University of Baltimore Law Forum

Volume 20
Number 1 *Fall, 1989*

Article 3

1989

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Marybeth Zamer

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by Marybeth Zamer

The studio is quiet, except for the sound of the singer's voice, carrying the melody of a soft ballad through the evening air. She hits the last note and holds it for a long, stirring moment.

"That was the one!" the producer shouts. The singer acknowledges his comments with a smile and removes her headphones. Proud of her final take, she leaves the studio with the hopes that this time, the recording will be a hit.

The song becomes a hit, and the singer embarks on a long and rewarding career in the music business. After years of singing at weddings, parties, and nightclubs, she has finally become so popular that the moment she begins to sing, the public immediately recognizes her distinctive voice.

But how far will all that hard work get her? Can someone else simply re-record her performance and incorporate it into his records without her consent or permission? Does she not get any credit for the value of her performance, the value of her talent?

The question of sampling another artist's musical performance has quickly become a current issue in the music industry. With the technology being developed in computers, software and recording techniques, any musician's prior recorded performance can be copied by digital sampling.

Digital sampling involves recording a live performance or re-recording an existing recording. These sounds are then analyzed by a computer programmed to duplicate the tonal qualities of the work. This analysis can be stored in the memory of a digital synthesizer and can be played back in either an altered or identical form.[1]

Digital sampling has affected the music industry in three significant ways. First, any part of a commercially successful sound recording may be sampled and used on any subsequent recording without the permission of the copyright owner.[2] Second, synthesizer sampling can replace acoustic musicians of all varieties and types, putting many musicians out of work, as well as taking advantage of their talents.[3] Finally, these sampled sounds can be bought and sold just like any other product, depriving acoustic musicians of work in all markets, not only in their local studios but also in studios across the country looking for a similar sound.[4]

The musician who feels that sampling is infringing her right to create and perform can choose among several different legal theories to uphold her rights. These theories include copyright infringement, right of publicity, and unfair competition.

COPYRIGHT INFRINGEMENT

The copyright clause of the United States Constitution empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."[5] The 1976 version of the Copyright Act (the Act) protects only those works "fixed in a tangible medium of expression."[6] The Act, therefore, does not extend to those cases where a performer has been sampled during a live performance.[7] Additionally, the Act applies only to those recordings fixed on or after February 2, 1972, but does not limit state protection of pre-1972 recordings until February 2, 2047.[8]

The Copyright Act defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sound, 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."[9] The exclusive rights of the copyright owner of a sound recording are limited to the rights specified in clauses (1), (2) and (3) of 17 U.S.C. Section 106.[10] These exclusive rights include the right of reproduction, the right to prepare derivative works and the right to distribute.[11] The right to copyright a public performance is specifically excluded.[12]

The remaining question concerning statutory copyright infringement is whether sound sampling can ever constitute an infringement of those rights afforded by sections 114(a) and 106(1)-(3) of the Act to the owner of a post-1972 sound recording. In order to succeed, the plaintiff in such an action must prove several things. First, the plaintiff must prove copyright ownership and originality in the sound recording. Second, the plaintiff must prove copying of the copyrighted work. This is done by showing access and substantial similarity. Finally, the plaintiff must successfully prevail over a claim by the defendant of fair use.

Initially, the musician must first prove that she is the owner of the copyright. In some instances, this may be difficult. Often the record company or producer owns the copyright in the sound recording itself, although the musician may frequently be the copyright holder of the music and lyrics. Often, the musician may also be the producer. In situations where the musician is the music/lyric writer or

the producer, proving ownership or co-ownership of the copyright of the sampled sound will not be very difficult.

However, where the musician is simply one player among many on a sound recording, proving ownership of the copyright may be more difficult. If the musician is an employee of the producer, her work may be considered a "work made for hire"[13] and, absent any written express agreement to the contrary,[14] the employer record company or producer is presumed to be the sole owner of the copyright. Nevertheless, if the musician is considered an independent contractor, she can make the argument that the sound recording is a "joint work"[15] and, absent an express agreement, she will be the co-owner of the copyrighted work.[16]

On the other hand, proving originality is a much simpler matter. The originality of a musician's performance was recognized by Judge Learned Hand in *Capitol Records, Inc. v. Mercury Records Corp.*[17]

> [A] musical score in ordinary notation does not determine the entire performance, certainly not when it is sung or played on a stringed or wind instrument. Musical notes are composed of a "fundamental note" with harmonics and overtones which do not appear on the score. There may indeed be instruments- e.g. percussive- which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a "composition" as an "arrangement" or "adaptation" of the score itself....[18]

The second element which must be proven in a suit for copyright infringement is copying. Copying is established by proof of access and substantial similarity.[19] A musician may prove access to her work by showing public dissemination through record releases, public performances and sheet music or, in a case against a record company or producer, by proving the defendant's actual personal contact with the sound recording.[20] Most courts will consider circumstantial evidence and expert testimony regarding the similarities of the works in question as proof of access.[21]

Additionally, the musician must prove that the defendant's recording was substantially similar and not merely a *de minimus* appropriation.[22] To prove substantial similarity, the plaintiff must show that the defendant used the sampled sound in such a manner as to make his recording "recognizable as the same performance"[23] as the plaintiff's.[24] Nevertheless, there remains a question regarding the standard by which the substantial similarity requirement should be judged and by whom.

Generally, a lay person is able to recognize a sampled sound recording of a well-known singer as being that particular singer. However, even among lay persons vocal recognition will vary depending on that person's familiarity with a particular type of music.

On the other hand, it may be unfair to the defendant if the substantial similarity requirement is decided by expert witnesses, if the general public does not see a distinction between the works in question.

"[A] few notes of a well-known performer's song may... infringe the copyright."

Another question regarding substantial similarity involves the amount of the sound recording that is sampled. If a sound recording of a well-known performer is sampled and used in another sound recording, it may be argued that it is only a few notes within a song containing several thousand, and the use is therefore *de minimus* and not an infringement of the sampled copyrighted work. Yet, only a few notes of a well-known performer's song may prove to be enough to infringe the copyright if those few notes constitute the main hook or purpose of the song. This is analogous to the holding in *Harper and Row Publishers, Inc. v. Nation Enterprises,*[25] where the Supreme Court stated, in a case regarding literary works, that substantial similarity may be reflected in the quality of the taking, if it is the essence of the work, no matter how few words have been taken.[26]

Not only must a plaintiff prove that the defendant copied her work, but she must also overcome the affirmative defense of fair use. The Copyright Act lists four factors to be used in determining whether the use of a copyrighted work may be considered a fair use.[27] These factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the taking; and (4) the effect of the use upon the potential market for the copyrighted work.[28] Taking these factors into consideration, it is doubtful that the use of sampled sounds for other commercial recordings would be considered a fair use.

Under the first factor, the purpose and character of the use,[29] the courts would not uphold a fair use defense for a sampled sound used in a commercial recording. In *Sony Corp. of America v. Universal City Studios, Inc.,*[30] the Supreme Court held that the finding of a commercial use results in two rebuttable presumptions against the defendant. First, that every commercial use is not a fair use, and second, that every commercial use constitutes a possible harm to the market or value of the copyrighted work.[31] Generally, most sampled sounds are used in commercial recordings which are released to the general public to make a profit for the record company, producer and performer, and would not be considered a fair use under this factor.

The second factor is the nature of the copyrighted work.[32] Generally, creative works are granted more protection against fair use than works of a more factual nature.[33] Since the sampled sounds of a vocalist or instrumentalist are considered creative in nature, the sampling of these sounds would be given more protection under the statute. Accordingly, the second factor would also preclude a fair use defense of sampled sounds.

The third factor to be considered is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[34] This factor may weigh more in the favor of the defendant than the musician due to the fact that the amount of the original work used in a sampled sound may be minute compared to the length of the whole. However, if the amount taken becomes a substantially large portion of the defendant's recording, then this factor might also work in the musician's favor.

Additionally, the courts will look not only at the quantity that is taken from the copyrighted work, but also at the quality of the work that is taken.[35] If a defendant's work features sampled sounds that are a distinctive or prominent part of the copyrighted work, the court will lean in the musician's favor.

The fourth factor, the effect on the potential market of the copyrighted work,[36] is perhaps the most important factor considered by the courts.[37] A sample of a

well-known artist's performance will certainly increase the potential market for a commercial recording that contains the sample. The artist, however, is not compensated for this taking although another producer and record company are making money off the musician's performance. It is possible that by using the sampled sound of a musician, the market for that musician's own recordings may be diluted, creating potential economic harm to the musician.

By using the copyright laws, a musician can protect her lyrics, music, and the underlying sound recordings from sampling by others without her permission. Additionally, the musician can protect the exploitation of her name and talent by protecting her right of publicity.

THE RIGHT OF PUBLICITY

The right of publicity is protected either statutorily or by common law in most states. This right has been recognized as protecting two economic interests: the values of personal recognition and of performance.[38] Since the sampling of a musician's performance affects both of these interests, a right of publicity action would be appropriate when an unauthorized sample has been used in a commercial setting.

The recognition value of a performer extends to her right to protect the use of her name or likeness from commercial exploitation without her permission.[39] Sound sampling can be said to directly infringe upon this right. If a singer or instrumentalist does not give her permission to use the sampled sound, then her recognition value is capitalized without compensation. Furthermore, it is possible that a performer does not wish anyone to use her musical talent in a commercial recording other than one she has authorized. Some musicians may resent others appropriating sampled sounds on their commercial recordings because they do not want to be associated with the person(s) who appropriated the sound. Many musicians and performers are particular about who performs on their sound recordings and only want to be associated with a certain level of musician. Their right of recognition is infringed upon if they are associated with a group of individuals with whom they do not wish to perform.

Recently, California codified a law which prohibits unauthorized use of someone's voice in advertisements.[40] Additionally, California has recognized that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort."[41] By recognizing that a voice cannot be imitated to sell a product, it is possible that California will extend the law to encompass the use of a sampled sound of the actual performer to sell a product in the form of a commercial recording.

Of equal importance to the right of publicity is the musician's performance value in her own work. A performer's sound may be valuable as a commodity; therefore, its distribution by unauthorized and uncompensated sampling undermines that performer's ability to earn a living as an artist.[42] The Supreme Court first recognized a right to an artist's performance value in *Zacchini v. Scripps-Howard Broadcasting Co.*[43] The Court held that a human cannonball had a cause of action under a right of publicity claim against a television station which broadcasted his entire performance on a local news show because the broadcast infringed upon the performer's right to earn a living.[44]

Although only a small portion of an artist's work is usually sampled for commercial recordings, one can argue that the sampling nevertheless undercuts the performer's right to earn a living. Therefore, the reasons for protecting performance value in *Zacchini* should also apply to sound sampling.[45]

"[P]erformers' rights do not yet exist in the United States."

Moreover, the right of publicity is not the only avenue which a musician may use to prevent sampling of her work. The musician may, in the alternative, bring an action against the defendant for unfair competition.

UNFAIR COMPETITION

The Trademark Act of 1946 (the Lanham Act)[46] prohibits false designations and applies to two different types of unfair competition in interstate commerce, including "palming off," which involves selling goods or services of one person's creation under the name or mark of another, and false advertising about goods or services of the advertiser.[47] Generally, unfair competition claims involving the use of sampled sounds involve reverse palming off which is "accomplished . . . when the wrongdoer removes the name or trademark on another party's product and sells that product under a name chosen by the wrongdoer."[48] The United States Court of Appeals for the Ninth Circuit, in *LaMothe v. Atlantic Recording Corp.*,[49] applied the Lanham Act to musical compositions.

Analogously, it is possible that the Lanham Act may be held to include the sampling of sound recordings. Often the musician whose sample is used is not given credit or acknowledgement for her work or authorship. Under *Smith v Montoro*,[50] the Lanham Act should also apply to sound recordings when authorship of a sampled sound is not given proper recognition.

In a recent New York case,[51] the plaintiff alleged that the defendants, the Beastie Boys, produced and distributed a recording containing sounds sampled from one of plaintiff's recordings. The plaintiff claimed that the defendants infringed the copyright of his sound recording and composition as well as violated his rights under the unfair competition clause of the Lanham Act. The case is still pending, and as evidenced by the actions alleged in the case, the battle against sound sampling rages on.

THE FUTURE OF DIGITAL SAMPLING

In 1978, the Copyright Office suggested that performers' rights in sound recordings be incorporated in the Copyright Act, giving performers a right to protect their work from use without permission and compensation.[52] The Office suggested that performers be paid royalties for their performance on sound recordings similar to those paid to the owners of copyrights in musical compositions and sound recordings.[53] If Congress initiated additions to the Copyright Act in conjunction with these suggestions, all musicians would be protected and compensated for their performances on sound recordings, and the current problems with digital sound sampling would not exist.

Unfortunately, performers' rights do not yet exist in the United States. Thus, musicians must look to the copyright laws, the right of publicity and the Lanham Act to protect their rights. However, litigation can be both expensive and time consuming and many musicians have neither the resources nor the time to pursue protection of their performances through these avenues.

Nevertheless, many musicians can pro-

tect themselves against the abuses of sound sampling. Musicians can insist on additions to their recording agreements which specify that the material recorded under the agreement must be used only for the purposes set forth in the agreement. If the musician is signing a release, she should insist on language in the release specifically limiting the right to sample her work on a certain recording. Additionally, the musician should request compensation for any additional use of her performance on any other commercial recording.[54] The musician who works regularly in the studio must make the effort to protect herself and her creative talent. Hopefully, as the floodgates of litigation open wide to the ever-increasing problems of copyright infringement and digital sampling, Congress will act to protect the musician and her creative endeavors.

ENDNOTES

[1]For a more detailed and scientific explanation of the digital sampling process, *See generally*, C. Dodge & T. Jerse, Computer Music: Synthesis, Composition and Performance 3 (1985).
[2]*Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 Colum. L. Rev. 1723, 1726 (1987).
[3]*Id.* at 1726.
[4]*Id.*
[5]U.S. Const. art. 1, § 8, cl. 8.
[6]17 U.S.C. § 102(a) (1982).
[7]An unfixed performance does not constitute a "writing" under the United States Constitution. *See supra* note 5.
[8]17 U.S.C. § 301(c) (1982).
[9]*Id.* at § 101.
[10]*Id.* at § 114(a).
[11]*Id.* at § 106(1)-(3).
[12]*Id.* at § 114(a).
[13]*Id.* at § 101.
[14]Id. at § 201(b).
[15]"A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into separable or interdependent parts of a unitary whole." *Id.* at § 101.
[16]*Id.* at § 201(b).
[17]221 F.2d 657 (2nd. Cir. 1955).
[18]*Id.* at 664 (Hand, J., dissenting).
[19]*Arnstein v. Porter*, 154 F.2d 464, 468 (2nd. Cir. 1946).
[20]S. Shemel & M. W. Krasilovsky, *This Business of Music*, 265 (1985).
[21]*Id.* at 266.
[22]*Digital Sound Sampling*, 87 Colum. L. Rev. at 1734.
[23]*United States v. Taxe*, 380 F. Supp. 1010, 1017 (C.D. Cal. 1974), *aff'd in part, rev'd in part*, 540 F.2d 961, 965 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).
[24]*Digital Sound Sampling*, 87 Colum. L. Rev. at 1734.
[25]471 U.S. 539 (1985).
[26]*Id.* at 569.
[27]17 U.S.C. § 107 (1982).
[28]*Id.*
[29]*Id.*
[30]464 U.S. 417 (1984).
[31]*Id.* at 451.
[32]17 U.S.C. § 107 (1982).
[33]*Sony*, 464 U.S. at 455 n.40.
[34]17 U.S.C. § 107 (1982).
[35]*Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 564-66 (1985).
[36]17 U.S.C. § 107 (1982).
[37]*Harper & Row*, 471 U.S. at 566.
[38]*Digital Sound Sampling*, 87 Colum. L. Rev. at 1739.
[39]*See generally, Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).
[40]Cal. Civ. Code § 3344 (West Supp. 1987).
[41]*Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988)
[42]*Digital Sound Sampling*, 87 Colum. L. Rev. at 1743.
[43]433 U.S. 562 (1977).
[44]*Id.* at 576.
[45]*Digital Sound Sampling*, 87 Colum. L. Rev. at 1743.
[46]15 U.S.C. § 1125(a).
[47]*Id.*
[48]*Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981).
[49]847 F.2d 1403 (9th Cir. 1988).
[50]*See supra* note 47.
[51]*Thomas v. Diamond*, No. 87-7048 (S.D.N.Y., filed Oct. 1, 1987).
[52]Copyright L. Rep. (CCH) ¶16,040 (1978).
[53]*Id.*
[54]Berman, *Copyright Infringement and the Ethics of Sampling*, 9 Stage and Studio 34, 76 (February 1989).

Marybeth Zamer is currently in her fourth year at the University of Baltimore School of Law and is also a professional musician.
