection of various musical compositions, see Sherman, Musical Copyright Infringement: The Requirement of Substantial Similarity, 22 COPYRIGHT L. SYMP. (ASCAP) 81 (1977).

derlying compulsory licensing, it is apparent that Congress intended to encourage different arrangements of the same song, while still providing fair compensation to the original artist. Furthermore, to accommodate advancing technology, the courts have shown great deference by interpreting the Act in broader terms.

It is suggested that the proper method of analysis and application of the Act to sampling depends upon the length and degree of infringement of the original work to create the sampled material. Indeed, some sampled segments are so short in duration and dramatically altered that copyright protection cannot be afforded. However, if the work remains recognizable as the original performance, albeit slightly altered, then the sampled material complies with the applicable criteria for copyright protection.

C. The Lanham Act

A final source of copyright law which may afford a viable source of protection against the problems generated by digital sampling is the Lanham Act. The protections of the Lanham Act, enumerated in section 43(a), enable a plaintiff to sue for damages.
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or injunctive relief\textsuperscript{48} for any "false designation of origin, or any false description or representation" sufficient to confuse the pub-

... any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

\textit{Id.}

Because the purpose of the Act was to protect individuals from unfair competition that resulted from trademark or tradename infringement, past judicial interpretation restricted its applicability. See Bauer, \textit{A Federal Law of Unfair Competition: What Should be the Reach of Section 43(a) of the Lanham Act}, 51 UCLA L. Rev. 671, 682-85 (1984).

Section 45 of the Act declares that among the Act's purpose is "to protect persons engaged in ... commerce against unfair competition [and] to prevent fraud and deception in ... commerce by the use of reproductions, copies, counterfeits, or ... imitations ... ."


In 1954, the language of section 43(a) was given broader construction and protection was extended to parties who were victims of deliberate and false representations. See L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 650-54 (3d Cir. 1954) (defendant held liable for causing mistaken impression of plaintiff's product through use of mail order). See generally Allison, \textit{Private Cause of Action for Unfair Competition Under the Lanham Act}, 14 Am. Bus. L.J. 1, 4-6 (1976) (broad construction of § 43(a) protects against false representations). Subsequently, this section was given further application. See, e.g., PPX Enters. v. Audio Fidelity Enters., 818 F.2d 266, 268 (2d Cir. 1987) (plaintiff afforded protection under § 43(a) because defendant marketed albums purporting to contain performances by Jimi Hendrix, when Hendrix was merely session performer); Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24-25 (2d Cir. 1976) (section 43(a) extended protection to plaintiff's comedy program which defendant presented to public in garbled form); Vuitton Et Fils, S.A. v. Crown Handbags, 492 F. Supp. 1071, 1076-77 (S.D.N.Y. 1979) (under section 43(a) defendant barred from distributing imitation Vuitton handbags), aff'd, 622 F.2d 577 (2d Cir. 1978); Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516, 517-18 (S.D.N.Y. 1978) (defendants liable for selling album purporting to contain principle recordings by George Benson, who was merely background player). See also \textit{Restatement of Torts} § 761 (1939) (discussing civil liability of defendant who deliberately misrepresented his goods as equal to another's); Comment, \textit{Injunctive Relief for Trademark Infringement - The Second Circuit Misses the Mark: Home Box Office v. Showtime/The Movie Channel}, 62 St. John's L. Rev. 286, 286-89 (1988) (explaining application of Section 43(a) of Lanham Act).

\textit{PPX Enters.}, 818 F.2d at 271. In order to establish a claim for damages, plaintiff must demonstrate "actual consumer confusion or deception" through the use of direct or circumstantial evidence and testimony. Id. (emphasis added). See, e.g., Warner Bros. v. Gay Toys, Inc., 659 F.2d 76, 79 (2d Cir. 1981) (plaintiff must prove public was actually deceived to recover damages under section 43(a) of Lanham Act); DC Comics, Inc. v. Filman Assoc., 486 F. Supp. 1273, 1279 (S.D.N.Y. 1980) (same).

\textit{PPX Enters.}, 818 F.2d at 271. In attempting to establish a claim for injunctive relief, plaintiff must demonstrate a "likelihood of deception or confusion on the part of the buying public caused by false description or representation." Id. (emphasis added). See Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 316 (2d Cir. 1982) (likelihood of confusion or deception is necessary to obtain equitable relief); Black & Decker Mfg. Co. v. Ever-Ready Appliance Mfg. Co., 518 F. Supp. 607, 616 (E.D. Mo. 1981) (same), aff'd, 684 F.2d 546 (8th Cir. 1982).

A reasonable person standard must be proven in a § 43(a) action. See, e.g., Vidal Sassoon v. Bristol-Myers Co., 661 F.2d 272, 278 (2d Cir. 1981) (cause of action exists where consumer test results deceive reasonably intelligent consumer); Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 190 (2d Cir. 1980) (statute demands only proof providing reasonable basis for belief of likely injury).
The critical inquiry in cases of consumer confusion is whether the consumer was actually deceived, or was likely to be deceived, by the defendant's product (i.e., sound or style), mistaking it for the plaintiff's so as to entitle him to relief under the Lanham Act. This deception may manifest itself from the utilization of the originator's work to enhance the work of the infringer, a concept commonly known as "reverse palming-off". It is asserted that in cases of sound sampling, as in cases of sound-alikes, there will be a mistake in identity as to the artist performing on the album sold in commerce, creating confusion to the public and ultimately resulting in liability. It is further suggested that an artist's sound or style can be so unique that it tends to identify the same, and when sampled results in deception or confusion of the public as to the "origin" of the sampled sound.


It is clear that an imitation of a distinctive voice which ultimately results in public confusion is actionable. See Lahr v. Adell Chemical Co., 300 F.2d 256, 259 (1st Cir. 1962). This is true especially when the defendant causes a "mistake in identity, because "[s]uch passing-off is the basic offense." Id.

See, e.g., PPX Enters., 818 F.2d at 271. See Perfect Fit Indus. v. Acme Quilting Co., 618 F.2d 950, 955 (2d Cir. 1980) (consumers must be actually misled or confused as to origin of goods), cert. denied, 459 U.S. 832 (1982); D.C. Comics, 486 F. Supp. at 1279 (consumers must be confused as to origin of products).


Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1982). The phrase "false designation of origin" within section 43(a) of the Act has been broadly construed by the courts to apply to various aspects of the origin of goods. See, e.g., Liquid Controls Corp. v. Liquid Control Corp., 802 F.2d 934, 939-40 (7th Cir. 1986) (prohibition against false designation of origin may protect "passing-off" of non-distinctive term); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 871 (2d Cir. 1986) (in deciding likelihood of confusion, law
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thereby qualifying for relief under the Lanham Act.

III. POSSIBLE DEFENSES

A possible defense to a claim of sampling is that the result of sound sampling represents a new and independent fixation, different from the original and thus does not constitute infringement. Furthermore, sound sampling may fall within the “fair use” exception of the Act.

The Lanham Act does not prohibit “an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” An “independent fixation of sounds” occurs when there is a new performance of a sound, in contrast to the mere “re-recording of the copyrighted fixation.” Thus, an individual accused of sampling infringement will ultimately defend on the basis of “independent fixation,” claiming that to have a copyrightable work demands some type of originality.

should be liberally construed): Federal-Mogul-Bower Bearings v. Azoff, 313 F.2d 405, 408 (6th Cir. 1963) (“origin” is liberally construed and therefore extends to identity of manufacturer).

See 17 U.S.C. § 114(b) (1982). This possible defense is not without precedence because under the prior copyright act limited copyright protection was afforded to sound recordings fixed after February 15, 1972. See 1 M. Nimmer, The Law of Copyright § 35 (1975). Under the relevant provisions, the copyright owner acquired the exclusive right to duplicate, but this did not bar independent fixation by another of other sounds similar to those copied. See United States v. Taxe, 540 F.2d 961, 965 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).


“The [fair use] doctrine is an equitable rule of reason ... and each case raising the question must be decided on its own facts.” H.R. Rep. No. 83, 90th Cong., 1st Sess., at 29 (1967). In determining the validity of a fair use defense however, courts have enumerated several elements which should be examined to properly make this ad hoc determination. See infra notes 56-59 and accompanying text.


See, e.g., L. Batlin & Son, Inc. v. Snyder, 536 F. 2d 486, 490 (2d Cir.) (test of copyright originality can be fulfilled by “merely trivial variation”), cert. denied, 429 U.S. 857 (1976);
Regardless of whether or not the alleged infringement can be classified as an independent fixation, courts have allowed the in-substantial use of a work without permission. Fair use is a privilege belonging to those who use another's copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. The scope of what constitutes fair use will be determined by "(1) the purpose and character of the use, including whether such use is of 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." It is asserted that in light of the factors enumerated above, sampling could fall under the fair use exception. However, if so much of the original work is taken so that its value is diminished to an injurious extent, or if the efforts of the original author are significantly appropriated by another, that is sufficient to constitute a piracy pro tanto.

CONCLUSION

Focusing on the broad aspect of liberty granted by the first
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amendment and the countervailing limits imposed by the copyright law, courts have successfully balanced the opposing interests of a society that favors the right to free expression against an individual's right to reap the benefits of his original creations. This accomplishment was achieved through the common law and legislation. Despite this success, modern technology and electronic inventions are upsetting this balance by imposing a substantial economic threat to the careers of musicians through the use of digital sound sampling. Individuals who support sound sampling inappropriately claim that imitation is the most sincere form of flattery. Defenders of sampling also claim that it should be viewed as a "musical collage," which is merely the assembly of diverse fragments and thus not an infringement. More accurately, digital sampling involves the "use of the sweat of somebody else's brow" to reap the commercial benefits that are derived from public recognition.

Through the application of the relevant common law copyright laws, along with case law and legislation used in situations analogous to digital sampling, the challenges presented by sound sampling can be successfully combatted and protection afforded in cases of sampling infringement. If the existing legal avenues prove inadequate, legislative action will be necessary to properly regulate sound sampling and to provide just compensation to sampled artists.

Lori D. Fishman

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60 Marks, supra note 27, at 1. Some sampler operators claim that most musicians are flattered to hear their sounds being used and do not see sampling outside a music tape session as an infringement. Dupler, supra note 7, at 74. In defense of sound sampling, one technician claimed, "[t]he sound sources are out there — if you sample your dog or a bird in a tree, is he entitled to copyright?" Id. (quoting Bobby Nathan, co-owner of Unique Recording).

61 Interview with Robert A. Weiner, Esq., Associate at Berger & Steingut and counsel to Beastie Boys in digital sampling litigation, in New York City (Nov. 9, 1988). For a perspective on commercially benefiting from another's efforts, see Callmann, He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition, 55 Harv. L. Rev. 595 (1942).

62 Marks, supra note 27, at 7. See Dupler, supra note 7, at 74.