Digital Sampling and the Musician

Marybeth Zamer

Follow this and additional works at: http://scholarworks.law.ubalt.edu/lf

Part of the Law Commons

Recommended Citation
Available at: http://scholarworks.law.ubalt.edu/lf/vol20/iss1/3

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.
Digital Sampling and the Musician

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." The 1976 version of the Copyright Act (the Act) protects only those works "fixed in a tangible medium of expression." 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 re-
cording, proving ownership of the copy-
right may be more difficult. If the music-
ian is an employee of the producer, her
work may be considered a "work made
for hire" and, absent any written ex-
press agreement to the contrary, the
employer record company or producer is
presumed to be the sole owner of the
copyright. Nevertheless, if the musician
is considered an independent contract-
or, she can make the argument that the
sound recording is a "joint work" 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 recog-
nized by Judge Learned Hand in Capitol
Records, Inc. v. Mercury Records Corp. 17
[A] musical score in ordinary nota-
tion does not determine the entire
performance, certainly not when it is
sung or played on a stringed or wind
instrument. Musical notes are com-
posed of a "fundamental note" with
harmonics and overtones which do not
appear on the score. There may
indeed be instruments—e.g. percus-

sive—which do not allow any latitude,
though I doubt even that; but in the
vast number of renditions, the perform-
er 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 infringe-
ment is copying. Copying is established
by proof of access and substantial similari-
y. A musician may prove access to her
work by showing public dissemination
through record releases, public per-
formances 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. 19
Most courts will consider circumstantial
evidence and expert testimony regarding
the similarities of the works in question
as proof of access. 20

Additionally, the musician must prove
that the defendant's recording was sub-
stantially similar and not merely a de
minimus appropriation. 21 To prove sub-
stantial similarity, the plaintiff must show
that the defendant used the sampled
sound in such a manner as to make his re-
cording "recognizable as the same per-
formance" 22 as the plaintiff's. 23 Neverthe-
less, 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 recog-
nize a sampled sound recording of a well-
known singer as being that particular
singer. However, even among lay per-
sons vocal recognition will vary depend-
ing 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 wit-
nesses, if the general public does not see
a distinction between the works in ques-
tion.

Another question regarding substan-
tial similarity involves the amount of the
sound recording that is sampled. If a
sound recording of a well-known per-
former is sampled and used in another
sound recording, it may be argued that it
is only a few notes within a song contain-
ing several thousand, and the use is
therefore de minimus and not an in-
fringement 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
dew notes constitute the main hook or
purpose of the song. This is analogous to
the holding in Harper and Row Publish-
ers, Inc. v. Nation Enterprises, 25 where
the Supreme Court stated, in a case re-
garding 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 fac-
tors to be used in determining whether
the use of a copyrighted work may be
considered a fair use. 27 These factors are:

- The purpose and character of the use;
- The nature of the copyrighted work;
- The amount and substantiality of the
taking; and
- The effect of the use upon the
potential market for the copyrighted
work. 28 Taking these factors into consid-
eration, it is doubtful that the use of
sampled sounds for other commercial re-
cordinos would be considered a fair use.

Under the first factor, the purpose and
character of the use, 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., 29 the courts 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 con-
stitutes a possible harm to the market or
value of the copyrighted work. 30
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 per-
former, and would not be considered a
fair use under this factor.

The second factor is the nature of the
copyrighted work. 31 Generally, creative
works are granted more protection
against fair use than works of a more
factual nature. 32 Since the sampled sounds
of a vocalist or instrumentalist are con-
sidered 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 copy-
righted work as a whole." 33 This factor
may weigh more in the favor of the defen-
dant than the musician due to the fact
that the amount of the original work used
in a sampled sound may be minute com-
pared to the length of the whole. How-
ever, if the amount taken becomes a sub-
stantially 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. 34 If a defen-
dant'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 poten-
tial market of the copyrighted work, is
perhaps the most important factor con-
sidered by the courts. 35 A sample of a

---

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

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. Additionally, California has recognized that "when a distinctive voice of a professional singer is widely known and is de

liberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort." 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. The Supreme Court first recognized a right to an artist's performance value in Zacchini v. Scripps-Howard Broadcasting Co. The Court held that a human cannonball had a cause of action under a right of publicity claim against a television station which broadcast his entire performance on a local news show because the broadcast infringed upon the performer's right to earn a living.

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

"[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) prohibits false designations and applies to 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. 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." The United States Court of Appeals for the Ninth Circuit, in _LaMotte v. Atlantic Recording Corp._ 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_, 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, 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. 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. 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. 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


3Id. at 1726.

4Id.

5U.S. Const. art. I, § 8, cl. 8.


7Unfixed performance does not constitute a "writing" under the United States Constitution. See supra note 5.

817 U.S.C. § 301(c) (1982).

9Id. at § 101.

10Id. at § 114(a).

11Id. at § 106(1)-(3).

12Id. at § 114(a).

13Id. at § 101.

14Id. 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.

16Id. at § 201(b).

17221 F.2d 657 (2nd Cir. 1955).

18Id. at 664 (Hand, J., dissenting).

19Arnstein v. Porter, 154 F.2d 464, 468 (2nd Cir. 1946).


21Id. at 266.

22Digital Sound Sampling, 87 COLUM. L. REV. 1734.


part, rev'd in part, 540 F.2d 961, 965 (9th Cir. 1976), cert. denied, 429 U.S.

1040 (1977).

24Digital Sound Sampling, 87 COLUM. L. REV. at 1734.


26Id. at 569.


28Id.

29Id.


31Id. at 451.


33Sony, 464 U.S. at 455 n.40.


37Harper & Row, 471 U.S. at 566.

38Digital Sound Sampling, 87 COLUM. L. REV. at 1739.


41Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

42Digital Sound Sampling, 87 COLUM. L. REV. at 1743.


44Id. at 576.

45Digital Sound Sampling, 87 COLUM. L. REV. at 1743.


47Id.

48Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981).

49F.2d 1403 (9th Cir. 1988).

50See supra note 47.


53Id.

54Berman, 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.