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Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology

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COMMENT

DIGITAL SAMPLING: OLD-FASHIONED PIRACY DRESSED UP IN SLEEK NEW TECHNOLOGY

In a dream, a young record producer envisions a ballad crooned by the King, Elvis Presley, and accompanied by the brilliant solos of the legendary trumpeter, Miles Davis. Mesmerized by the vision, the producer's mind grew obsessed with the idea of the song. Although it was impossible to record with Elvis, he decided to produce the song by auditioning Elvis sound-a-likes and negotiating with Miles Davis. Upon inquiry the producer discovered the revered trumpeter's fees were far above his recording budget. Similarly, none of the Elvis sound-a-likes really sounded like Elvis. Dejected, he resigned himself to the futility of the project. Later, during a phone call with a fellow record producer, he recounted his dilemma concerning the song. The other producer laughed and said, "I have the power to make Elvis sing and Miles Davis play in any way you may command. Come over to my studio." Within two weeks, the song had been recorded using the voice of Elvis and the trumpet playing of Miles Davis.

An amusing fantasy? Hardly. The record producer was not lying, for this is a tale of scientific fact. Although the notion of a musical artist, living or dead, singing or playing a musical instrument without his consent or input seems absurd, it is an amazing innovation originating from the breakthrough technology of digital audio recording. At issue is the use of digital samplers, devices capable of identifying, analyzing, capturing and duplicating any sound even if surrounded by other sounds.[1] The controversy concerns whether the practice of digitally sampling a copy-

1. Thus, it seems Elvis is alive, well and living in a digital sampler. *See,* Seligman, *Saved! Classic Rock Tracts Kept Forever Young on C.D.,* 482 ROLLING STONE 81, 82-83 (1986) [hereinafter *Seligman*]:

> At the rate of 44,100 times per second, a digital recorder samples a musical signal and analyzes each harmonic and dynamic characteristic within it and instantly renders the data in a binary code that can be understood by computer. A musical phrase as short as "She loves you yeah, yeah, yeah" would be sampled 11,250 times. The entire two-minute nineteen-second song would require roughly 6,129,900 separate samples. The resulting code for each sample is recorded on a digital master tape and any subsequent copies reproduce those numbers exactly. This largely explains why digital compact discs reveal the extremes of the sonic spectrum with such clarity and presence.

Id.

righted record violates the Sound Recording Act of 1971 ("the Act"), which protects "the actual sounds fixed in the recording" from duplication.[2]

Returning to the above example, it would be possible for a sampling device to analyze the complete recorded works of Miles Davis, identify, separate and store the various individual sounds and create a library of note executions.[3] A record manufacturer could then draw sounds from

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2. The Sound Recording Act of 1971, 17 U.S.C. § 114 (1976), provides:
Scope of Exclusive Rights in Sound Recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4).

(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 duplicate the sound recording in the form of phonorecords, or of copies of motion picture and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (1) 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 otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 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. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g): *Provided,* that copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

Id.

3. The Sound Recording Act of 1971, 17 U.S.C. § 106 (1976) provides:
Exclusive Rights in Copyrighted Works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphics, or sculptural works, including the individual

this library and create a new sound recording performance from a previous recording. By this process, Elvis will sing again in full album releases.[4] Uses of actual sounds fixed in a copyright, without copyright permission, seemingly are clear violations of the Sound Recording Act.

Unfortunately, there is rampant confusion in both the recording industry and the courts concerning digital sampling and the scope of protection provided by the Sound Recording Act. Specifically, current record manufacturers and artists suffer from the misconception that if they only take some or part of the sounds from a copyrighted work they are not taking at all.[5] In *United States v. Taxe,*[6] which concerned the duplication of an entire song, the court held that "trivial re-recordings of one or two notes might very well be held to be such an insubstantial taking as not to infringe."[7] *Taxe,* however, was decided a full decade before the arrival of digital audio technology.

This comment journeys through the confusion to determine if various forms of digital sampling[8] are violations of the Sound Recording Act.

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images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

"Note execution" refers to the sounds created when a musical note is sung or performed by an instrument in a sound recording. A distinction should be made between the sound recording and the material medium in which it is found. In the Sound Recording Act, Congress defines sound recordings as: "[w]orks that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as discs, tapes, or phonorecords, in which they are embodied . . . ." 17 U.S.C. § 101 (1976).

Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed. 17 U.S.C. § 101 (1976).

These definitions illustrate a purposeful recognition of the sounds, standing alone, as a recognized copyrightable intellectual creation, while the actual phonorecord or disc is viewed as a constantly changing technological pack mule, which, regardless of its sophistication, merely serves as a carrier for the sound recording trace.

4. The value of a single word sung by Elvis is evidenced in the ability to sample phonemes, the individual sounds that form a word. RCA's upcoming release, "The Return of the Rocker," is an album composed of sampled portions from rotting zinc oxide tapes manufactured in the 1960's. Digital editors and equalizers can clean up and modernize the sound of an old master tape and even change it. Digital delay adds spatial ambiance, dynamic expanders bring back the full sonic spectrum of the original recording session and noise filters alleviate mechanical tape hiss. *See* Seligman, *supra* note 1, at 83-89.

5. Dupler, *Digital Sampling: Is It Theft?,* 98 BILLBOARD MAG. 11, 74 (1986).

6. 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd in part and vacated in part,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977).

7. *Id.* at 1014.

8. One use of digital sampling is the straightforward reproduction of the original works, which illustrates the technique's ability to analyze and separate the sounds of a piano from

To determine the scope of protection of the Act, the journey must travel three separate paths. First, it is necessary to map out and explain the intent of the provisions of the Sound Recording Act of 1971, as well as address the relatively late enactment of copyright protections to sound recording.[9] Second, it is necessary to discover that Congress' delayed recognition of sound recordings as copyrightable works resulted in a variety of state piracy laws. The states enacted their piracy laws on a myriad of legal theories now implicit in the Act.[10] However, they legislated with great caution, fearing their laws may be found unconstitutional due to federal preemption in the realm of copyright.[11] Therefore, it is necessary not only to traverse the area of piracy law to determine differences between the state laws and the Act, but also to determine how the laws continue to influence judicial interpretation of the Act.

Third, it is necessary to walk even further into the past, beyond piracy laws, to the actual right that states were protecting—composition copyright. The composer was the first musical author granted copyright protection. Thus, decisions in this area have influenced the extension of musical copyright to sound recordings. Many judicial assumptions

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those of a guitar, even if both were recorded on the same track. Another use is to produce distortions of the sounds to the extent that they become unrecognizable as to the original. This ability suggests the question of whether copyright infringement exists when a sound is reproduced without permission, yet it is so altered that it is unrecognizable to the original performance. Even if the result is unrecognizable, the fact remains that the sounds reproduced were chosen for their exploitable characteristics which were the origin or base of the distortion.

9. The Sound Recording Act of 1971 was seen as the solution to the rampant record piracy created by the development of the cassette tape recorder. HOUSE COMM. ON THE JUDICIARY, COPYRIGHT—SOUND RECORDINGS, HOUSE REPORT TO ACCOMPANY S. 646, H.R. REP. NO. 487, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1576 [hereinafter 1971 HOUSE REPORT].

10. Unfair competition and misappropriation are the dominant theories. *See* Fame Publishing Co. v. Alabama Custom Tape, 507 F.2d 667 (5th Cir. 1975), *cert. denied*, 423 U.S. 841 (1975); United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974).

11. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964), and Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964), are sister cases concerning actions to enjoin imitations of unpatentable designs. In both cases the Court held that state unfair competition remedies were limited to labelling requirements to prevent palming off. The Supreme Court stated:

> When an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Article I, § 8 clause 8 of the Constitution and in the implementing federal statutes to allow free access to copy whatever the federal patent and copyright laws leave in the public domain.

Compco Corp., 376 U.S. at 237.

The reluctance of the Court, bordering on weariness, to tread in an area specifically in the jurisdiction of Congress is evidenced in many cases. *See, e.g.*, Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

formed in composition decisions do not apply to sound recordings, yet they continue to influence sound recording decisions.

By travelling these three paths, we inevitably end up on the road to defining the extent of copyright power bestowed on the sound recording author: the artist. The progress of technology forces us to uncover the implicit rights possessed by an artist/author. The court has never before encountered the new forms of piracy now possible due to audio digital technology barely a decade old. However, the abuses of technology lead to the recognition and rediscovery of the sound recording author's implicit right—the right to control recorded performance. Without such a reanalysis, an incongruous result of a copyrighted work which is both protected by copyright but also part of the public domain will occur.

THE SOUND RECORDING ACT: FEDERAL COPYRIGHT PROTECTION

The Effects of Delay

It is impossible to understand Congressional intent without probing the historical incentives which propelled the Act's legislation and enactment. The most important inquiry is to determine why Congress delayed recognition of sound recordings as copyrightable works. It is necessary to further measure the effects of that delay. The unfortunate delay was a product of political self-interest rather than a lack of merit or originality.

At the turn of the century, powerful broadcasting and juke box interests successfully lobbied Congress to exclude sound recordings from the protections of the Copyright Act of 1909.[12] The special interest groups wished to avoid paying new licensing and royalty fees, while vocalists, musicians and producers sought protection and compensation.[13] The various legal theories denying extension of copyright protection to sound recordings have consisted of basically four arguments:

> 1. Records are not "writings" since (*a*) they are not legible [(they cannot be read or seen)], (*b*) the Supreme Court has held that they are not "copies," and (*c*) they are "material objects"

12. STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS 37 (Comm. Print 1961) (Study No. 26 by Barbara Ringer, Register of Copyrights) [hereinafter RINGER].

13. *Id.* Many early cases held that sound recordings did not meet the definition of a copyrightable writing. *See, e.g.*, Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955); RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); Jerome v. Twentieth Century Fox-Film Corp., 67 F. Supp. 736 (S.D.N.Y. 1946), *aff'd*, 165 F.2d 784 (2d Cir. 1948); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937); Aeolian Co. v. Royal Music Roll Co., 196 F. 926 (W.D.N.Y. 1912).

> or "mechanical devices" and thus belong under patent rather than copyright protection.
>
> 2. Protection for a recording would violate the [composer's] "exclusive right" in the work that had been recorded.
>
> 3. Performers [(musicians, vocalists)] cannot be regarded as "authors" since their contributions do not amount to original intellectual creations.
>
> 4. Record manufacturers cannot be regarded as "authors" since their contributions do not amount to original intellectual creations.[14]

These theories not only confuse sound recordings with the material objects in which they are fixed, but also judge musical and vocal performances as inferior, nonintellectual creations. It was precisely this type of value judgment that the federal judiciary wished to avoid.[15] Although these arguments served as a good shield for the royalty dodging motives of interest groups, they were inconsistent with the judicial trend to expand federal copyright protection.

Originally, the federal judiciary interpreted the Constitution's copyright clause as protecting only creations which shared similar characteristics with books.[16] The two prominent characteristics were the communication of ideas by the tangible fixation of images on a sheet of

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14. RINGER, *supra* note 12, at 47.

15. In a case concerning an artist's circus illustrations, Justice Holmes warns of the many dangers that would occur if judges were to determine whether an object was "art," and therefore worthy of copyright protection:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

16. The federal judiciary, for the first hundred years of the Constitution, followed the list recognized by Congress when extending copyright protection. The list included books, maps, charts, dramatic musical compositions, engravings, cuts, prints, paintings, drawings, statutes, statutory models and designs. This is illustrated in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), where the judiciary interpreted the copyright clause of the Constitution to include photographs. "Unless, therefore, photographs can be distinguished in the classification on this point from the maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why Congress cannot make them the subject of copyright as well as the others." *Id.* at 57.

paper and the ability to be perceived by the human eye.[17] As a result, a musical composer's creation could be copyrighted because his ideas could be perceived by printing the musical score or notation on a sheet of paper. Conversely, a musical sound recording author could not receive protection, because musical sounds recorded on record discs were invisible and were not considered "writings."

However, the federal courts soon adopted the policy that judges would not arbitrate artistic merit and began to interpret the terms "writings" and "authors" broadly.[18] The broad interpretation is consistent with the three separate theories motivating copyright protection. The first of these theories is the public policy provision that society benefits when inventors are guaranteed protection over their creations. This policy implies that society rewards an author's creations with the grant of a monopoly over his work so that society may benefit from his originality and genius, while concurrently giving the author economic incentive to share his genius.[19]

Second, Professor Nimmer argues for the "natural rights" theory of private property.[20] For example, a monopoly of control is given to the owner of a possession upon purchase. Therefore, when a consumer purchases a car, it becomes his private property. In the case of a copyright author, it is by creation that an "author" owns a "writing." If gov-

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17. When extending protection to photographs in *Burrow,* the Court put great emphasis on the necessity for an author's writing or other creation to be perceived by the human eye:

> [N]o one would now claim that the word writing in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.

Burrow, 111 U.S. at 58.

The Court then explained that the only reason photographs were not on the list is because the photographic process was not yet in existence. *Id.*

18. An example of the Court's refusal to arbitrate the artistic merit and interpret the copyright laws broadly is evidenced by the grant of copyright protection to a mass produced ballerina shaped lamp base in Mazer v. Stein, 347 U.S. 201 (1954). *See also supra* note 15.

The present list of copyrightable objects is divided into categories: "Works of authorship include the following categories: (1) literary works; (2) musical works; including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings." 17 U.S.C. § 102(a) (1976).

19. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction 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 the useful Arts.'" *Mazer,* 347 U.S. at 219.

20. NIMMER, NIMMER ON COPYRIGHT § 1.03.A at 1-32 [hereinafter NIMMER].

ernment bestows a monopoly to a property owner, certainly a genius who creates his own property deserves a monopoly over it.[21]

Third, the marketability or commercial value of a creation is a reason for granting copyright.[22] The courts acknowledged the obvious—the only reason an object is counterfeited or a record is pirated is to capture the unique appeal it inspires in the consumer. Certainly, record sales in the billions indicate the economic value of sound recordings. Despite the broad interpretation of the copyright clause, sound recordings remained unprotected until the early 1970's.

Congressional delay produced two separate problems. First, because composers were recognized and given protection at an early date, composition law became dominant in the musical field. These cases developed important elements of law that are implicit in the Sound Recording Act. However, perceptions developed in the separate area of musical composition copyright, influencing the protection given to sound records, without consideration of differences between the mediums.[23]

Moreover, the delay in recognition also facilitated piracy for criminal duplication. By the 1960's and early 1970's virtually one-fourth of all records and tapes sold in the United States were illegal duplicates.[24] The debilitating economic effect of piracy helped to unite the various entertainment interest groups. The enactment of the Sound Recording Act of 1971 finally granted sound recordings the copyright protection extended to other intellectual creations.

The Sound Recording Act Of 1971

The Sound Recording Act of 1971 provided long overdue federal copyright protection to vocalists, musicians, engineers and record manufacturers.[25] The long delay had fostered rampant piracy and confusion

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21. As stated in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975):

> Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The 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. (footnote omitted).

22. *See* Waring v. WDAS Broadcasting Station, 327 Pa. 433, 440-42, 194 A. 631, 635 (1937).

23. For discussion of the differences, see *infra* note 30 and accompanying text.

24. *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. 25 (1971) [hereinafter PIRACY HEARINGS].

25. "The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of

in the state courts.[26] The Congressional scheme was to grant copyright protection to sound recording artists while preserving freedom of musical exchange. As a result, the Act prescribes a "special and limited" status to musical authors when compared to other copyright authors.[27] This special and limited protection in no way implies a badge of inferiority on sound recording works.

This policy is illustrated in subsection 1(f) of the Act which specifically refers to the limitations of the reproductive, adaptive and distributive rights granted to the copyright author. The reproductive right grants copyright authors the exclusive right to make copies of their work.[28] But the sound recording author's reproductive right is "limited to the right to duplicate the sound recording in the form . . . that directly or indirectly recapture[s] the actual sounds fixed in the recording."[29] The Act clarifies this limitation by stating that the right of reproduction does "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."[30]

Thus, the sound recording author's copyright is diminished since he

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royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues." 1971 HOUSE REPORT *supra* note 9, at 1567.

26. The Copyright Act of 1909 protected the musical composer and composition. However, the Act contained a compulsory licensing fee allowing any artist to record a song by compensating the composer according to a statutorily prescribed fee. Since the Act did not protect the recording's sound on records, pirates believed they could legitimize their unauthorized duplication by paying the compulsory license fee for the composition. "This follows from the provision in section 1(e) that, when the owner of a musical copyright has permitted anyone to record his music, any other person may make similar use of the musical work upon payment of a royalty of two cents per recording." 1971 HOUSE REPORT *supra* note 9, at 1579.

The situation fostered a back door to legitimacy which encouraged piracy. The Sound Recording Act of 1971 was enacted to slam this door shut. "If the unauthorized producers pay the statutory mechanical royalty required by the Copyright Act for the use of copyrighted music there is no Federal remedy currently available to combat the unauthorized reproduction of the recording." *Id.* at 1567. "The Committee regrets that action on the bill for general revision of the copyright law has been delayed, and that the problem of record piracy has not been dealt with as part of a broad reform of the Federal copyright statute." *Id.* at 1569.

27. "It is also true under existing law that the protection given to owners of copyright in musical works with respect to recordings of their works is special and limited." *Id.* at 1567.

28. NIMMER, *supra* note 20. *See also infra* notes 39-42 and accompanying text.

29. 17 U.S.C. § 114(b) (1976).

30. *Id.* "Under the bill, sound recordings are defined as 'works that result from the fixation of a series of musical, spoken, or other sounds, but not including sounds accompanying a motion picture.' " 1971 HOUSE REPORT, *supra* note 9, at 1578. "The exclusive right created thereby is limited to the duplication in tangible form of the *specific* recorded performance copyrighted: it does not include imitation or simulation of that performance." *Id.* (emphasis added).

only has protection over the exact sounds he creates. He cannot prohibit another from recording and imitating his (the copyright author's) unique sounds as long as the imitator creates his own set of sounds utilizing his own musicians and recording processes.[31] Congress intentionally allowed the simulation or imitation of copyrighted musical sounds because the policy behind the free exchange of musical information requires that no one may obtain a monopoly over a musical sound and prohibit others from recording.[32] Conversely, an artist does obtain a monopoly over the individual sounds or musical voicings he creates. The author is given reproductive, adaptive and distributive control of his sounds and thereby can reproduce and distribute copies of the music to the public by sale or other transfer of ownership.[33] For example, Miles Davis controls the actual sounds he creates, yet another trumpeter is free to attempt to reproduce the exact sounds on another album if he wishes.

The full recognition of sound recordings as "works" in the constitutional sense is evidenced by Congressional response to the petitioning of pirates lobbying for a compulsory licensing provision concerning sound recordings.[34] The Senate Committee rejected the proposal highlighting the core distinction between musical composition and sound recording:

> [T]he existing compulsory license merely provides access to the copyrighted musical composition, which is the "raw material" of a recording [as opposed to] . . . the performers, arrangers, and recording experts [who] are needed to produce the finished creative work in the form of a distinctive sound recording. . . . [T]here is "no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the recording company

31. *See* Jondora Music Publishing Co. v. Melody Recordings, 506 F.2d 393, 397 (3d Cir. 1979), *cert. denied,* 421 U.S. 1012 (1975); United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974).

32. As stated in Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285, 287 (1974), *cert. denied,* 419 U.S. 1120 (1975):

> Congress in 1909 considerably extended the copyright interest of the composer to the end that thereafter the copyright owner of a musical composition could himself control the mechanical reproduction of his composition. At the same time, fearful that by permitting a musical composition to be thus copyrighted it was permitting an absolute monopoly, Congress tacked on a proviso or exception to the statute authorizing the copyright of musical compositions.

Id. (footnote omitted).

33. 17 U.S.C. § 106 (1976).

34. "[C]ertain of the manufacturers engaged in the unauthorized reproduction of records and tapes have proposed the inclusion in the legislation of provisions granting a compulsory license to reproduce records and tapes upon payment of a statutory royalty." 1971 HOUSE REPORT, *supra* note 9, at 1569.

and the artist."[35]

In other words, the composition of a song was only the raw material of a song. Performers, arrangers and engineers were needed to transform the notes on paper, or the raw material into the unique and distinctive sounds or note voicings that compose a record. Importantly, each individual performer has a copyright in his sounds. Since the Act recognizes each performer and each engineer as an author, the industry custom results in the record company buying the copyrights of *each* author, thus making the record company the exclusive copyright proprietor.[36] Therefore, the digital sampling of a single instrument from a copyrighted recording is a violation of that author's reproductive copyright which may be owned by the record company.

Although the provisions of the Act do not specifically list copyright owners of a sound recording, the Senate Committee drafting the Act names performers, engineers and manufacturers as co-authors and thus, co-owners. As stated by Congress:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work . . . . [T]he bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.[37]

It is important to emphasize that the Act recognizes that "there may be cases (for example, recordings of birdcalls, [or the] sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable."[38] This illustrates that the unauthorized reproduction of even a bird call found on a copyrighted recording is prohibited. One must find the nest, climb the tree, bring the equipment and record the chirping,

35. *Id.* Congress additionally acknowledged an unfair advantage that pirates exploited. A compulsory license on sound recordings "would enable the 'pirates' to select those recordings that become hits, and thus to invade the producer's market for his profitable recordings, while leaving the producer to suffer the losses from his unsuccessful ones." *Id.* at 1570.

36. *Id.*

37. *Id.*

38. *Id.*

using one's own labor. "Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings."[39]

The Act's small scope of protection must be closely guarded. Only *exact sounds* produced by the author are given protection. The policy of allowing imitation or simulation of a sound recording work results in limiting sound recording authors from applying their right of reproduction to control infringements occurring in other media. Copyright authors in all other media can prevent the imitation or simulation of their works.[40] Drawing a sketch from a copyrighted photo,[41] manufacturing a doll similar to a cartoon character[42] and making a movie similar to a book[43] have been held as copyright infringements. These uses are considered so similar to the original work that they constitute misappropriations of another's labor. Nevertheless, anyone who wishes to identically reproduce a copyrighted sound recording may do so by paying the compulsory license to the composer and by hiring and recording musicians.

Additionally, the Act does not contain a performance right provision for sound recording artists.[44] It should be noted that due to bureaucratic error, the Act applies only to recordings made after 1972. Works recorded prior to 1972 are still protected by state law.[45] The granting of

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39. *Id.*

40. Simply because a work in one medium has been copied from a work in another medium does not render it any less than a "copy." Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir. 1982). In a case involving a two-dimensional reproduction of a three-dimensional work, the Fifth Circuit found infringement of copyright. Tennessee Fabricating Co. v. Moultrie Mfg., 421 F.2d 279 (5th Cir. 1970). Similarly, a three-dimensional reproduction of a two-dimensional illustration was found to be an infringement. Walco Prods. v. Kittay & Blitz, Inc., 354 F. Supp. 121 (S.D.N.Y. 1972).

41. *See* Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968). The drawing of a sketch from a frame of the Kennedy assassination file known as the "Zapruder film," was held to be an infringement of the copyright that Time, Inc. owned in the photograph.

42. Fleischer Studios v. Ralph A. Freundlich, Inc., 73 F.2d 276 (2d Cir. 1934), *cert. denied* 294 U.S. 717 (1935); King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924); Ideal Toy Corp. v. Kenner Prods., 443 F. Supp. 291 (S.D.N.Y. 1977).

43. Filmvideo Releasing Corp. v. Hastings, 509 F. Supp. 60 (S.D.N.Y.), *aff'd,* 668 F.2d 91 (2d Cir. 1981); Filmvideo Releasing Corp. v. Hastings, 426 F. Supp. 690 (S.D.N.Y. 1976).

44. *See* 17 U.S.C. § 114(a) (1976) *supra* note 2. Opposition to a performance right in sound recordings has come from broadcasting and music publishing interests. Broadcasters fear additional royalties, while publishing interests are reluctant to share the fees they already garner for the performance of musical works. *Hearings on S. 597 Before Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 502, 536 (1967).

45. "The bill does not apply retroactively and Section 3 expressly states that it should not be construed as affecting in any way any rights with respect to sound recordings fixed before the date of enactment. It thus does not deal with recorded performances already in existence.

copyright protection is not an idle gesture. The limitations do reduce the scope of the sound recording author's rights, yet they also focus the protection of the Act in one specific area, the exclusive control of actual sounds fixed in their recorded performance. Unauthorized reproduction of a copyright author's sound violates the Act's intent.

PIRACY AND THE STATES: SCOPE, LEGAL THEORIES, JUDICIAL TRENDS

The second leg of this journey travels three paths which all lead to the conclusion that digital sampling is a new form of piracy. First, differences between piracy decisions and the Sound Recording Act are explored to determine the extent of protection envisioned by the Act. Second, the link between technology and methods of piracy are examined acknowledging the relationship between technological innovation and the growth of piracy. Third, the legal theories and policies behind the piracy decision reveal the particular, separate property rights of copyright authors protected by the Act.

A. Distinctions between State Piracy Law and the Sound Recording Act

Record piracy is the unauthorized duplication of the sounds on copyrighted records, tapes, cassettes, compact discs or any other form of sound storage.[46] However, prior to 1972, federal law protected only the musical composers from piracy.[47] The composer alone had the exclusive right to record his composition and reproduce copies to sell for profit. Thus the early piracy cases envisioned the songs as extensions of a composer's copyright in his composition rather than intellectual creations of both the composer and the musical performers.[48] However, state piracy decisions based on the concepts of unjust enrichment, unfair competition

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Instead it leaves to pending or future litigation the validity of state common law or statutes governing the unauthorized copying of existing recordings." 1971 HOUSE REPORT, *supra* note 9, at 1578.

The distinction is not due to any inherent differences in the recordings. Actually the intent of Congress was to fully protect all sound recordings until January 1, 1978; *see* 17 U.S.C. § 303 (1976). A Justice Department misconception led to the exclusion of the works. Due to the differences in successive bills, the Department feared that the enactment of a federal statute would render state law unconstitutional. NIMMER, *supra* note 20, at § 2.10 B(1). The Senate agreed and acted hastily, voting to exclude state law from federal preemption to sound recordings made prior to 1972. *See infra* note 61.

46. 1971 HOUSE REPORT, *supra* note 9, at 29.

47. The Copyright Act of 1909, 17 U.S.C. §§ 5(e), 1(a) and 1(c) (1976).

48. This was a natural result from the 1909 Act, which viewed the sound recording as an extension of the composition, rather than a separate work of authorship.

and misappropriation helped to define the property rights eventually extended to performing artists by the Sound Recording Act. Yet it is an important distinction that early piracy cases did not consider or focus on the individual musical creations, or in other terms, the actual sounds fixated on the record, as the Act does.[49]

This exclusion created a judicial and legislative tendency to view piracy in the historical fashion, i.e., the illegal duplication of an entire song or album. Consumers purchased a song or album in the form of a record; thus, pirates copied and sold popular records. There was no market for ten seconds of a song, or parts of a song like the separated sounds of the individual instruments. Before digital technology, it was not possible to precisely separate sounds on a record.[50] That was the piracy of the past.

Piracy is no longer limited to simple copying of an entire song. The crucial distinction is that digital sampling pirates today utilize only parts of a song. Therefore, instead of the piracy occurring *after* the recording of a work (i.e., making bootleg copies for resale), today's piracy occurs *during* the recording phase as part of a new sound recording. This form of piracy has never been encountered before. The new forms of piracy require an expansion of the definition of piracy as well as an updated analysis of copyright infringement acknowledging the expansion proscribed by the Sound Recording Act.

B. The Link between Technology and the Growth of Piracy

According to the Department of Justice, piracy of records produced, recorded and copyrighted in the United States yields annual sales in ex-

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49. *See* White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908) (focus on the composition, not the sounds).

50. Before digital audio recording, analog technology was the dominant process in sound recording. The problem with the analog system was that it contained too much noise distortion.

> In effect, the distortion is an analog noise, combined with the analog music as the tape is recorded. Later on, the play back head faithfully reproduces the signal, which is now a somewhat—distorted version of the original source.
>
> . . . .
>
> The problem (though certainly not the solution) is obvious. The playback head is incapable of making a distinction between the wanted and the unwanted components of the analog signal, or now rather, signal-plus-noise.
>
> In order to get around our difficulties, we must devise a method of recording in which the playback system will simply not recognize (and therefore, will not reproduce) the unwanted noise components of the recorded signal.

J. WORAM, THE RECORDING STUDIO HANDBOOK, 418 (1982).

Digital recording was the answer to analog distortion. By converting analog amplitudes into a binary-coded digital system the tape head receives an encoded signal thereby freeing the recording from any sound distortion. *Id.* at 423.

cess of $1 billion.[51] Throughout the history of piracy, the cases below illustrate that the methods consistently mirror the contemporary technological sophistication. The ingenuity of the thief increases with technology.[52] The state courts have protected the sounds of copyrighted works through all the technological innovations the industry has undergone. This is evident in that even before records were common, early piracy cases concerned the illegal duplication of perforated piano rolls![53] When Victrola Talking Machines emerged, the courts responded immediately by prohibiting a new form of matrix duplication.[54]

In the 1940's, however, the emergence of the phonograph disc and record player along with machines that could mass produce copies of the recording, created the opportunities that led to the modern illegal piracy industry. Similarly, another upswing in piracy occurred in the 1960's with development of pre-recorded tape, first used in "eight track" tapes. Eight track tapes were replaced in the 1970's with cassette tapes, spurring another increase in piracy due to the relative ease of cassette duplication.[55] The 1980's have seen the piracy of records and tape cassettes extended to compact discs.

Congress recognized that technological innovation greatly affects the recording industry. The Sound Recording Act broadly defines "phonorecords" to include objects in which the recording of sounds are "fixed by any method now known or later developed."[56] The recent development of digital audio technology presents a profound effect on the recording industry because it is not simply a new device to store sounds, like a record or cassette, but rather a new process or method in the science of recording sounds. Digital audio recordings render previous technology obsolete.[57] Recalling that state courts have prohibited piracy

51. SUBCOMM. ON CRIMINAL LAW, S. COMM. ON THE JUDICIARY, REP. TO ACCOMPANY S. 691, S. REP. NO. 42, 97th Cong., 1st Sess. 29 (1981).

52. *Id.* at 40. From its beginning the law of copyright developed in response to significant changes in technology. Indeed, the invention of a new form of copying equipment—the printing press—gave rise to the original need for copyright protection. Repeatedly, as developments have occurred in this country, it has been the Congress that has fashioned the new rules that recent technology has made necessary. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 430-31 (1984).

53. Aeolian Co. v. Royal Music Roll Co., 196 F. 926 (W.D.N.Y. 1912).

54. Victor Talking Mach. Co. v. Armstrong, 132 F. 711 (C.C.S.D.N.Y. 1904).

55. "The widespread availability and use of phonograph record and tape-playing machines, particularly the comparatively inexpensive cassette or cartridge tape players, give added impetus to piracy of sound recordings. This trend [technological progress facilitating piracy] is certain to continue and to grow unless effective legal methods to combat and reverse it are provided." 1971 HOUSE REPORT, *supra* note 9, at 1576.

56. 17 U.S.C. § 106 (1976). *See supra* note 3 for text of section 106.

57. J. WORAM, THE RECORDING STUDIO HANDBOOK, 417 (1982) states:

from piano rolls to compact discs, the unique ability of digital sampling may require an updated response by both the courts and legislatures.

C. *Legal Theories Used to Protect Property Rights*

When a pirate illegally *re*-records or copies the sounds on record, and resells the copies for profit, what does he take? State decisions based on legal theories of unjust enrichment, unfair competition and misappropriation helped to identify specific property rights protected from piracy. The protection of property rights was eventually extended to musical performers by the Act. However, judicial assumptions inapplicable to the Act were eventually extended to post-Act decisions. This section looks at dynamic and valuable state court decisions, some of which are instructive yet no longer fully applicable.

Prior to 1972 only the composer was granted federal copyright protection. To take advantage of that protection the composer was required to prove: (1) ownership of the copyright, (2) access to the copyrighted work, (3) that the accused copied his work and (4) that there is a substantial degree of similarity between his composition and the infringer's.[58] One of the rights granted to the composer was the exclusive right to record his composition. Performers or musicians captured in the recording were not protected on their own. Thus, courts only viewed the composer as the party suffering damages by piracy, even though he did not create any of the sounds used in the recording.

The focus on the composer as the holder of exclusive recording rights led to two problems. First, a limited perception of the definition of a song or record, and second, the "back-door concept" used to justify piracy.[59]

1. Limiting Judicial Perception With a Definition of a Song

Perhaps the most profound legacy of state piracy decisions is the

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> Despite many impressive advances in recording technology over the past century, at least one basic principle has—until quite recently—remained unchanged. Ever since the first recording was etched onto a wax cylinder, the recorded format—if not the quality—has closely resembled the waveform of the original sound source.
>
> . . . .
>
> Previously, there was little need to concern ourselves with this fine point, since there were no alternative methods of recording anyway. But now that digital technology has been introduced to the recording studio, it is often necessary to make the distinction between old and new . . . .

Id.

58. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977).

59. 1971 HOUSE REPORT, *supra* note 9, at 1579.

judicial tendency to view a song or recording as a single unit or product containing only one copyright, that of the composer.[60] In other words, a song was viewed as a single work of authorship or intellectual creation. This is in complete contrast with the Sound Recording Act, which views the song or recording as a combination or collection of numerous copyrighted works or intellectual creations bound together in a joint effort resembling one work—a song.[61]

The view that a song was a single product with a solitary copyright originated from a traditional piracy practice, the illegal duplication of a popular copyrighted song or album. Traditional piracy was based on market realities, where consumers purchased *entire* songs. However, with the passage of the Sound Recording Act and the emergence of digital sampling, the judicial tendency to view a song or record as a single work with a single copyright must be abandoned in favor of an updated view incorporating the expanded protection and recognition of the Act. Similarly, the judicial definition of piracy must be updated to meet the new sophisticated forms of piracy created by digital sampling.

2. The Back Door Concept

The second problem caused by the solitary focus on the composer as the exclusive holder of recording rights was the "Back Door" concept arising from the old Copyright Act of 1909's "compulsory licensing provision." This provision required the composer to allow any other person to record his composition. Thus, it allowed another manufacturer to record the song using different vocalists and musicians. The subsequent user had to give notice and pay the statutory royalty fee of a few cents per record manufactured to the composer.[62] Congress imposed a com-

60. "The policy of the law is to protect the author against every form of piracy without distinction, and the piracy of a musical composition by reproducing and selling it . . . is just as culpable as in any other form." White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 2 (1907). "If an author has among his writings a musical composition, the only possible way of 'securing' to him the 'exclusive right' thereto is by giving him the monopoly of this musical composition, no matter in what form it may be represented; otherwise, he gets only a partial exclusive right thereto." *Id.* at 3. *White-Smith* concerned the piracy of perforated piano rolls. Although the above assertions made by the composer were usually recognized by the court, only the labor of the punch hole maker was protected in piano roll piracy. *Id.* at 16.

61. However, the Supreme Court has held that even under the 1909 Act, state laws prohibiting record piracy are not invalid by reason of federal preemption. Goldstein v. California, 412 U.S. 546 (1973). Therefore, the tendency to view sound recordings as solely the composer's work has been avoided in the few states which enacted piracy laws. *See infra* note 71.

62. 1971 HOUSE REPORT, *supra* note 9, at 1579. Section 1(e) of the Copyright Act of 1909, the compulsory licensing provision, provides:

> [As] a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or

pulsory licensing provision on the composer because it feared a small number of record companies would buy the rights to all existing musical compositions and monopolize the exclusive right to record them.[63]

The implicit policy behind the provision was the belief that music should be freely accessible to anyone wishing to use it, and if the proposed use was a commercial one, then payment of a licensing fee to the composer was required. However, a troubling misconception arose out of the provision. The compulsory license provision applied only to the composition or musical score of a recorded song, not the sounds of the recorded song itself.[64] Ignoring this, pirates, asserting the implicit policy of musical freedom, justified illegal duplication of the sounds fixated on the record, by paying the compulsory licensing fee. Despite the limitations of the provision it became a back door justification for pirates illegally duplicating the sounds of a record.

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knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof.

17 U.S.C. § 1(e) (1909).

63. PIRACY HEARINGS, *supra* note 24, at 17-18.

64. 1971 HOUSE REPORT, *supra* note 9, at 1567, 1579. However, beginning with the precedent-setting *Duchess Music* case, it was held that the compulsory license in a musical composition was not available to one who re-records music from another sound recording, and therefore that such activity resulted in copyright infringement of the composition. The court held that re-recording was not the "similar use" intended by the compulsory licensing provision. "She does not make 'similar use' of them, she makes exact and identical copies of them. This is clearly outside the scope of the compulsory license scheme." Duchess Music Corp. v. Stern, 458 F.2d 1305, 1310 (9th Cir.), *cert. denied,* 409 U.S. 847 (1972) (footnote omitted).

The case has been criticized because its attempt to protect the composition in fact protected the copyright in a sound recording, which the plaintiff composer did not own. As a result, the composer won a cause of action for the reproduction of what he did not create or own, the sound recording. Despite the inconsistencies in the *Duchess Music* rationale, it has been followed almost without question. However, the dissent in Jondora Music Publishing Co. v. Melody Recording, Inc., 506 F.2d 392 (3d Cir. 1974) (Gibbons, J., dissenting), *cert. denied,* 421 U.S. 1012 (1975) likens this preference to "the children of Hamelin [in] their erroneous piping." *Id.* at 401. Judge Gibbons divided the sound recording into three components: the musical composition, the performance, and the recording itself. He reasoned that since only the composition was protected by the 1909 Copyright Act, once a recording had been authorized, the right to record became non-exclusive. By paying the compulsory licensing royalties a pirate does *not* infringe. Following the *Duchess Music* rationale, courts in the Third, Ninth and Tenth Circuits "have attempted to provide a remedy which was not envisaged by the 1909 Act." *Jondora,* 506 F.2d at 401 (Gibbons, J., dissenting).

This interpretation of the 1909 Copyright Act was rebutted by the court in Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975). "[N]either the district court nor this court is bound by rather impressionistic statements in a legislative history as to what a prior existing law means. Especially is this true when, as here, a great deal of time (63 years) has elapsed between the two Congresses involved." *Id.* at 672.

Although the misconception concerning the compulsory licensing provision for musical composition led to the mistaken belief that one could pay the licensing fee and justifiably duplicate a record, later cases clarified the protectable rights of the musical performer, as opposed to the composer. For example, in *Jondora Music Publishing Co. v. Melody Recordings,*[65] the federal court ruled that the compulsory license provision of the federal copyright statute was enacted to prevent monopolization by manufacturers rather than to penalize the composer for his creative efforts.[66] Although the defendants had paid the compulsory licensing fee, the court held the provision did not legitimize their piracy operation. The court then focused on the wording of the provision. The "similar use" allowed by the provision was to use the *composition* in the recording of a song. Thus, "similar use" meant the right to assemble one's own labor to record a version of the composition, not to make similar use of a song by duplicating the recording and selling copies.[67] Two artists may record the same song, but the first artist has exclusive control over the sounds he produces, and reciprocally, the second artist exclusively controls his sounds.

Following *Jondora,* the court in *Fame Publishing Co. v. Alabama Custom Tape, Inc.,*[68] held that a taped duplicate is not a "similar use" of a composition even though the end product is not only similar but virtually *identical* because the process is completely similar.[69] The process of reproduction involved in piracy is completely unlike the process in the original recording since the latter involves the dynamics of recording live musicians while the former only requires placement of a finger on the RECORD button of a tape player.[70]

The policy in the above cases illustrates a reluctance to allow a pi-

65. 506 F.2d 392 (3d Cir. 1974).

66. *Id.* at 395-96. Indeed, the court illustrated how the composer's interests were intertwined with the record manufacturer's:

> Since the pirate's only initial expense is the purchase of one phonograph record or sound tape, he obviously can sell a duplicate at a substantially lower price. If the market is reduced by these cut-rate copies, the record manufacturer's incentive to market other hit recordings is necessarily diminished. In turn, this is a detriment to the composer, who may anticipate that his works will be performed in a less costly production and possibly receive less public attention.

Id. at 396.

67. *Id.* at 397. "It is our conclusion that making an identical copy of a recorded version of a copyrighted musical composition is not a 'similar use' as permitted by the compulsory license provisions of § 1(e)." *Id.*

68. 507 F.2d 667 (5th Cir. 1975).

69. *Id.* at 669-70. "This distinction [between product and process] is not mere musical metaphysics, it is the dividing line between that which the statute commands and that which it forbids." *Id.*

70. *Id.* at 669.

rate to profit from the work of another. This principle is the cornerstone of the legal theories used in state piracy decisions. Unlike federal copyright law, state common law copyright long recognized that vocalists, musicians and engineers have property rights.[71] Yet it took record manufacturers a shorter time to gain such recognition.[72] The problem with common law copyright is that it terminates once one publishes or distributes the work to the public.[73] However, the states went through contortions to preserve common law copyright after publication.

State common law protection is usually based on the legal theories of unfair competition, misappropriation and the similar notion of unjust enrichment. Unlike copyright laws, unfair competition does not require that a work be original to qualify for protection. The policy is similar to basic property law: if you create it, you own it. Unfair competition was originally composed of three elements.[74] First, there is competition be-

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71. In Gieseking v. Urania Records, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (1956), the New York Supreme Court held that performers have a property right in recorded performances when the court enjoined the defendant from reproducing records of the pianist Walter Gieseking. The court also held that the recorded performances may not be used in a manner not intended to represent, or not fairly representing, his service. *Id.*

However, in Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937), the court acknowledged the lack of federal protection and answered the question of:

> whether an actor or musician has any property rights at common law in his performance . . . in the present case we are concerned more particularly with the musician—to guard against his field of lucrative return being thus drastically narrowed, and to protect his artistic product against its indiscriminate reproduction, especially by those who, in a commercial sense, are in the nature of competitors.

Id. at 438-39, 194 A. at 634.

The court rejected the notion that a musician does nothing more than render articulate the silent composition of the author:

> Caruso, Paderewski, Kreisler and Toscanini, by their interpretations, definitely added something to the work of authors and composers which not only gained for themselves enduring fame but enabled them to enjoy financial rewards from the public in recognition of their unique genius; indeed the large compensation frequently paid to such artists is testimony in itself of the distinctive and creative nature of their performances.

Id. at 440, 194 A. at 635.

72. In 1951, the New York Supreme Court recognized the effects of Columbia Record's contract with the Metropolitan Opera for exclusive rights to the recording and releasing of its operatic performances. The defendant was enjoined from recording and selling lower quality recordings of performances broadcast on the radio. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (1950), *aff'd,* 279 A.D. 632, 107 N.Y.S.2d 795 (1951). After the Sound Recording Act of 1971 was enacted into law, it was held that "[s]ound recording firms provide the equipment and organize the diverse talents of arrangers, performers, and technicians. These activities satisfy the requirements of authorship found in the copyright clause . . . ." Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.C. Cir. 1972).

73. NIMMER, *supra* note 20, at § 9.01 C, 9-17 - 9-19.

74. The elements seemed to have been reduced to simply misappropriation and self compe-

tween the original author and the duplicator.[75] For example, the artist records and sells his record, while the pirate duplicates the artist's record and sells those copies. This is a form of unfair competition because the artist is forced to compete with himself. Every time the pirate sells one of the artist's records, the artist loses a sale.

The second element was "passing off" or "palming off". The pirate would "pass off" or borrow the image of an existing product in order to entice and deceive the consumer. The purchaser, lured by the appearance of the counterfeit, buys a substandard copy rather than the original product. This element was abandoned by the court in *Fonotipia Ltd. v. Bradley,*[76] where the pirates clearly labeled their record as an unauthorized duplication. The court reasoned that this factor was insignificant because the real legal issue was the misappropriation of the artist's work, which is the third and most influential element of unfair competition.

Misappropriation, the taking or stealing of another's product or ideas without permission or compensation, is the crux of piracy, copyright, and the Act. Courts grant relief whenever one party gains a com-

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tition. Passing or palming off has been viewed as an implicit characteristic of misappropriation. As stated in Fonotipia Ltd. v. Bradley, 171 F. 951, 957 (C.C.E.D.N.Y. 1909):

> If the defendant is selling to customers records reproduced by processes of the Continental Record Company, by means of discs purchased in the market by that company for the purpose, and if he advertises and guarantees to his customers that the Continental records are duplicates equal in all respects, including composition and finish, and that it is impossible to distinguish between the Continental records and those produced by the complainants, we have a question of fact presented in which the public is interested, namely, do the records submitted as evidence in the case lead to any determination upon the question of deception or imitation of the product, and the resultant benefit to the imitator, with corresponding injury to the imitated, by the results of the sales, and by the effect upon future sales if the product of the imitation be unsatisfactory?
>
> It may be argued that the imitation would go out of the market and be removed from interference with the original if the product proved unsatisfactory; but it would seem that business reputation and excellence of product are entitled to some protection from imitations which discourage further use and prove unsatisfactory as a whole, because the result of the sale of such a product must necessarily affect adversely the opinion of the very class of customers which is sought to be enlarged by the sale of a satisfactory product.

Id.

75. "[T]he question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business." International News Serv. v. Associated Press, 248 U.S. 215, 236 (1918). The command prohibiting competitors from injuring one another actually is a duty.

> The parties are competitors in this field, and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other (citation).

Id. at 235-36 (citing Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 254 (1916)).

76. 171 F. 951 (C.C.E.D.N.Y. 1909), *overruled on other grounds,* G. Ricordi Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952).

mercial advantage by appropriating the commercially valuable characteristics of another's product or idea.[77] In *International News Service v. Associated Press,*[78] the court held that one cannot profit in any manner from the appropriation of another's work, even if that work is non-copyrightable.[79] This case involved a competing newspaper which appropriated, verbatim, news stories from another newspaper for publication. Even though news or facts are not copyrightable, the expression of the facts is the work of another and may not be appropriated.[80]

The concept of misappropriation was applied to musical artists beginning with *Waring v. WDAS Broadcasting.*[81] The court held that the unauthorized broadcasting of a performer's music by a radio station amounted to a misappropriation of his "novel intellectual or artistic [genius and] value,"[82] and thus was deemed unfair competition. Although the radio station did not duplicate or sell a copy of the work, they did profit from another's labor. The courts were equally protective when they encountered instances of piracy.

Duchess Music Corp. v. Stern[83] *and Edward B. Marks Music Corp. v. Colorado Magnetics*[84] are cases where pirates made tape copies of copyrighted records. The *Marks* court held that the "raw materials," or musical sounds, were not authorized for duplication by the compulsory licensing fee, and that authorization from the copyright proprietor was necessary to duplicate.[85] However, in the case of *United States v. Bodin,*[86] the court specifically addressed the activities involved in piracy. After determining that the misappropriation of another's work had never fallen within the compulsory license provision,[87] the court responded to the defendant pirate's claim that copying records was within his First

77. The Supreme Court recognized that

> Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense [of creating or obtaining the product or service sold to the customer].

International News Serv. v. Associated Press, 248 U.S. 215, 240 (1918).

78. 248 U.S. 215 (1918).

79. *Id.* at 241-42.

80. *Id.*

81. Waring v. WDAS Broadcasting, 327 Pa. 433, 194 A. 631 (1937).

82. *Id.* at 441, 194 A. at 635.

83. 458 F.2d 1305 (9th Cir.), *cert. denied,* 409 U.S. 847 (1972). *See supra* note 64 and accompanying text.

84. 497 F.2d 285 (10th Cir.), *cert. denied,* 419 U.S. 1120 (1974).

85. *Id.* at 288.

86. 375 F. Supp. 1265 (W.D. Okla. 1974).

87. *Id.* at 1267.

Amendment right of self-expression. The court wryly reminded the defendants that they were not being denied freedom of expression since they were not seeking to express themselves artistically, but the right to express *others* artistically, by making exact sound recordings of other people's performances.[88] The court stated, "[w]e fail to see as any protected First Amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a single long-playing record of a musical performance."[89]

The court then rejected the contention that the public right to enjoy the arts promoted by individuals was being compromised.[90] The defendants were free to record the same songs they were pirating, if they hired their own musicians, rented their own studio and paid the compulsory licensing fee to the composer, since "[t]here is here no restraint placed on the use of an idea or concept."[91] The court described the critical distinction between the protection granted to compositions as opposed to that granted to sound recordings. The law does not prohibit using ideas or concepts found in a song. It prohibits using another performer's voicing of those ideas or concepts—the actual sounds an artist fixes on a record. As the court in *Duchess*[92] (similarly stated:)

> [The pirate] may, of course, record appellants' songs, when she hires musicians, artists, and technicians. Instead, she steals the genius and talent of others. She deceives others into thinking that her tapes represent her own work. She has no "right to copy." (citations) [The pirate] may not continue her piracy under the flag of compulsory licensing.[93]

Finally, the very same prohibition against the unjust enrichment of a pirate misappropriating another's work can be found in the earliest decision mentioned—the perforated piano roll case.[94] The court told the perforated piano roll pirate that he must go to the composer's sheet music, and punch the holes himself, but "[h]e cannot avail himself of the skill and labor of the original manufacturer of the perforated roll . . . ."[95]

The extent of protection granted to sound recordings remains unchanged regardless of the technological capabilities of the era. From pi-

88. *Id.*
89. *Id.*
90. *Id.* at 1267-68.
91. *Id.* at 1267.
92. Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972).
93. *Id.* at 1311 (quoting Capitol Records v. Greatest Records, 43 Misc. 2d 878, 252 N.Y.S.2d 553 (1964))(citations omitted).
94. Aeolian Co. v. Royal Music Roll Co., 196 F. 926 (W.D.N.Y. 1912).
95. *Id.* at 927.

ano roll to digital recorder, the state and federal courts' double mandate is clear. First, the unauthorized duplication of copyrighted sound recordings constitutes misappropriation (theft) of another's commercially valuable intellectual property. Second, the only legal process of reproducing the sounds fixated on a copyright recording is by imitation or simulation utilizing one's own studio and musicians. The sounds on a record *are* the genius and talent of the musical laborer.

THE SUBSTANTIAL SIMILARITY TEST: MUSICAL COMPOSITION AND SOUND RECORDINGS

This third journey explores decisions determining copyright infringement in musical composition cases in order to discern how the substantial similarity test should be applied to sound recordings. In order to avoid confusion in this complex area, the substantial similarity test and musical composition cases are discussed first. Next, the differences between musical compositions and sound recordings are examined to expose inapplicable assumptions from the composition field that have been imposed upon sound recordings. Finally, the application of the substantial similarity test to sound recordings is analyzed and some suggestions are made on how to apply the test to digital sampling.

A. Substantial Similarity and Musical Compositions

To infringe on a copyrighted work, one must *copy* from the work. However, since the actual act of copying is rarely witnessed,[96] or is impossible to witness because it can occur entirely within the mind of the infringer,[97] copying is rarely established by direct evidence.[98] As a result, copying is proved by proof of access and substantial similarity.[99] "Access" is defined as the actual viewing and knowledge of plaintiff's work by the person who composed defendant's work.[100] Proving that a person had access, however, can be as difficult as proving that a person copied, because again, there are few who witness the actual "access."

96. Blazon, Inc. v. DeLuxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965); Whitney v. Ross Jungnickel, Inc., 179 F. Supp. 751 (S.D.N.Y. 1960); Golding v. RKO Pictures, Inc., 35 Cal. 2d 690, 221 P.2d 95 (1950).

97. Edward S. Deutsch Lithographing Co. v. Boorman, 15 F.2d 35 (7th Cir.), *cert. denied*, 273 U.S. 738 (1926).

98. *Whitney*, 179 F. Supp. at 755; Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

99. Ferguson v. Nat'l Broadcasting Co., 584 F.2d 111 (5th Cir. 1978); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

100. Bradbury v. Columbia Broadcasting Sys., 287 F.2d 478 (9th Cir. 1961); Schwarz v. Universal Pictures Co., 85 F. Supp. 270 (S.D. Cal. 1945).

Therefore, access can be proven by showing the defendant had an opportunity to copy the work, which permits an inference of access.[101] However, there must be a reasonable possibility of viewing the work, not just a chance possibility.[102] Although access is difficult to prove, it will be presumed if there is a "striking similarity" which is "substantial" between the plaintiff's and defendant's work.[103] This is especially beneficial to authors whose works are widely known. Therefore, if a work is disseminated widely throughout a region, access may be found.[104] In the case of compositions and sound recordings, record sales and radio time will constitute automatic access.[105]

To prove copyright infringement not only must copying be established, but there must be a substantial similarity between the plaintiff's and defendant's work. Unfortunately, "the determination of the extent of similarity which will constitute a 'substantial' and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is least susceptible to helpful generalizations."[106] Obviously, trivial similarities are inconsequential and noninfringing.[107] Conversely, copying something entirely is an infringement.

The great challenge is to divine the exact point at which copying becomes an infringement. The courts have described the situation as an invisible line between faintly copying and substantial copying which "wherever it is drawn, will seem arbitrary."[108] Of course, the Copyright Act itself does not protect against the taking of abstract ideas.[109] Ideas

101. Kamar Int'l, Inc. v. Russ Berrie & Co., 657 F.2d 1059 (9th Cir. 1981).

102. Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346 (C.D. Cal. 1984).

103. This occurs when the defendant's work has unique traits of the plaintiff's work that are too similar to be considered the product of an independent creation. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946); Association of Am. Medical Colleges v. Mikaelian, 571 F. Supp. 144 (E.D. Pa. 1983), *aff'd per curiam*, 734 F.2d 3 (3d Cir. 1984). *See also* Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346 (C.D. Cal. 1984).

104. Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940).

105. In Stratchborneo v. Arc Music Corp., 357 F. Supp. 1393 (S.D.N.Y. 1973), the court held that widespread sales in many regions constitute access but localized performances do not. *Id.* at 1394. In Abkco Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983), the court ruled that holding the number one position on the *Billboard* charts for five weeks easily constituted access. Wide dissemination on television also will result in an inference of access. Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd., 452 F. Supp. 429 (W.D.N.Y. 1978).

106. Warner Bros. Inc. v. American Broadcasting Cos., 654 F.2d 204, 208 (2d Cir. 1981), *aff'd*, 720 F.2d 231 (2d Cir. 1983).

107. Caddy-Imler Creations, Inc. v. Caddy, 299 F.2d 79 (9th Cir. 1962).

108. Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

109. *See* 17 U.S.C. § 102(b)(1982).

themselves are not protectable; only their expressions are.[110] In other words, it is not the thought of the ideas, but rather the physical manifestation of the thought that receives protection. Because this area is abstract by definition, especially so when dealing with the medium of music, each case must be decided upon its specific facts.[111]

One factor indicating infringement, however, is the taking from a copyrighted work for a commercial purpose. This is because "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[112] This factor's importance sets the reference for the substantial similarity test in musical composition and sound recordings.

Since there can be similarity between works without copying,[113] there must be some copying of the plaintiff composer's work for an infringement to exist. The question is what part and how much of a work must be copied to constitute an infringement. In essence, the substantial similarity test measures the extent of copying *and* its use in the subsequent record. Specifically, has there been enough copying of the plaintiff's work by the defendant to the extent that there is a substantial similarity between the two works? However, substantial similarity is not simply a quantitative analysis, but a qualitative one.[114]

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110. "[A] copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself." Mazer v. Stein, 347 U.S. 201, 217 (1954).

111. "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc.*" Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

However, courts have come up with methods to guide the decisions, including Judge Hand's abstractions test.

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols, 45 F.2d at 121.

As for the value of the abstractions test, no one who has ever drawn a legal breath "has been able to improve upon Judge Learned Hand's famous 'abstractions test'." Sid & Marty Krofft Television, Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) (citing *Nichols,* 45 F.2d at 119).

112. Sony Corp. v. Universal City Studios, 464 U.S. 417, 451 (1984). *See also* Harper and Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).

113. Without copying, there can be no infringement of copyright regardless of the extent of similarity. This is because it is quite probable that two people could conceive of similar ideas without knowledge of each other's activities. *See* Twentieth Century Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946); Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936).

114. Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir. 1986).

In the quantitative analysis, even when a plaintiff proves the defendant copied, he cannot prevail unless he can also establish that the defendant copied a substantial portion of the plaintiff's work, showing that the two works are substantially similar.[115] The federal courts did not wish to enjoin a work simply because a small part of one song was similar to a small part of another song.[116] Thus, in order to infringe, one must utilize a substantial amount of the work. This may be standard for musical compositions but it has disastrous effects when applied to sound recordings.

This quantitative approach, however, has been challenged as an inadequate measure because a unique portion can be very small in length.[117] In other words, although the amount taken may be small, it may be the unique portion that gives the song *quality.* The qualitative analysis reasons that if the chorus or a unique melody is appropriated, the whole song is damaged. "No plagiarist can excuse the wrong by showing how much of his work he did not pirate."[118] It is the consumer value, or what appeals and motivates the consumer musically, that concerns the courts. Federal courts have defined this qualitative measure of substantial similarity as determining if the defendants took "the whole meritorious part of the song"[119] or "the very part that makes [the plaintiff's work] popular and valuable,"[120] or "that portion of [the plaintiff's work] upon which its popular appeal, and hence, its commercial success, depends,"[121] or "what is pleasing to the ears of lay listeners."[122]

Some cases have attempted to form bright line rules, making implicit qualitative and quantitative assumptions without analysis of the elements. *Mark v. Leo Feist, Inc.,*[123] a landmark case known for the "six-bar rule," held that a taking of only six bars is not an infringement. However, a more recent case, *Northern Music Corp. v. King Record Dis-*

115. Hirsch v. Paramount Pictures, 17 F. Supp. 816, 818 (S.D. Cal. 1937).

116. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), *aff'd on rehearing,* 158 F.2d 795 (2d Cir. 1947).

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

118. Sheldon v. Metro-Goldwyn Pictures, 81 F.2d 49, 56 (2d Cir.), *cert. denied,* 298 U.S. 669 (1936).

119. *Northern Music,* 105 F. Supp. at 397.

120. Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282, 283 (8th Cir. 1939).

121. Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956).

122. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946), *aff'd on rehearing,* 158 F.2d 795 (1947).

123. 290 F. 959 (2d Cir. 1923), *modified on other grounds,* 8 F.2d 460 (2d Cir. 1925).

trib. Co.,[124] held that the taking of only four bars was substantial and therefore an infringement. Similar to *Northern* and contrary to *Marks*, the court in *Boosey v. Empire Music Co.*,[125] held that the six note taking of a chorus "I hear you calling me" was substantial and thus a taking. The basis for finding infringements in these small takings lies in the courts' use of a qualitative rather than a quantitative approach.

After applying a mixture of qualitative and quantitative analysis, one can determine substantial similarity by judging the artistic and financial importance of the portion(s) copied or appropriated. As a result, substantiality is measured with reference not to the defendant's, but the plaintiff's work. Thus, the reference to the substantial similarity test is the damage done to the entire musical work from which the note patterns were taken. "The question in each case is whether the similarity relates to matter which constitutes a substantial portion of the plaintiff's work—not whether such material constitutes a substantial portion of the defendant's work."[126]

Finally, a "demands test" has also been applied as part of the substantial similarity test. The demands test determines whether the copying work decreased the demand for the plaintiff's work by fulfilling the same function as the plaintiff's work.[127] This test actually determines unfair competition. For example, based on the demands test, it is permissible to print the lyrics of a song in a magazine article.[128] However, if the article prints the lyrics along with musical notation so that the song can be played, this competes with the plaintiff's sheet music revenues, and is forbidden.[129] Thus, two works were deemed substantially similar because the defendant copied so much of the plaintiff's work that demand for the original decreased.[130]

B. Distinctions Between Musical Compositions and Sound Recordings

The pivotal issue lies in determining the correct application of the substantial similarity test to sound recordings. Before one can apply this test, distinctions between musical compositions and sound recordings must be identified.

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124. 105 F. Supp. 393 (S.D.N.Y. 1952).

125. 224 F. 646 (S.D.N.Y. 1915).

126. *See* Sheldon v. Metro-Goldwyn Pictures, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

127. *See, e.g.*, Rosemont Enters., Inc. v. Random House, 366 F.2d 303 (2d Cir. 1966).

128. *See, e.g.*, Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941).

129. *See, e.g.*, Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282 (8th Cir. 1939).

130. *Id.*

Musical compositions are fixated by printed notation of musical symbols on paper, commonly referred to as sheet music. Sound recordings, using a musical composition, are fixed on records and tapes by producing and recording sounds. Thus, a note on paper is not the same as a note in a sound recording. The protection against duplication given to a sound voicing of a note in a recording is not extended to a note on paper.

Notes on paper are similar to letters in the alphabet. The individual note is a tool of communication and thus not copyrightable. However, the *note voicings* found in the sound recordings are individual unique sounds or creations of the note found on paper and *are* copyrightable.[131] In sound recordings, all of the sounds a musician creates are protected by the Act since these sounds are the actual "work" of the author.[132] Hence, notes can be freely used as tools to create compositions. Alternatively, notes found in sound recordings are, themselves, the copyrighted works, and therefore cannot be used as tools in the creation of music. Due to this basic difference, the substantial similarity test cannot be applied to sound recordings in the same manner as it is applied to musical compositions.

C. *The Substantial Similarity Test and Sound Recordings*

How should the substantial similarity test be applied to sound recordings? The copyright protection given to sound recording is special and limited because the right of reproduction is extended only to the actual sounds fixed in the recording.[133] Therefore, while the right to reproduce other copyright categories is infringed by a duplicating work that imitates or simulates in a substantial manner, the Act immunizes imitations which are substantially similar to the original. As a matter of fact, "mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible."[134]

This parasitic trait is a traditional phenomenon in the entertainment industry. As soon as Frank Sinatra appeared on the musical horizon in the early 1950's, the recording industry became inundated with tuxedoed "crooners." In the late 1970's, when Eddie Van Halen first displayed his unique guitar ability, the airwaves soon became inundated with guitarists trying to copy his frenetic scale-playing style. When the rock group

131. *See supra* note 30.

132. *See supra* notes 37-39.

133. 17 U.S.C. § 114(b) (1976).

134. H.R. REP. No. 2222, 60th Cong., 2d Sess. 106 (1909).

"KISS" first appeared in the middle 1970's, the heavy metal field filled with bands imitating their image.

Therefore, if substantial similarity without actual sound re-recording is not an infringement, then it seems that the only possible way to infringe a sound recording is to re-record sounds from the original work. Since the Act only extends protection to the actual sounds fixated in the recording, it thus appears that the only issue is whether the defendant re-recorded sounds from the original. By this reasoning, it would appear that the substantial similarity test is inapplicable to the field of sound recording.[135] In short, the only issue is sound duplications, not substantial similarity.

This was the exact decision of *U.S. v. Taxe,*[136] one of the most influential cases interpreting the Sound Recording Act. The case involved defendants who were pirating, making and selling copies of hit tapes produced and distributed by major record companies. The defendants, during re-recording of the songs, changed them in most instances by speeding the sounds, deleting certain frequencies or tones, and adding echoes or sounds from a moog synthesizer. The defendants claimed they had made a derivative work, apart from the original recordings. Yet, "evidence revealed these changes were insubstantial [since they were inaudible] to the human ear and were intended to be so.[137]

The court instructed the jury by stressing that the critical analysis is whether the defendants' product was either a re-recording or an independent fixation utilizing their own engineering, musicians and finances, expressly excluding re-recording, even with changes.[138] The court went on to instruct the jury that since a new fixation by re-recording with modifications is not an independent fixation, it constitutes infringement.[139] The jury found the re-recording to be an infringement.

The court of appeals upheld the decision, but found the instruction to be in error, stating that the test of substantial similarity is applicable to sound recordings like every other medium of copyright.[140] "We believe the instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to consider 'substantial

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

136. 380 F. Supp. at 1014.

137. *Id.* at 1013.

138. *Id.* at 1014-15.

139. *Id.* at 1015.

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

similarity', and cured any error in the earlier part of the instruction."[141] The most important aspect of the court's ruling was that even though the right to reproduce is limited to the recapture of the original sounds, that right can be infringed by an unauthorized re-recording which, despite changes in the sounds duplicated, results in a work of substantial similarity. Thus, even though sound recordings do not expressly contain the right to produce derivative works, the sound recording artist can now prevent others from such activity.[142]

This holding is in line with the adaptive rights given to sound recordings by the Act. Of course, the adaptive right, the right to arrange different works from pre-existing sound recordings, is limited to the actual sounds fixed in the recording.[143] Therefore, one cannot re-record sounds from a pre-existing work in order to create a new or derivative work.

Therefore, according to the trial court in *Taxe,*[144] the substantial similarity test, as applied to sound recordings, determines whether the infringing work contains the actual sounds of a plaintiff's copyrighted work, or instead, substantially similar but independently created sounds, which are permitted by the Act. This test complies with the Act's command that the re-recording of any of the actual sounds fixated on a copyrighted work, for commercial purposes, is strictly prohibited.

The analysis of the substantial similarity test, however, is not as simple as determining whether sounds on an allegedly infringing work are re-recordings of a copyrighted work or instead, non-infringing but substantially similar, independently recorded sounds. The problem is found in cases interpreting the Act that were influenced by musical composition cases. These decisions fail to make the distinction between notes on paper and notes from a sound recording. This is evident in *Taxe,* where the court hypothesized "[t]he trivial re-recording[s] . . . of one or two notes, . . . [and] re-recording[s] combined with such comprehensive changes [as to render the re-recorded work] no longer recognizable to the original . . . might very well be held to be such an insubstantial taking as not to infringe."[145] Here, the ghost of composition law haunts the interpretation of the Sound Recording Act.

Musical composition decisions hold that in order to infringe, the defendant must copy a substantial amount. However, when a court

141. *Id.* at 965.
142. *Taxe,* 540 F.2d 961.
143. 17 U.S.C. § 114(b) (1976).
144. 380 F. Supp. at 1014.
145. *Id.*

states that the taking of a few notes may be insubstantial, it errs for three reasons. First, the court fails to make the distinction that notes on paper are tools, whereas notes in a sound recording are the copyrightable works protected by the Act. Second, the court makes an implicit quantitative test assuming that the taking of a few notes is insubstantial. Therefore, the court fails to perform a qualitative analysis to determine if the unique and meritorious aspects of the recording, or rather, the "portion of [the plaintiff's work] upon which its popular appeal, and hence, its commercial success, depends,"[146] are taken by the re-recording of the "trivial" notes. The dicta, "more than a trivial part . . . one or two notes," amounts to a vague qualitative and quantitative gauge. The Sound Recording Act lacks a similar gauge for infringements simply because no recordings are allowed of *any* of the actual sounds on a copyrighted record for commercial uses.[147] This is why the Act specifically allows for imitation or simulation by independent re-creation, using one's own labor.

Why all the fuss over two, three or four notes? This leads to the third problem. Courts have never before conceptualized the new capabilities created by digital sampling, which fostered new, unknown, sophisticated methods of piracy. *Taxe* was decided in 1974, a full decade before the emergence of digital audio technology. Courts have never envisioned sound recordings through digital eyes. Although the taking of one or two notes may be trivial in some cases, it can be substantial in another.

Taxe, therefore, which concerned illegal duplication of *entire* songs, is influential for its dicta concerning a situation not even before it—the taking of a few notes. Recalling how it is now possible to sample phonemes to create new performances by Elvis, one realizes that the taking of a few notes can result in a quantitative and qualitative substantial taking. Before addressing this point in the next section, the concept of "recognizability" must be discussed. The *Taxe* court directed in its jury instructions that "[a]n infringement which recaptures the actual sounds by re-recording remains an infringement even if the re-recorder makes changes in the speed or tone of the original or adds other sounds or deletes certain frequencies, unless the final product is no longer recognizable as the same performance."[148] In other words: Is the defendant's product recognizable as the same sounds found on the originally re-

146. Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956).

147. 1971 HOUSE REPORT, *supra* note 9, at 1570. *See also* text accompanying notes 37-39.

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

corded performance? The recognizability test is therefore a very important element of the substantial similarity analysis.

The problem lies in the judicial tendency to use an *entire song* as the reference point for the recognizability test, asking whether the defendant's song is recognizable as the plaintiff's song. This is another outdated assumption from composition and piracy decisions. It is the tendency to view sound recordings as a single product with a single copyright. This is contrary to the Sound Recording Act, which recognizes the input of musicians, vocalists, engineers and manufacturers as separate copyrightable works. Therefore, the reference point for the recognizability test should be: Is the defendant's product in any way recognizable to any of the copyrighted works found in the plaintiff's product? For example, a defendant may produce a product that is completely original, except for the digital sampling or re-recording of a few trumpet riffs from a Miles Davis recording. Although the defendant's song may not be recognizable as the entire song of Miles Davis from which the recording was taken, the trumpet playing in the defendant's song is recognizable as the trumpet playing of Miles Davis in his preexisting copyrighted recording.

The above example illustrates an important reference that should be used when applying the substantial similarity test. Currently in the music industry, digital samplers feel they do not infringe if they take only one instrument from a "whole" song. For example, a recording featuring a big band will commonly include eighteen to twenty musicians. To claim that one did not infringe because only the tenor sax was sampled is a misconception. Each musician on the album has a copyright in his work, which usually has been purchased by the record company.[149] Therefore, the sampling of the tenor sax is an infringement of the saxophonist's copyrightable work. To hold otherwise contradicts the Act's recognition of each musician as a copyright author, and additionally would set a precedent for a varying degree of acceptable misappropriation. A helpful illustration is to view a song as a whole entity composed of separate parts, similar to the body. The guitar, sax, piano and voice all represent various organs, such as the heart, liver, kidneys and spleen. Each component/organ is essential to the functioning of the whole. To remove any one of them is to impair the body or the sound of a song.

However, what if only part of the tenor sax performance from the big band record is sampled? Obviously, a qualitative and quantitative

149. However, many recording contracts vary according to the bargaining power of the artist. As a result, the copyright proprietor can be multiple contracting partners.

approach must be used. All decisions of infringement will inevitably be ad hoc.[150] For example, the United States Supreme Court held that 300 words copied from over 200,000 is an infringement because "[w]hat was essentially the heart of the book" was taken.[151] Similarly, another court held that copying one minute and fifteen seconds from a one hour and twelve minute motion picture to be "qualitatively substantial" and therefore an infringement.[152]

Again, no bright line exists to determine an infringement. Deciding what is taken and how it is used is analyzed on an ad hoc basis. To illustrate this point consider the two words "Hey you." Suppose a pirate sampled these two words from separate Elvis songs. He then puts them into a new song and they are repeated only twice among the sounds independently created by other musicians and vocalists. Would this use be an infringement? Perhaps this is trivial. However, what if the sampler used the words "Hey you" two-hundred and seventeen times, building a song around the phrase, which is modified and speeded up so that it sounds different each time. In essence, Elvis becomes the vocalist—is this an infringement? Consider even further if the sampler took the words "Ain't nothing but a hound dog" and used the phrase thirty times. Does this use infringe more because it may take away commercial sales from the pre-existing song of the same name?[153] These illustrations show the need for ad hoc decision making.

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150. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960). *See supra* note 111 and accompanying text.

151. Harper and Row, Publishers v. Nation Enters., 471 U.S. 539, 564-65 (1985) (citing *Harper and Row,* 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

152. Roy Export Co. Establishment v. Columbia Broadcasting Sys., 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd,* 672 F.2d 1095 (2d Cir.), *cert. denied,* 459 U.S. 826 (1982).

153. The method employed by the court to determine the effect of the pirate's use upon the potential market value of the original work has two stages. First, a comparison is made of the media in which the two works may appear; second, a comparison is made in terms of the function of each work regardless of the media. This is the functions test. Meredith Corp. v. Harper and Row, Publishers, 378 F. Supp. 686 (S.D.N.Y.), *aff'd,* 500 F.2d 1221 (2d Cir. 1974).

However, "[s]ome commercial purposes, for example, might not threaten the [copyright owner's] incentives because the user profits from an activity that the owner could not possibly take advantage of." Pacific and Southern Co. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984). As a result of these holdings a digital sampler cannot duplicate the sounds of a copyrighted musical work because he uses them for the same function that the author does—sound recordings for profit in the same market. *See infra* note 160 for the effects on the individual artist.

IS DIGITAL SAMPLING AN INFRINGING USE? UNCOVERING THE IMPLICIT: A RIGHT TO CONTROL RECORDED PERFORMANCE

One of the main reasons that digital sampling is difficult to conceptualize is because digital piracy occurs during record production, not subsequently. Traditional piracy occurs by illegal duplication of a finished sound recording. For example, the traditional pirate waits until a song is released, like Frank Sinatra singing "My Way," and then duplicates the entire song in order to sell copies. Today's digital sampling pirate will take individual words or sounds that Frank Sinatra sings in order to release a new song (different lyrics and music) with Frank Sinatra singing.

Digital samplers record sound digitally and allow musicians, producers and equipment manufacturers to borrow (steal) other artist's signature instrumental or vocal sounds, making it possible to put the drum sounds of Phil Collins or the guitar bite of Eddie Van Halen on any record.[154]

This misappropriation is fostered by two elements. First, there is the judicial misperception that a mere trivial recording of a few notes is not a taking. Second, there is either total contempt or ignorance of piracy laws and the Sound Recording Act on the part of producers and artists in the industry. This is illustrated in the following quote by a producer, "On the one hand if I sample your voice and use the sound unaltered so that it sounds exactly like you and I make good money from the recording, that is not good. On the other hand, you could say, 'Look, a sound is out there, it's public domain.' "[155] What the producer is really saying is, "I take your talent, genius and labor, and use it for my own benefit to make money for myself, you (the artist) getting none, and while I know that this is bad or wrong, I can do it because the law seems to allow me because sounds are in the public domain."

Wrong! The Act recognizes and protects actual sound fixated in a record by each copyright artist. In other words, the artist's individual sounds are protected. The aforementioned producer needs to be reminded of *United States v. Bodin.*[156] That case held that there is no First Amendment right to usurp the labor of another since a pirate does not seek to express himself creatively, but to express another's creativity.[157]

154. *See* Seligman *supra* note 1. *See also* Seligman, *Digital Sampling: Is It Theft? Technology Raises Copyright Question,* 31 BILLBOARD MAG. 98 (1986)[hereinafter *Digital Sampling*].

155. Seligman, *Digital Sampling,* 31 BILLBOARD MAG. at 98.

156. 375 F. Supp. 1265 (W.D. Okla. 1974).

157. *Id.* at 1267.

Recalling how piracy, fair use, musical composition and sound recording laws prohibit the misappropriation of the unique intellectual creations that are the product and property resulting from another's labor, consider this incredibly incriminating quote by a producer:

> In some cases you use a sample because it's a really *unique* sound you want and it would be impossible *to get* otherwise, like [the deceased member of Led Zeppelin,] John Bonham's kick drum. In other cases, *it is simply to save time.* You could probably, with a lot of set-up and experimentation, get the sound you're after. But it's so much faster to use a sample.[158]

In other words, the producer is saying: "When I take another's work, I take it for one of two reasons. Either I take because it is a unique creation and is the part of a song that makes it popular and valuable, and I am unable by my own labor to produce the sound(s),[159] or I take it so that I do not have to perform the labor, nor bear the expense of creating those sounds. It's easier to take from others and quicker too, so I save on studio expenses as well." Digital sampling violates precisely what the piracy, musical composition and sound recording laws try to protect—the unique intellectual creations of copyrighted sound recording artists and their careers. Reviewing these areas with digital sampling in mind will illustrate that an artist's individual sounds are protected and that sound recording artists have the implicit right to control recorded performances.

Piracy laws historically responded to new forms of technology in order to safeguard and protect the intellectual property found on records. The effort to protect these works culminated with passage of the Sound Recording Act. The advent of digital technology created new forms of piracy previously unattainable. These new forms of piracy require a re-

158. *See* Seligman, *Digital Sampling, supra* note 154 at 98 (emphasis added).

159. Stealing the unique musical performances of the individual copyright artist amounts to a usurping of their identity. This is especially disheartening for past legends who witness new bands sampling their copyrighted works and receiving credit for their performances. Perhaps the most blatent example of digital sampling occurred to legendary rock group, Led Zeppelin when Def Jam Records' producer, Rick Rubin "boldly lifted the core Jimmy Page guitar riff from the song 'The Ocean' for the Beasty Boys song 'She's Crafty.' " Fricke, *Robert Plant*, ROLLING STONE, Mar. 24, 1988, at 58. Led Zeppelin's lead singer, Robert Plant, spoke directly toward producer Rubin's sampling of their music: "Maybe he ought to write his own riffs then. He's not particularly an innovator in that way. There's loads of house music from Chicago and rap stuff that steal Zeppelin in far less obvious ways. I guess if he's going to nick something, he might as well nick something good. He's made a lot of money." *Id.* at 171. According to Zeppelin copyright proprietors, this situation may end in litigation.

The problem is that young consumers hearing the record think the Beasty Boys are great guitarists. Imagine their surprise at their first Beasty Boys concert, when they learn all the music was taped and none of the Beasty Boys are musicians.

analysis of the Act's piracy test. Congress rejected pleas for the sounds fixated on a record to be subject to a compulsory license because they viewed the sounds as the actual copyrighted work of the author. Both the Act and piracy statutes have long recognized such duplications as unfair competition and misappropriation of another's creative intellectual property. The Act specifically limited the power of the sound recording artist in that anyone using their own musicians and studio could imitate or simulate any copyrighted sounds.

This illustrates that sound recording artists were given a very specific area of protection—limited to the actual sounds they fixate on a record. Digital sampling now threatens to take away the very small area of protection sound recording artists now rely on. Piracy laws and the Act prohibited duplication to thwart the unfair competition and misappropriation engendered by piracy. Congress has continued to protect illegal duplication by passing the Record Rental Amendment of 1984,[160] by amending the "first sale" provision of the Act to prohibit record rental, so that work could not be rented, taped and then returned. The Senate Committee Hearings indicate Congress' intent to protect each sound recording performer contributing to the sounds fixated on a record.

Congress has recognized on many occasions that sound recordings only bear the originality of the performer. Thus, the Act allows ownership of the copyright in the work to be negotiated contractually according to the percentage of original input. What protection is given to an artist's work and career if others can call up their artistic work and signatures by digitally manipulating their past performances? Digital samplers in essence rob sound recording artists of a new recording contract or session date and compensation for the use of their copyrighted work. Sampling must not occur unless permission from the copyright author has been obtained and proper compensation has been made.

In a statement submitted to the Senate Subcommittee on Piracy and Counterfeiting, the Recording Industry Association of America outlined the effects of piracy on each individual author.[161] Recalling the differ-

160. Record Rental Amendment of 1984, Pub. L. No. 48-450, 98 Stat. 1727 (1984).

161. The RIAA depicted the injury to each Sound Recording Author by the following statement:

> [M]ost of these talented performers [recording artists] have only very brief careers because of changes in consumer tastes . . . pirates feed off their careers when their hits are selling well. Recording artists lose millions in royalties and fees from unchecked activities of pirates. Pirates leave the new or less popular artists to be subsidized by legitimate entertainment companies.
>
> Both lead recording stars and the multitude of background musicians are directly injured every time (a pirated performance occurs) . . . members of the Ameri-

ences between a note on paper and a note voicing executed on a record, the value of a few sounds becomes clear. Fifty saxophone players can all blow a diminished C-A-G note sequence on their instruments, yet samplers choose to ignore those fifty available musicians and take the C-A-G note sequence the revered saxophonist Miles Davis creates. This is simply due to the same reason Miles Davis can be found on recordings, his unique talent and genius overshadowing lesser players. The sampler takes his genius by capturing his sound, without bearing the expense of contracting or recording it.

The process of digitally sampling copyrighted sound recordings, without the artist's knowledge or consent, violates the exclusive control of the reproductive rights granted to performers by the Sound Recording Act. The Act protects the commercial value and marketability of the sounds, or rather, the unique intellectual creations produced by vocalists, musicians, engineers and record manufacturers. However, the scope of copyright protection is limited to the actual sounds fixated on a record. Unlike other copyright authors, sound recording artists cannot prohibit other entities from imitating or simulating their works of authorship. This is due to Congress' desire to encourage musical freedom and prevent the monopolization of the idea of a sound. As a result, only the actual sounds an artist captures on a record are protected, and anyone is free to perform or hire his own musicians and record his own imitation of the sounds in the original work. The Act also recognizes each musical performer, engineer and manufacturer as holding an individual copyright in his work.

Thus, the Act treats a copyrighted song or recording as a combina-

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can Federation of Musicians receive supplemental income through a Special Payment Trust Fund, and Music Performance Trust Fund every time a record is sold. In 1980 each fund received 19 million dollars. The current volume of pirating . . . deprives these two musicians funds millions of dollars each year.

[Writers', composers', engineers', and publishers'] . . . earnings are determined by the legitimate sales of records and tapes. When a piracy occurs, these individuals are robbed of the fruits of their labor.

Pirating adversely effects the [record] companies since they take the risk investing in a record. Only a small percentage of records make money. In 1979, 84% of all records failed to recover their cost; the record company is thus dependent on its relatively few hits to cover its costs, develop new talent, subsidize losing projects and hopefully make a profit. Pirates copy only the hits (or the unique) . . . depriving record companies of the revenues they need to survive in a very risky business.

Id. at 34-37.

The RIAA went on to state that piracy and the Sound Recording Act are not being enforced. Current RIAA President Jason S. Berman recently concluded that digital technology "is the gravest threat we have ever faced." He suggested that all new recordings should be manufactured with a certain anti-piracy frequency so that digital samplers and recorders cannot duplicate the sounds. Yet this possible anti-piracy mechanism is of no benefit to past and current record releases. *Id.*

tion or collection of numerous copyrighted works or intellectual creations bound together in a joint effort resembling one work—a song. This is contrary to the traditional outdated view found in piracy decisions before the Act and digital sampling—a song is a single product with a single copyright owner, the composer. The definition of piracy must be updated to meet both the call of the Act and the new unknown sophisticated forms of piracy created by digital sampling. Digital sampling devices offer undreamed of capabilities allowing the capture of the commercially valuable characteristics of copyrighted sound recording artists. Throughout the history of piracy, the law has consistently protected sound recordings by responding to technological changes. Although some may claim digital sampling is a new musical language, when one samples copyrighted recordings the language has a one word vocabulary—violation.

As the *Bodin* court wryly noted, there is no First Amendment right to express yourself musically by using the recordings of others.[162] One must do the work himself and bear the expense. Similarly in musical composition cases, courts have performed quantitative and qualitative analysis to protect against the unique, seductive, commercially valuable characteristics found in a musical piece. Therefore, when one samples the sounds in a recording, the actual copyrighted works of the artist that seduce and entice the consumer are misappropriated. Clearly, the intent of the Act is to protect each individual sound component in a song. The assertion that a mere trivial recording of a few notes is not an infringement is a baseless quantitative assumption with no place in an industry threatened by digital sampling.

In reality, the pirate has taken the entire copyrighted work from the trumpet player. If we apply the demands and function test to determine substantial infringement, it is clear that digital sampling does decrease the demand for the sampled artist's work because it fulfills the same function as the artist's work. Thus, instead of having to hire, record and purchase an artist's copyright, the pirate takes another's genius for free. This activity also violates the Adaptive Rights given to the musical artist by the Sound Recording Act. The Adaptive Right is limited to the right to prepare a derivative work in which the actual sounds are altered in sequence or quality. One is not free to make subsequent songs from a pre-existing one. The custom in the recording industry is to contract separately for each song. The resulting scope of the Act and the influence of piracy and musical composition decisions uncover the extent of

162. United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974).

power bestowed on the sound recording author, the artist. The advent of technology forces the recognition and rediscovery of the implicit right of a sound recording artist—*the right to control recorded performance.*

Digital sampling is a pirate's dream come true and a nightmare for all the artists, musicians, engineers and record manufacturers. Federal courts must update their view of piracy and interpretation of the Act to meet the sophistication of digital technology. Sounds are not ideas, but expressions, and therefore copyrighted works. Without adequate protection, the Act will be virtually useless. Sampling specifically injures artists. Their implicit right to control their recorded performance must be recognized. This is a right that cannot be contracted away to the copyright proprietor. Perhaps record manufacturers who tire of an artist's musical progression will view past works as a gold mine from which to create new works without the artist's consent. Although this is a subject for another paper, the artist's right to control recorded performance should be acknowledged. Unchecked digital sampling will present the incongruous result of a copyrighted work which is both protected by copyright but is also part of the public domain. By any standard, digital sampling is nothing but old fashioned piracy dressed in sleek new technology.

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