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## Current and Suggested Business Practices for the Licensing of Digital Samples

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# CURRENT AND SUGGESTED BUSINESS PRACTICES FOR THE LICENSING OF DIGITAL SAMPLES

## I. INTRODUCTION

Concurrent with the widespread proliferation and acceptance of digital sampling technology,<sup>1</sup> an increasingly common practice for musical artists and audio producers is to include portions of the copyrighted recordings of others in their own works.<sup>2</sup> Much to the frustration of the owner of the applicable copyright in the prior work,<sup>3</sup> these samples are often used without obtaining the requisite permission. Although situations may exist in which such use of a portion of a copyrighted recording would not constitute copyright infringement, many instances of unpermitted use are clearly infringing.<sup>4</sup> In between these extremes, as in most areas of the law, a significant gray area exists.

The ad hoc approach within the music industry to the issues of when and whether the artist must seek permission to use the sample, from whom such permission must be obtained, and on what terms permission is granted has unnecessarily inhibited the growth of a process of creating music that has many artistic and economic benefits.<sup>5</sup> The purpose of this article is to survey the legal background relating to sampling, examine the current practices in the recording industry concerning the

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1. A digital sampler enables a musician to record a portion of a sound recording or other audio signal (the "sample") as binary code in a computer. The musician may recall the sample later, manipulate it and include it in his own subsequent performance. There are other techniques by which a musician may achieve similar effects, most notably "scratching" and "needledropping." Scratching is a process whereby a vinyl record is physically rocked back and forth to manipulate and play the sound recording embodied therein. Needledropping, also called "looping," is a process whereby a portion of a sound recording is recorded onto magnetic tape, and the beginning and end of the tape are joined together to form a continuous loop which, when played, repeats the portion recorded therein ad infinitum. The latter process is generally used to create a background track for the subsequent sound recording.

All of these processes share the characteristic of potentially infringing on the owners of the copyrights in the original sound recording and musical composition, thus for the sake of clarity, the terms "sample" and "sampling" should be understood to include all processes by which a portion of a sound recording may be embodied in a subsequent sound recording.

2. Sampling is most common in Rap and Dance music. One source, *see infra* note 6, reported that at least 180 recordings, by 120 different musical artists, contain samples from recordings by the P-Funk series of bands (Parliament, Funkadelic, and various spin-off bands formed by George Clinton or Bootsy Collins).

3. Samples may infringe on the copyrights in the prior musical composition, sound recording, or both. *See infra* text accompanying notes 24-86.

4. *See infra* text accompanying notes 31-86.

5. *See infra* text accompanying notes 95-102 and 106-08.

licensing of digital samples,<sup>6</sup> and derive from this information a standardized licensing scheme for samples. The author hopes that this effort will enable artists who wish to use samples in their work to reasonably predict the costs and procedures involved and provide both licensors and licensees in such situations with common guidelines and language to use when negotiating the price of the license.

## II. WHY SEEK CONSENT AT ALL?

### A. Legal Concerns

By definition, sampling is copying.<sup>7</sup> As a result, the use of a sample may constitute copyright infringement if the sample embodies an excessive amount of the prior work.<sup>8</sup> Artists and record companies therefore undertake substantial risks when using potentially infringing samples without permission. Under federal copyright law, the remedies available to one whose exclusive rights<sup>9</sup> have been violated include: ac-

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6. While researching the current practices in the industry concerning sampling, the author contacted many industry figures to determine the parameters of these practices. These figures include music publishers, record company executives, and attorneys representing artists and record producers that sample. All of these people deal with sampling issues on a continuing basis; thus, as a condition to their speaking freely, many of them requested that their name, company and the artists involved not be identified. This request was justifiably made so that the publication of this article would neither be deemed a statement of their general policy, or lack thereof, nor hamper any of the many behind-the-scenes settlements that occur almost daily concerning sampling. Accordingly, assertions in this comment based upon statements made by these sources will not receive citations.

7. See *supra* note 1.

8. See *infra* text accompanying notes 24-86 for a discussion of what may be considered an excessive appropriation. For the purpose of this section, it is only necessary to understand that, at some point, the use of a sample may infringe upon the rights of others. See Newton, *Digital Sampling: The Copyright Considerations of a New Technological Use of a Musical Performance*, 11 HASTINGS COMM/ENT L.J. 671 (1989); McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147 (1989); Comment, *Digital Sampling: Old-Fashioned Piracy Dressed Up in Sleek New Technology*, 8 LOY. ENT. L.J. 297 (1989); Comment, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723 (1987). *But cf.* Comment, *Digital Sampling and Signature Sound: Protection Under Copyright and Non-Copyright Law*, 6 MIAMI ENT. & SPORTS L. REV. 61.

9. The exclusive rights of the copyright owner of a musical composition are to do or to authorize the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based on the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work;
4. to perform the copyrighted work publicly; and
5. to display the copyrighted work publicly.

Copyright Act of 1976, 17 U.S.C. § 106 (1988). The exclusive rights in a sound recording are limited to those rights set forth in 1, 2 & 3 above. 17 U.S.C. § 114. There are other important limitations to the rights in sound recordings. See *infra* note 73.

tual damages;<sup>10</sup> statutory damages;<sup>11</sup> attorney's fees and costs;<sup>12</sup> injunctions against further exploitation;<sup>13</sup> impounding and destruction of infringing materials;<sup>14</sup> and possible criminal penalties.<sup>15</sup>

The potential effect of these remedies, should the defense of an infringement suit prove unsuccessful, may devastate both an artist's career and bank account. In addition to a judgment against the artist that could easily amount to several hundred thousand dollars, the time and energy wasted in attending to the suit may create a substantial impediment to the orderly development of the artist's recording career. One respected litigator stated that even a *successful* defense of a copyright infringement claim may cost \$150,000 or more. Similarly, a pre-trial settlement would be unnecessarily expensive and inefficient. The defendant would be in a weak bargaining position as a result of the prior release of his recording, and the plaintiff would have a natural tendency to be upset about the infringement and thus reluctant to grant favorable terms for the use.<sup>16</sup> When considered in light of these possibilities, the wisdom of obtaining prior permission to use a sample is readily apparent.

Generally, the costs of a suit or settlement would be borne entirely by the artist. Although a record company could be liable under contributory infringement theories<sup>17</sup> or by virtue of its infringement of the copyright owner's exclusive right to distribute the copyrighted material,<sup>18</sup> in

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10. 17 U.S.C. § 504b.

11. 17 U.S.C. § 504c.

12. 17 U.S.C. § 505.

13. 17 U.S.C. § 502.

14. Copyright Act of 1976, 17 U.S.C. §§ 503, 506b (1988).

15. 17 U.S.C. § 506a.

16. With rare exception, this situation describes the conditions under which very expensive settlements occur. These settlements often involve full or partial assignments of the copyright(s) and cash payments in the tens of thousands of dollars. Even if no litigation is initiated, virtually all record and publishing companies polled stated that the price charged for the use of a given sample would be substantially higher if the company had to contact, on its own initiative, the user of the sample after the release of the infringing record. In addition, the perception within the industry that an artist or record company is stealing from others may have the effect of increasing the costs of licenses for subsequent samples and perhaps costs associated with other, unrelated deals.

17. There are two types of situations in which this doctrine may apply. One is where the defendant: 1) actively induces, yet does not directly participate in, the infringement; 2) has knowledge of the infringing acts; and 3) has a direct financial stake in the infringement. *See, e.g., Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973). The other is where the defendant: 1) has the power or right to supervise the acts of the direct infringer; and 2) has a financial stake in the infringing acts (knowledge of the infringing acts is not required). *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963). Arguably, either of these doctrines may apply in the recording artist-record company relationship.

18. *See supra* note 9 and accompanying text.

virtually all cases there will be a clause in the contract between the record company and the artist in which the artist agrees to indemnify the record company from any claim that the recordings produced pursuant to the contract violate the rights of third parties.<sup>19</sup> Despite such contractual language, the record company does undertake a substantial risk in not licensing, or causing the licensing of, samples used by its artists. If the artist is not in the financial position to uphold the indemnification, the record company will be left to bear the costs of the suit or settlement.<sup>20</sup> Some record companies have responded to this risk by requiring proof from the artist, prior to the record company's acceptance of the masters,<sup>21</sup> that the samples used in a recording have been cleared with the owners of the applicable copyright. This practice undoubtedly will, and should, be followed by more record companies in the future if the unlicensed use of samples is not otherwise curtailed.

A sobering thought for those who think their sampling will go unnoticed: at least one major music publisher has now begun to buy each rap album and single as it hits the charts<sup>22</sup> and has its employees listen care-

19. Typical provisions to this effect would read:

None of the Masters hereunder, nor the performances embodied thereon, nor any other Materials, as hereinafter defined, nor any authorized use thereof by [the record company] or its grantees, licensees or assigns, will violate or infringe upon the rights of any third party. "Materials" as used herein means: all Controlled Compositions; each name or sobriquet used by you or Artist, individually or as a group; and all other musical, dramatic, artistic and literary materials, ideas and other intellectual properties furnished or selected by you, the Artist or any individual producer and contained in or used in connection with any Recordings made hereunder or the packaging, sale, distribution, advertising, publicizing or other exploitation thereof.

4 ENTERTAINMENT INDUSTRY CONTRACTS NEGOTIATING AND DRAFTING GUIDE Form 160-1, cl. 1.07 (D. Farber 7th ed. 1990) [hereinafter *Contracts*]; and

You agree to and do hereby indemnify, save and hold [the record company] and its licensees harmless of and from any and all liability, loss, damage, cost or expense (including legal expenses and reasonable attorney fees) arising out of or connected with any breach or alleged breach of this agreement or any claim which is inconsistent with any of the warranties or representations made by you in this agreement

*Id.* at cl. 1.12.

20. Whether or not the record company is responsible for these expenses, such proceedings will disrupt its normal business operations. While a major record label may be able to effectively withstand this disruption due to its considerable resources, a smaller label with limited financial and human resources may not be able to fare as well.

21. In a standard recording contract, the record company has the right to reject recordings delivered thereunder that infringe upon the rights of others. 4 *Contracts, supra* note 19, at cl. 3.01. Should the record company reject the recordings, the artist is deemed to have not fully performed his obligations under the contract and must either clear the violative portion or deliver a substitute recording.

22. There are many charts in the industry that show the relative sales and airplay of albums currently in release. The chart most commonly referred to is the *Billboard* Top 200 Pop albums and Top 100 singles. *Billboard* also publishes similar charts that focus on "black" music. Rap albums may, and often do, appear on both types of charts.

fully for samples that may infringe on the company's rights. A major record company whose catalog includes artists who are frequently sampled has been reported as employing a similar practice. Such procedures will spread quickly if the unpermitted use of samples continues to go unchecked. An artist or record company should not therefore justify the risks involved in unpermitted sampling by thinking that no one will notice.<sup>23</sup> As a standard business practice, potentially infringing samples should be cleared prior to the release of the subsequent recording.

### *B. Practical Concerns*

A further benefit of licensing samples would be the creation, through experience and familiarity, of industry-wide standards regarding the terms of such licenses. These standards would greatly reduce the uncertainty currently present in decisions relating to the use of samples and would allow the artist to accurately choose the most efficient course of action. The more accurately an artist understands, prior to going into the studio, what types of sampling require consent and approximately how much this consent would cost, the better position he will be in to make intelligent decisions as to whether it was economically advantageous to use a particular sample. He will sample only when it was "worth it" to him. Conversely, the artist will not be inhibited from sampling by the uncertainty as to whether he can obtain the use of a sample for a fair price or whether he may ultimately risk facing costly litigation or forced settlements. Since, when use occurs, the owner of the original copyright receives fair compensation, he too would benefit from the artist's increased knowledge.

Standardization may also permit a reduction in the overall costs of the licenses. If the owner of the applicable copyright in the sample felt that generally he would be fairly compensated for the use of samples, he may be more inclined to grant favorable terms in the license for each use. Transaction costs associated with such licensing would also be greatly reduced, because if both parties knew what the terms were likely to be prior to negotiation, they would spend less time concluding the deal.

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23. Such a position would be unreasonable even if companies were not specifically looking for infringing samples, as it is entirely inconsistent with the nature of the record business. Records are very expensive to produce, costing on the average (for a major label release) \$150,000-\$175,000 each. When one adds the costs associated with manufacturing, promotion, marketing, overhead and related expenses, the investment may easily exceed \$250,000. Even a release on a small record label, although objectively costing considerably less, will represent a significant investment relative to the company's available assets. Clearly, the goal of recording artists and their record companies is to be noticed, so that they may sell records and recover their investment.

### III. AT WHAT POINT DOES THE USE OF A SAMPLE REQUIRE CONSENT?

Two distinct copyrights are embodied in any given popular recording: that of the musical composition<sup>24</sup> and that of the sound recording itself.<sup>25</sup> These two copyrights are virtually always owned by different companies<sup>26</sup> that have different interests and concerns. Further, use of a sample may infringe the copyright in the sound recording without infringing upon the copyright in the musical composition.<sup>27</sup>

In order to prove copyright infringement, the plaintiff must show: 1) ownership of a valid copyright; and 2) impermissible copying by the defendant.<sup>28</sup> The second element of the test requires a two-step analysis. The first step is to establish that the defendant copied the plaintiff's work.<sup>29</sup> The second step is to show that the defendant's copying constituted improper appropriation.<sup>30</sup> The question posed by the second step of this test — at what point the use of a short portion of a work will constitute improper appropriation — is likely to be heavily contested in the context of sampling and thus is the focus of this section. The answer

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24. There is no definition of "musical work" or "musical composition" in the Copyright Act. A musical composition is generally understood, however, to be the song (i.e., words and music) upon which a recording is based.

25. 17 U.S.C. § 101 provides:

'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

A sound recording is the recording of a particular performance of a musical composition, or song. Accordingly, the sound recording is a derivative work of, and thus embodies, a musical composition. When one samples a recording, one risks infringing upon both the copyright in the musical composition and the copyright in the sound recording.

26. The copyright in a sound recording is owned by a record company, and the copyright in a musical composition is owned or controlled by a music publisher.

27. A classic example of this is a sample of a popular singer's shout. This phenomenon will be discussed at greater length below. *Compare infra* text accompanying notes 61-67 and text accompanying notes 70-80.

28. *Arnstein v. Porter*, 154 F.2d 464, 468, *aff'd on reh'g*, 158 F.2d 795 (2d Cir. 1946). The first element of this test is unlikely to be a factor in the vast majority of potential sampling cases and thus it will not be discussed in depth. The possession of a valid copyright certificate is prima facie evidence of the validity of the copyright and the facts stated in the copyright registration. 17 U.S.C. § 410c. As a matter of course, music publishers and record companies will be in possession of a valid copyright certificate stating that they are the owner of the applicable copyright in the work.

29. Again, the first step at this stage is not the concern of this article, for the act of sampling is by definition a clear case of actual copying. *See supra* note 1. Although the subtle issues involved in actually proving sampling, and thus copying, are beyond the scope of this article, such proof may be shown either by comparison listening tests or by waveform analysis.

30. *Arnstein*, 154 F.2d at 468.

to this question will differ significantly for musical compositions and sound recordings.

### A. Musical Compositions

#### 1. Infringement Under the Copyright Laws

In its most basic terms, the test used to determine whether an appropriation of a portion of a prior work and its incorporation into a subsequent work is improper, is whether, as a result of the appropriation, the two works are "substantially similar."<sup>31</sup> In such determinations, courts generally focus their inquiries on the qualitative value of the portion appropriated.<sup>32</sup> As applied to musical compositions, the standard of infringement has been variously explained by the courts as whether the defendant appropriated: "the whole meritorious part of the song;"<sup>33</sup> "what is pleasing to the ears of lay listeners;"<sup>34</sup> "that portion of the [plaintiff's work] upon which its popular appeal, and hence, its commercial success, depends;"<sup>35</sup> and "the very part that makes [the plaintiff's work] popular and valuable."<sup>36</sup>

The qualitative approach to substantial similarity was more fully explored in *M. Witmark & Sons v. Pastime Amusement Co.*<sup>37</sup> ("*Witmark*"). In *Witmark*, the defendant publicly performed the chorus of the plaintiff's song to accompany the showing of a silent movie.<sup>38</sup> The defendant argued that such a performance could not infringe the copyright in the song as solely the chorus was performed and such a quantitatively small use was *de minimus*.<sup>39</sup> The court rejected this argument, stating that should such a purely quantitative approach be followed, "the fairest portion of a musical composition, the very parts that make it pop-

31. 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT, § 13.03[E] (1990).

32. See *infra* text accompanying notes 33-39. Such an approach is particularly germane in the context of sampling, as most samples involve the appropriation of relatively short portions of the prior work. Of course, the greater the amount appropriated, the more likely that the portion will contain something of sufficient qualitative value to constitute infringement.

33. Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 397 (S.D.N.Y. 1952).

34. Arnstein v. Porter, 154 F.2d 464, 473 *aff'd on reh'g*, 158 F.2d 795 (2d Cir. 1946).

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

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

37. 298 F. 470 (E.D.S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924).

38. The court found the chorus to be 27 seconds long. *Id.* at 473.

39. Essentially, "de minimus" is a shorthand phrase meaning, in this context, "too insubstantial an appropriation to be an infringement." The phrase comes from the Latin maxim "de minimus non curat lex," which translates into English as: "The law takes no notice of trivialities." LATIN WORDS & PHRASES FOR LAWYERS 64 (R. Vasan 1980).



ular and valuable, may be taken with impunity, provided the work is not taken in its entirety."<sup>40</sup> Although recognizing the impossibility of formulating a precise rule, the court did offer some guidelines as to when the line between de minimus use and infringement would be crossed:

To constitute infringement it is not necessary that the whole, or even a large portion, of the work shall have been copied, [but] on the principle of 'de minimus non curat lex' it is necessary that a material and substantial part of it shall have been copied; it being insufficient that mere words or lines have been abstracted. Between these extremes no precise and definite rules can be cited. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially and to an injurious extent appropriated by another, that is sufficient . . . to constitute piracy. The question is one of quality rather than quantity, and is to be determined by the character of the [original] work and the relative value [to the original work] of the material taken.<sup>41</sup>

Although it is helpful knowing that a qualitative approach is to be followed, such knowledge does not fully resolve the issue. The true question is what are the qualities that make short portions of a musical composition protectable by copyright law? The answer may be found by considering the nature of the language describing infringing appropriations and the general goals of the copyright laws.

The specific qualitative aspect that courts tend to focus on in determining whether an appropriation constitutes copyright infringement is the commercial value of the portion appropriated. This may be inferred from the consistent use of words like "valuable,"<sup>42</sup> "popular,"<sup>43</sup> and "commercial success"<sup>44</sup> to describe the qualities of an infringing appropriation. These words clearly relate to the potential remuneration to the author for his efforts. The importance of the commercial value of the portion appropriated was explicitly acknowledged in *Arnstein v. Porter* ("*Arnstein*").<sup>45</sup> The court stated that "plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the

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40. *Witmark*, 298 F. at 478.

41. *Id.* at 476-77.

42. *See supra* notes 36, 40 and accompanying text.

43. *See supra* notes 35, 36, 40 and accompanying text.

44. *See supra* note 35 and accompanying text.

45. *Arnstein v. Porter*, 154 F.2d 464 *aff'd on reh'g*, 158 F.2d 795 (2d Cir. 1946).

lay public's approbation of his efforts."<sup>46</sup> If a plaintiff's legally protected interest is in the potential financial returns from his compositions, then logically those portions of his compositions with the greatest commercial value will be the most highly protected.

In popular music, the most commercial element of any given composition is, almost without exception, the chorus.<sup>47</sup> The chorus is the comparatively brief, highly repetitive and especially memorable section of a song that is itself repeated, generally after each verse and often incessantly at the end of the song. This barrage of repetition has a tendency to cause the chorus to echo in the listener's head long after the song has played and become the song's primary identifying characteristic.<sup>48</sup> That such a portion becomes so distinctive and unforgettable is crucial to the creation of public demand for the song, which leads to, among other things, radio airplay and record sales. The airplay and record sales in turn bring potentially staggering income from performance and mechanical royalties.<sup>49</sup> The protection of the chorus is thus justifiably quite high, as it will often embody the bulk of the commercial value in a song.<sup>50</sup>

Due to its high commercial value, exceedingly short appropriations of the chorus have been considered infringing. *Boosey v. Empire Music Co., Inc.*<sup>51</sup> ("Boosey"), involved two songs that the court found were "considerably different, both in theme and execution, except as to [the] phrase, 'I hear you calling me.'"<sup>52</sup> This phrase, and the music accompanying the words, were "practically identical"<sup>53</sup> in both compositions. The court held that such an appropriation was an infringement because, even though it was a very short phrase, it had "the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater." The fact pattern in *Boosey* closely parallels a typical sampling fact pattern. In the context of sampling, it is highly likely that the two songs will be "considerably differ-

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46. *Id.* at 473.

47. The chorus is often referred to within the industry as the "hook," as it is the part of the song which "hooks" the listener and causes him to purchase a recording of the song. *See also infra* note 48.

48. "The chorus of the song . . . is often the only part of the song that anybody cares about. The Gershwin brothers' 'I Got Rhythm' . . . has certainly been a classic for a long time, but who remembers its verse?" Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. (ASCAP) 81, 103 (1977).

49. *See infra* notes 100-01.

50. *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282, 283 (1939) (citing *Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C. 1924)).

51. 224 F. 646 (S.D.N.Y. 1915).

52. *Id.* at 647.

53. *Id.*

ent" in overall theme and execution, sharing only the brief, sampled phrase. Thus *Boosey* stands for the proposition that if the sampled phrase is commercially important to the original work, then the appropriation of that phrase will constitute infringement.

The chorus is valuable precisely because it is distinctive and memorable. One useful guideline that may be drawn from this fact is that to the extent a portion of a song has these characteristics, it will be commercially significant, and therefore likely to be protected. Phrases that are repeated often throughout the original composition would probably fall within this category.<sup>54</sup> One commentator has suggested that in addition to phrases that are repeated, short phrases at the beginning or end of a song may be sufficiently memorable to afford protection.<sup>55</sup>

Repetition of the appropriated portion in a *defendant's* work may also affect the determination of whether the use is infringing. As a simple matter of mathematics, such repetition should create a greater likelihood of infringement if the portion appropriated was also repeated throughout the original work. If the defendant takes a phrase consisting of six consecutive notes from the plaintiff's composition, in which the phrase is repeated fifteen times, and the defendant repeats the phrase ten times in his own composition, he has not taken just the six notes, but has actually appropriated sixty notes. Such a use would be more likely to make the overall sound of the two compositions substantially similar, thus constituting infringement, than if the phrase were used only once in the subsequent work.<sup>56</sup> Accordingly, although the repetition of a phrase in both the plaintiff's and defendant's works will not necessarily create substantial similarity,<sup>57</sup> it may have the effect of making the appropriation of a fairly short, yet commercially important, phrase more likely to be an infringement.

One significant limitation to the protectability of an exceedingly short phrase within a musical composition is that the protected expression embodied therein is closely intermingled with the unprotected ideas that the expression conveys.<sup>58</sup> When there are a limited number of ways

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54. See, e.g., *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924). "[T]he effect upon the ear [of a short phrase is] entirely different when the figure is rolled over and over again." *Id.* at 148.

55. Sherman, *supra* note 48, at 109.

56. See, e.g., *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940). "The strength of the plaintiff's case lies in the substantial identity of a sequence of eight notes in his song and theirs; and indeed, that hardly does justice to the similarity between the two, because the sequence reappears in each song so frequently as to constitute the greater part of each." *Id.*

57. *Davilla v. Harms, Inc.*, 36 F. Supp. 843, 844 (S.D.N.Y. 1940).

58. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regard-

in which an idea, e.g., a musical tone, may be expressed, there will be no copyright protection for such expressions. In *Morrissey v. Proctor & Gamble Co.*,<sup>59</sup> the defendant appropriated, almost verbatim, certain sweepstakes rules that the plaintiff had previously copyrighted. Although the situation was such that, if the rules had been protectable, the defendant would have certainly been liable for infringement, the court nonetheless held for the defendant, stating:

[w]hen the uncopyrightable subject matter is very narrow, so that the 'topic necessarily requires,' if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.<sup>60</sup>

As applied to musical compositions, this rule would mandate that a single musical note would never be copyrightable, as a note is properly considered an idea that may only be expressed one way. The copyright in a musical composition protects the sequence of notes and words from which it is made. As there are only twelve possible notes in traditional western music, to afford protection to any one of them would severely limit musical expression by removing that note from the pool of available ideas upon which a composer could otherwise base his expressions. Similarly, a two-note phrase would not be protectable, as there are only a very limited number of two-note combinations that can be made from the available pool of twelve notes. This same rationale would also probably prevent the protection of combinations of three notes. As the number of notes in the sequence increases, the possible permutations of notes and rhythm would inhibit this doctrine from denying protection.

To date, the smallest infringing appropriation from a musical composition has been a phrase consisting of six notes.<sup>61</sup> However, in *Elsmere Music, Inc. v. NBC*,<sup>62</sup> the court strongly suggested that the taking of a four-note phrase is capable of rising to the level of copyright infringement. In this case, the appropriated portion of the composition was four notes and two of the words from the phrase "I Love New York."<sup>63</sup> The phrase was constantly repeated in both the plaintiff's and defendant's

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less of the form in which it is described, explained, illustrated, or embodied in such work." Copyright Act, 17 U.S.C. § 102b.

59. 379 F.2d 675 (1st Cir. 1967).

60. *Id.* at 678 (citations omitted).

61. See *Boosey v. Empire Music Co.*, 224 F. 646, 647 (S.D.N.Y. 1915); *supra* notes 51-53 and accompanying text.

62. 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd* 623 F.2d 252 (2d Cir. 1980).

63. *Id.* at 744.

work, and was referred to by the court as "the heart of the composition."<sup>64</sup> The defendants used the portion of the plaintiff's composition in a parody on the television show *Saturday Night Live*, changing the words to "I Love Sodom."<sup>65</sup> Although the court found that the use was not an infringement because it was a satire, and thus excused under the fair use doctrine,<sup>66</sup> it stated that the taking was of a "substantial nature," "easily recognizable" and "capable of rising to the level of a copyright infringement."<sup>67</sup> Due to the factors relating to the idea/expression dichotomy discussed above, a phrase consisting of less than four notes would not likely be protected by the copyright in a musical composition, despite the repetition of the phrase in the original or subsequent work.

## 2. Perceptions Within the Industry

Because infringement standards for musical compositions have been heavily litigated through the years, a somewhat uniform, if only intuitive, perception has evolved within the music industry concerning the type of appropriation that may constitute infringement.<sup>68</sup> Although the test as applied to any given situation may be argued at length, as reported to the author,<sup>69</sup> the standard itself is generally understood within the industry to include those appropriations embodying an arguably valuable portion of the original composition. This standard is essentially in agreement with the discussion in the previous subsection, and thus will not be discussed at length. As mentioned, the standard is fairly ambiguous, thus some illustrative examples from music publishers will be helpful in developing an intuitive understanding of the parameters of infringement.

Portions of a musical composition that are perceived as clearly un-

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64. *Id.*

65. *Id.* at 743.

66. The fair use doctrine is an affirmative defense to a claim of copyright infringement. Thus, even though an appropriation may constitute infringement, a finding of fair use would relieve the defendant of liability. The four factors to be applied in a fair use analysis are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work. 17 U.S.C. § 107. This doctrine is primarily applicable to works of criticism, comment, news reporting, teaching, scholarship, or research. *Id.* Sampling per se is unlikely to fall consistently within this exception to copyright infringement, due to its commercial nature and effect on the potential markets for the original work. However, specific instances of sampling could conceivably be excused under traditional applications of the doctrine, such as parody or criticism.

67. *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980).

68. One publisher interviewed by the author unknowingly paraphrased Justice Stewart's infamous words concerning obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), stating, in effect: "I can't define infringement, but I know it when I hear it."

69. See *supra* note 6.

protectable include: a shout by a famous singer; any single note; two chords; three notes from a nonessential bass line; commercially insignificant phrases; and commonplace phrases that are not original to the plaintiff. Appropriations that are perceived as clearly constituting infringement include: the chorus; any portion that is clearly identifiable as having been taken from the original composition; and any portion which an average person would immediately recognize and associate with the original composition. Situations in which an appropriation may or may not be perceived as constituting copyright infringement include the use of: a mildly noticeable portion of the melody; or a portion only recognizable by experts or a similarly limited audience.

### B. Sound Recordings

#### 1. Infringement Under the Copyright Laws

The question of what constitutes the smallest theoretically protectable portion of a sound recording<sup>70</sup> is somewhat more difficult to answer. As yet, no cases have been decided on the issue.<sup>71</sup> Accordingly, any analysis of such a standard will necessarily involve a close examination of the relevant statutory provisions and the potential analogous application of the standards relating to musical compositions.

Although copyright protection for all works extends solely to the protection of expression of ideas and not the ideas themselves,<sup>72</sup> the protection granted to sound recordings is uniquely worded to conceptually separate the ideas from the expression represented therein. A copyright in a sound recording protects only the *actual recorded performance*, or

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70. Federal copyright law does not extend protection to sound recordings fixed prior to February 15, 1972. 17 U.S.C. § 301c. For sound recordings fixed before this date, state law, generally the doctrine of misappropriation, may be used to protect such works. *Id.* This should not drastically affect a prudent artist's decision to obtain consent for the use of a sample, since misappropriation applies if: 1) the plaintiff creates an intangible product through extensive time, labor, skill and money; 2) the defendant makes use of that product and gains a special advantage because the defendant is not burdened with the same production costs; and 3) as a result, the plaintiff suffers commercial damage. *See, e.g., International News Service v. Associated Press*, 248 U.S. 215 (1918). Sampling would seem to fall well within the scope of such protection.

71. Cases involving infringement of the copyright in a sound recording have so far been concerned with record piracy, which is the appropriation of a sound recording in its entirety. To this date, all of the cases filed relating to digital sampling have been settled prior to judgment, and thus there have been no judicial constructions of the copyright laws relating to the appropriation of short segments of a sound recording. *See, e.g., Island Records, Inc. v. Next Plateau Records, Inc.*, No. 87 Civ. 8165 (S.D.N.Y. Nov. 17, 1987); *Thomas v. Diamond*, No. 87 Civ. 7048 (S.D.N.Y. Oct. 1, 1987); *Castor v. Def Jam Records*, No. 87 Civ. 6159 (S.D.N.Y. Aug. 25, 1987).

72. 17 U.S.C. § 102b.

pure expression, of the song which it embodies.<sup>73</sup> In sharp contrast to musical compositions, no unprotectable ideas are intermingled with the protectable expressions embodied in sound recordings.

That a sound recording is, by definition, a pure expression of ideas should permit quite substantial protection against sampling. The *ideas* embodied therein may be easily borrowed, free from the chilling effect of potential liability for copyright infringement. Any person wishing to incorporate an element of a sound recording may do so with impunity by hiring musicians to precisely recreate that element in a subsequent recording. They cannot, however, appropriate any of the actual sounds embodied on the sound recording as such sounds are pure expression and fully protected. Since the transfer or use of ideas will not be inhibited by complete protection, a compelling argument exists that the protection should be absolute.

This reasoning is strongly supported by the words of the Copyright Act, which states that the exclusive rights to copy and prepare derivative works granted to the owner of the copyright in a sound recording do not extend to subsequent sound recordings that consist "*entirely* of an independent fixation."<sup>74</sup> By the words of this section, Congress appears to have intended that a subsequent sound recording consisting of an actual copy of *any* portion of a prior sound recording, so long as such portion was not independently fixed, would infringe on the owner's copyright. Under this interpretation, all samples taken from prior recordings would infringe upon the copyright in that sound recording.

Although the words of the Copyright Act may support such a broad statement, this interpretation may be subject to judicial narrowing. As a practical matter, it is unlikely a court would find, for instance, the use of 1/1000th of a second from a sound recording to constitute infringement. Logically, such an extremely brief appropriation would be *de minimis*. If a court did not apply the strict test proposed above, it would likely apply a standard analogous to the substantial similarity test discussed

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73. "The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." 17 U.S.C. § 114b. Thus, the copyright protection granted to sound recordings with respect to the copying and preparation of derivative works is limited to the copying of the actual sounds of the sound recording. If one were to hire musicians and record one's own version of the song embodied therein, there would be no infringement of the sound recording copyright even if the subsequent performance sounded identical to the prior recording. Whether such an act would infringe on the copyright in the musical composition is a separate matter.

74. 17 U.S.C. § 114b (emphasis added). See *supra* note 73.

above in connection with musical compositions.<sup>75</sup> However, due to the difference in the nature of the elements protected in musical compositions and sound recordings, the standards of infringement will necessarily differ.

The substantial similarity test suggests that the measure would be based on the qualities of the *protectable* portions of the sound recording that have commercial value.<sup>76</sup> Since the sound recording of a performance is pure expression and thus contains no unprotectable elements,<sup>77</sup> the essential question would be whether the portion of the performance captured by the sample has commercial value.<sup>78</sup> The issue therefore arises, what constitutes the commercially valuable elements, excluding the musical composition, of the performance embodied in a sound recording?

The lifeblood of the music industry is personality. The marketing and promotion of an artist's recordings in all cases focus on the qualities of the artist that are relatively unique and distinguish him from the other musicians whose recordings are available in the marketplace. This phenomenon is present in the marketing of the artist's appearance, lifestyle, and most importantly to the present discussion, the style of his performance of musical compositions. The distinguishing characteristics of an artist's performance have great commercial value, as they are often responsible for the consumer's purchase of that artist's recordings instead of the recordings of other artists performing the same or similar songs. For this reason, in the context of sound recordings, it is the distinguishable qualities of the artist's performance that would be protected by copyright law. In this sense, the copyright in a short portion of a sound recording may be considered somewhat analogous to the law of trademark and the right of publicity.<sup>79</sup>

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75. See, e.g., *United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976). See *supra* text accompanying notes 32-46.

76. See *supra* note 46 and accompanying text.

77. That is, protection would not be limited by the fact that there are only eleven notes to choose from since it is only the actual recording of each note is protected, not the note or sequence of notes per se. See *supra* note 58 and accompanying text.

78. As a rule of thumb, given the higher standard of infringement for musical compositions, any infringement of the copyright in a musical composition due to sampling would also infringe upon the copyright in the sound recording from which the sample was taken, although the converse would not necessarily be true. See *supra* note 27. This statement of course assumes the sample is not of an independent fixation of the recording, but of the actual recording itself. See *supra* note 73 and accompanying text.

79. The most significant difference would be that, as previously explained, the protection granted to sound recordings only extends to the appropriation of the actual recording and not to the emulation thereof, see *supra* note 73, whereas the protection granted under the above referenced theories applies as well to emulation as it does to actual appropriation.



Under a substantial similarity test, any part of the performance that is sufficiently unique or distinctive to be recognizable as identified with the artist, and thus arguably valuable, would be protected. A sample as quantitatively minor but qualitatively significant as a shout or yell by a famous singer, or a particularly notable guitar slide by a well-known guitar player, should certainly receive protection.<sup>80</sup> This category of sounds is often referred to as a "signature sound," as it is recognizable by the average listener as unique and identified with the performer. In this sense, a signature sound is analogous to a handwritten signature. In contrast to the protection of signature sounds, a single, indistinguishable drum beat, guitar note or sound that is so heavily modified that an average listener would neither recognize nor associate it with the original recording or performer, would not be protected under this test.

## 2. Perceptions Within the Industry

Although copyright law may afford sound recordings absolute protection from subsequent re-recordings,<sup>81</sup> this standard could not generally be used within the industry. As a practical matter, an unrecognizable sample would not attract the attention of the record company that owns the original recording. Further, even if the company did discover the use of such a sample, the damages resulting from the use would be so insignificant it is highly unlikely that the company would vigorously attempt to enforce its rights.

The signature sound standard, with some variation, is the overwhelming position of the record companies polled by the author.<sup>82</sup> This standard has been most often stated by record companies as those samples that are recognizable by an average listener as being taken from the original source. Some companies intimated that they might consider a sample an infringement even if it were only recognizable by a "sophisticated party." Others stated that they would be unlikely to press their rights unless the sample embodied an "essential element" of the original recording.<sup>83</sup>

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80. These examples are not intended to create the perception that only extremely popular musicians would be entitled to protection. The test, as mentioned, is recognizability. See *supra* text accompanying notes 78-79. However, it is reasonable to assume that a court would find an extremely popular musician to be more recognizable than lesser known musicians, thus a smaller appropriation of one of the performances of an extremely popular musician would constitute infringement.

81. See *supra* note 74 and accompanying text.

82. See *supra* note 6.

83. One unstated, but highly relevant, standard which should not be ignored by artists and record companies using samples is whether the sample is recognizable by the record company executive responsible for enforcing rights relating to the sound recording sampled. The latter

Parties using samples should obtain licenses for the use whenever the sample embodies a recognizable portion of the prior recording, even if the portion is recognizable only to sophisticated parties. The attorneys polled who represent artists who have sampled, or are currently sampling, support this position. In close cases, they would prefer to err on the side of caution, by licensing when it might not be necessary, rather than risk not licensing when it is necessary. These attorneys recognize that it will be cheaper to negotiate a few licenses in advance, even if one thinks that an infringement suit would be unsuccessful, than to litigate or be forced into negotiation over even a single sample after the release of the subsequent recording.<sup>84</sup> Such a prudent practice should be encouraged. Record companies may do so by granting favorable terms for samples that embody only a relatively minor portion of the original recording and are cleared in advance.<sup>85</sup> Considerations of whether the sample is recognizable by a sophisticated listener, an average listener, or embodies an essential element of the prior sound recording should more appropriately be considered in the context of setting a fair price for the use of the sample.<sup>86</sup>

#### IV. HOW MUCH SHOULD THE CONSENT COST?

##### A. *The Benefits of Reasonableness*

While the idea of charging high prices for the use of a sample may at first sound enticing to licensors, the problems generated by such a practice outweigh its benefits. When the licensor presses for substantially more compensation than the licensee truly feels is justified, transaction costs associated with the license will increase. The increase in costs will manifest itself as an abundance of unclosed deals for which the licensor is reticent to sue on<sup>87</sup> and the inefficient use of a significant portion of the

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standard would be the most accurate test, as it takes into account the varying degrees of attempted enforcement throughout the industry. Some companies, especially those controlling sound recordings which are frequently sampled, have demonstrated a greater tendency to actively seek unpermitted uses of its sound recordings. See *supra* text accompanying notes 22-23. This fact should be taken into account by parties using samples.

84. See *supra* note 16.

85. The attorneys polled stated that the most significant impediment to the implementation of a policy seeking licenses for all samples is the possibility that the record companies from which such licenses are sought would be unreasonable in the terms required for relatively insignificant uses. Record companies could eliminate this reluctance by accepting realistic terms for minor uses. See *infra* text accompanying notes 95-99.

86. See *infra* text accompanying notes 90-91.

87. There are two primary reasons that, absent peculiarly egregious circumstances, a licensor would be reticent to sue. One reason is that the damages recoverable from most sampling cases would be unlikely to justify the risks and aggravation of litigation. The second reason is

company's resources negotiating deals which, in the scope of the company's activities, represent a very minor portion of its income. Further, if the licensor sets a very high price, he will dissuade potential licensees from obtaining licenses to use future samples. In essence, he would be encouraging the continuing unlicensed use of samples since the licensee may, under the circumstances, decide to undergo the risks involved.

Egregious terms would also adversely affect the licensor in future negotiations. Most large record companies have both a significant back catalog and a large active roster.<sup>88</sup> Under these circumstances, any benefit from higher prices that the company receives as a licensor, when its catalog is sampled, would be roughly equaled by the increased costs it would bear as a licensee, when its active artists sample.<sup>89</sup> When the related increase in transaction costs is factored in, the situation may involve a net *loss* of income, despite the higher price. In light of the fact that large record companies control the majority of past catalog, few potential licensors exist that could benefit from increased prices for the rights relating to the sound recordings without being equally burdened by increased costs. Music publishers would not be entirely immune to the reciprocal effect of expensive samples. To the extent that the publisher controls rights pertaining to songs by artists who are sampling, the company will have to bear the adverse effects of such prices. An increase in costs beyond the actual value of the sample would benefit virtually no one.

### *B. Factors Relating to the Price*

Though numerous, the considerations taken into account when setting the price of the license to use a sample generally fit into three broad categories: what is sampled; how the sample is used; and who is using the sample. These categories apply, with minor variations, to both sound recordings and musical compositions.

#### 1. What is Sampled

The focus of the first factor is on the relative value of the sample to

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that since the record business is comparatively small and closely knit, parties prefer to settle disputes through negotiation rather than sue an entity which it may wish to do business with in the future.

88. The "catalog" of a record company is the collection of recordings the company has previously made. The "active roster" is the collection of artists of which the record company is currently producing records.

89. This statement assumes, of course, that the record company's recordings are sampled by others approximately as much as the record company releases records embodying the recordings of others.

the owner of the original copyright. The specific considerations involved in such a determination include: how popular the original song or recording was and is; how recognizable the sample is; whether the sample is from the chorus, melody or background of the original work; and whether it is from a vocal or instrumental portion of the work.<sup>90</sup> Further, the identity of the songwriter or performer may either trigger a contractual requirement for the copyright owner to obtain consent from said person in order to grant consent at all, or may otherwise increase the recognizability, and thus the value, of the sample. A highly valued sample under this category would be an extremely recognizable and qualitatively important vocal portion of a hit song or record by a very popular artist or songwriter. A low-valued sample would be a relatively unrecognizable instrumental portion of an obscure recording or song.<sup>91</sup>

## 2. How the Sample is Used

The focus of the second factor is on the relative value of the use of the sample to the person doing the sampling. The relevant considerations include: the number of times the sample is repeated in the new work; how qualitatively important the sample is to the new work; and whether the new work has artistic or commercial merit.<sup>92</sup> Further, many industry figures expressed an unwillingness to license samples for use in exceedingly violent or pornographic works.<sup>93</sup> A sample used in a highly valued manner would be repeated constantly throughout, and constitute the primary appeal of, a subsequent recording or song with substantial commercial potential but relatively little artistic merit. A low-valued use of a sample would embody the sample only once in a song or sound recording of little commercial potential but high artistic value, and constitute only a minor portion of the subsequent work.<sup>94</sup>

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90. In the context of sound recordings, these factors would relate to the issue of whether the sample was recognizable only to sophisticated parties (low value), average persons (medium value), or embodied an essential element of the original recording (high value). See *supra* text accompanying note 83.

91. A low value sample from a musical composition would be unlikely to be considered an infringement, as the taking must be qualitatively substantial. See *supra* note 41 and accompanying text.

92. All other factors remaining constant, commercial potential was reported as more likely to drive the price up, as there is the expectation that there will be more profit generated by the record. Artistic merit may drive the price down, as the copyright owner may not dislike being quoted as such.

93. This generally would not be a factor when the original song or recording was violent or pornographic.

94. A low valued use of a musical composition would be unlikely to be considered an infringement. See *supra* note 41 and accompanying text. When a minor use is made of a low

### 3. Who is Using the Sample

The third factor primarily concerns the relationship between the owner of the original copyright and the person or entity seeking consent for the use. Although the general rapport between the parties is significant, the most important consideration relates to the issue of whether the artist or record company using the sample attempted to obtain permission to do so before the release of the subsequent recording. Without exception, each of the industry figures polled stated that if the original copyright owner had to initiate discussions with the sampling artist or record company regarding the licensing of a sample, a substantial penalty would be added to the price that would otherwise have been set.

In such a situation, the artist or record company is at a significant disadvantage in negotiating a favorable price for the use, since the new recording is already on the market. Options that may have been previously available to the licensee, such as declining to use the sample, are no longer available. The stature of the artist or record company using the sample may also affect the price, since a very popular artist may be able to pay more for the use. This fact is seldom lost on the owner of the original copyright. The most expensive type of sample in this category would be one used by an extremely popular artist with a general reputation throughout the industry as being an uncooperative megalomaniac who refuses to acknowledge the need to obtain consent to use a sample embodied on a hit record. This particular scenario would, in all likelihood, require litigation in order to be resolved. Conversely, if the parties have a good rapport, the sample is cleared in advance, and the artist using the sample is new and relatively unknown, the price for the sample may be less than would otherwise be set.

#### *C. Types of Deals*

There are five basic classes of deals that are used to grant consent for the use of a sample: gratis; buyouts; royalties; co-ownership; and an assignment of the copyright. Not all of these deals are used for both songs and recordings. The various classes of deals will therefore be discussed according to the copyright to which they most often relate.

##### 1. Sound Recordings

Generally, the license to use a sample from a sound recording will be either gratis, a buyout or a royalty. Gratis use is granted for fairly

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valued sample, the sample is particularly unlikely to infringe on the copyright of the original musical composition.

minor samples that are relatively unrecognizable or used only once in the new work by an artist or record company friendly with the original copyright owner. Such deals, though not unheard of, are relatively uncommon.<sup>95</sup>

Buyouts are the most common form of deal, due to the ease of administration for all concerned.<sup>96</sup> A typical buyout is a one-time payment for all rights necessary to exploit the new work, and may range from \$500-\$5,000 or considerably more, if the above referenced factors<sup>97</sup> weigh heavily in favor of the original copyright owner. Gratis use and buyouts are most often documented in simple letter agreements.

Royalties are used by some companies, but are somewhat disfavored by both the original copyright owners and the licensees.<sup>98</sup> However, if the new recording appears to have great commercial potential, the owner of the original copyright may have a greater tendency to demand a royalty, in order to participate more fully in the expected success of the record. When used, the royalty rate is generally \$.005-\$.03 per unit, but at times is as high as \$.05. These rates may be subject to the deductions and limitations of the sampling artist's royalty, pursuant to his contract with his record company. Often, a royalty deal will use a rollover method of accounting, generally requiring successive advances based on sales for anywhere from 50,000-500,000 units,<sup>99</sup> the exact figure depending on anticipated sales. Royalty deals are most often documented in a form similar to a traditional master use license.

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95. One reason for this is that often the licensor will require a nominal fee, solely as a matter of principle, to reinforce the notion that a license is necessary even for minor uses.

96. A single rap album may embody twenty to thirty samples, and at times considerably more. If a record company had in release a substantial number of albums with a high number of sampling royalty participants — in addition to the standard royalty participants like artists, producers and publishers — its accounting system could become sorely taxed. Also, given the tremendous uncertainty of sales predictions in the record business, many licensors would prefer a buyout as a "bird in the hand." Some companies use a buyout for minor uses and a royalty for significant uses, but currently there appears to be a growing trend in favor of buyouts.

97. See *supra* text accompanying notes 90-94.

98. See *supra* note 96.

99. In essence, this method of payment requires that the licensee pay a set fee each time the sales plateau is reached. For example, if the royalty were \$.01 per unit and the contract required successive advances for each 100,000 units sold, then the licensee would make an immediate payment of \$1,000 for the right to use the sample on the first 100,000 units, then a further payment of \$1,000 when the 100,001st unit was sold, for the right to use the sample on units 100,001-200,000, and so on. A variation on this type of deal may require the licensee to increase the payment by a stated amount as particular sales plateaus are reached.

## 2. Musical Compositions

Generally, the compensation required for permission to use a sample from a musical composition will take the form of a royalty, co-ownership or an assignment. A royalty deal is the most common approach and will take the form of a percentage of mechanical royalties<sup>100</sup> on the order of 10%-50%, usually documented as a simple letter agreement. In some cases, a similar percentage of the performance royalties<sup>101</sup> due may also be part of the deal. Another fairly common type of deal is co-ownership. In such a situation, the owner of the original copyright will acquire an ownership interest in the range of 25%-50%. Accordingly, all income related to the new song<sup>102</sup> will be apportioned between the parties. Such deals are documented in fairly traditional publishing co-ownership agreements.

One significant problem with co-ownership is that the original copyright owner may be exposing himself to potential future lawsuits if there are other uncleared samples used in the new work. Although the original copyright owner would generally demand and rely upon an indemnification from its co-owner should such a situation arise, as previously mentioned in the context of artist-record company relationship,<sup>103</sup> such an indemnification could be illusory if the co-owner does not have considerable financial resources.

An assignment of the copyright is obviously the most egregious arrangement and is often reserved for artists who are very uncooperative in obtaining consent for the use. Generally, these agreements occur pursuant to the settlement of a previously filed lawsuit. An assignment may also be required in situations where the sampling artist has added little, if

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100. Mechanical royalties are the money due to a publisher from a record company for the right to embody a song on phonorecords. S. SHEMEL & M. KRASILOVSKY, *THIS BUSINESS OF MUSIC* 174 (1985). Mechanical royalties are generally governed by statute, the current statutory rate being \$.057 per unit, but often a record company will be able to reach an agreement with the publisher or songwriter to reduce the rate payable to 75% of the statutory rate. 4 *Contracts, supra* note 19, at cl. 11.01(a)(2)(i).

101. Performance royalties are monies due to a publisher from those parties who publicly perform a song, such as radio and television stations, nightclubs, and establishments that play music for the enjoyment of their patrons. S. SHEMEL & M. KRASILOVSKY, *supra* note 100, at 178. These fees are paid by acquiring blanket licenses from performing rights societies such as The American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music, Inc. (BMI), to publicly perform any and all songs the societies control. The performing rights society then allocates this money to the publishers and songwriters it represents. *Id.*

102. In addition to the previously mentioned mechanical and performance royalties, publishers may also receive money from such sources as the sale of printed sheet music of the song and fees payable for the right to synchronize the song with visual images, as in films and videos.

103. See *supra* note 19 and accompanying text.

anything, to the previous song.<sup>104</sup>

### B. *The Cost Matrix*

In order to graphically clarify the range of prices and deal types, and to suggest a method of calculating the value of a sample, Schedule "A" embodies these concepts in a "Cost Matrix." Use of the Cost Matrix is simple. First, one determines the approximate value of the sample — high, medium or low — in accordance with the factors set forth above. Next, one determines the value of the use in a similar fashion. The box represented by the conjunction of these two valuations will provide some guidance relating to the type of deal that would be reasonable, in light of current industry practices, in that particular situation.<sup>105</sup> Considerations relevant to who did the sampling should cause one to shift up or to the left for favorable factors, and down or to the right for unfavorable factors.

## V. CONCLUSION

Many industry figures express a desire to see the entire issue of sampling go away, stating that the whole situation is considerably more trouble than it is worth. However, the public appears to have accepted, if not embraced, the use of samples in the music that it purchases.<sup>106</sup> As a result, musicians and audio producers will likely continue to include samples in their works.<sup>107</sup>

There are clear benefits to sampling, not the least of which is the ability for publishers and record companies to recycle old and relatively inactive copyrights.<sup>108</sup> Sampling permits a new method of composing

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104. In this situation, the new recording is actually considered a liberal interpretation of the original song, not a new and different song. A true assignment would only be required if the sampling artist had previously registered the copyright to the new song. Otherwise the artist would simply obtain the requisite mechanical license to embody the song in records, without claiming ownership of the song.

105. The Cost Matrix is designed to provide a structure for a dialogue concerning the pricing of sampling licenses and suggest reasonable outcomes to those dialogues. Naturally, individuals and companies will have their own preferences and predilections in such matters.

106. Two of the largest selling albums of 1990, "Please Hammer Don't Hurt 'Em" by MC Hammer, and "To The Extreme" by Vanilla Ice, apparently made considerable use of prior copyrighted works. These albums sold approximately eight million and five million copies respectively. *Top Pop Albums*, Billboard, Dec. 22, 1990, at 102.

107. Saxophones, electric guitars and electronic keyboards were all, at times, considered to be musical "fads" and likely to fade into obscurity. Quite possibly, sampling will achieve and maintain a similar level of acceptance in the future.

108. At least one major publisher has begun to encourage artists to sample its catalog and thus reap the potential benefits of a "new" version of the song achieving widespread popularity.



music with unique artistic potential, and reduces the high overhead associated with the production of records. Currently, the most distressing concern with sampling is the confusion in the industry with respect to the issues of when a license to use a sample is necessary and how much the applicable license should cost. This confusion should dissipate as the music industry develops standardized practices in this area through experience with the process of obtaining such licenses and thoughtful consideration of the issues involved. Crucial to this end is the employment of reasonable practices by all parties involved. Those using samples should conscientiously obtain permission for their use, and those parties who are asked for permission to use a sample should grant it on reasonable terms.

*Whitney C. Broussard \**

COST MATRIX  
What Is Sampled

value		LOW	MED	HIGH
How The Sample Is Used	LOW	SR: Free/Low Buyout  MC: N/A	SR: Buyout  MC: Buyout/ Low Royalty	SR: High Buyout/ Low Royalty  MC: Royalty
	MED	SR: Buyout  MC: Buyout/ Low Royalty	SR: High Buyout/ Low Royalty  MC: Royalty	SR: Royalty  MC: Royalty/ Co-Ownership
	HIGH	SR: High Buyout/ Low Royalty  MC: Royalty	SR: Royalty  MC: Royalty/ Co-Ownership	SR: High Royalty  MC: Co-Ownership/ Assignment

SR = Sound Recording

Low Buyout = \$250-\$1,000

Low Royalty = \$.005-\$.01

Buyout = \$1,000-\$3,500

Royalty = \$.01-\$.025

High Buyout = \$3,500-\$5,000+

High Royalty = \$.025-\$.05

MC = Musical Composition

Low Royalty = 10%-25%

Royalty = 25%-50%

N/A = not an infringement

