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NOTES

DIGITAL SOUND SAMPLING AND A FEDERAL RIGHT OF PUBLICITY: IS IT LIVE OR IS IT MACINTOSH?*

I. INTRODUCTION

Imagine the sound of an ideal band; perhaps James Brown singing lead vocal, Madonna and Diana Ross on back-up vocals, David Sanborn on saxophone, Jaco Pastorius¹ on bass, and John Bonham² on drums. Today's technology enables this dream to be more than imaginative wishful thinking. Through the technique of digital sound sampling, the unique sound of these and countless other artists has been stored and can be reproduced, enabling each artist to "perform" any song with any other combination of artists, for time immemorial.³ For many perform-

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1. Deceased. Many feel he was the best jazz bass player in the history of the instrument.

2. Deceased percussionist of the group Led Zeppelin.

3. James Brown's voice has been sampled from his recordings and used on other recordings by Tom Lord-Alge, a Grammy-winning recording engineer, Thomas Dolby, and various rap and hip-hop artists. Harris, *Taking Prison in Stride*, St. Louis Post-Dispatch, Apr. 26, 1989, at 2W, col. 1; Moran, *Sampling Works in the Right Hands*, Daily Trojan, Nov. 9, 1988, at 15, col. 3 (U.S. Cal.) [hereinafter *Sampling Works*]; Miller, *Creativity Furor: High Tech Alteration of Sights and Sounds Divides the Art World*, Wall St. J., Sept. 1, 1987, at 1, col. 1. After having served fifteen months of his six-year prison term, Brown has been transferred to a work-release center. Until his term there expires, Brown will be unable to record material with his band. However, through the use of digital sampling, recording engineers could theoretically release new James Brown hits. Madonna's live concerts include her own sampled voice, digitally reproduced to sing back-up vocals, Levy, *Push-Button Rock*, ROLLING STONE, Nov. 21, 1985, at 89, 110, and her squeal, as well as Diana Ross's voice, has also been sampled and used on other recordings by Lord-Alge. Miller, *supra*, at col. 1. David Sanborn and Jaco Pastorius have been sampled, and several studios keep these disks on file for their own use. Telephone interview with Bernie Fleischer, President of Local 47, Los Angeles, American Federation of Musicians [AFM] (Nov. 19, 1987). John Bonham "still plays on new records, with bands that were formed after he was lowered into the grave. . . . Bonzo is alive and well—and living on a computer chip." Levy, *supra*, at 89. In fact, his sound sample is one of the best selling computer chips in the music sampling industry. *Id.* at 108.

ing artists, however, the reality of digital sampling is not an innocent dream-come-true; its effects can reach nightmarish proportions.

A digital sound sampler is a new type of synthesizer that has changed the music world forever. Through digital sampling technology, "[t]he computer has . . . become an instrument of music plagiarism."⁴ When operated with the necessary hardware and software, a computer⁵ can copy live or recorded sounds by "sampling" a sound's waveform and storing this data in numerical (digital) form. This data can later be reproduced so that when a key is pressed or a drumhead is hit, the same exact sound is reconstructed.⁶ The digital sampler can also manipulate the soundwave data so that a new sound is formed from the root of the sampled tone; either a totally new tone or a "soundsplice," such as a tone that begins with the sound of a flute and ends with the sound of a carhorn.⁷

The use of this new technology has become pervasive in the music industry as well as the related fields of film and television scoring and jingle producing.⁸ In fact, "[o]n any recent record, there is a good chance that the piano is not a piano and an even better chance that the drums are not drums."⁹ For example, one can reportedly hear Phil Collins's grated snare sound on "dozens of records he's had nothing to do with."¹⁰

The prevalence of digital sampling,¹¹ and the black market of art-

4. Goldberg & Bernstein, *Music Copyrights and the New Technologies*, ENT. & SPORTS LAW., Summer/Fall 1988, at 3, 3 [hereinafter ENT. & SPORTS LAW.].

5. Even many home computers, including the Apple Macintosh and the IBM-PC, can be used as digital samplers. See Yavelow, *Digital Sampling on the Apple Macintosh*, BYTE, June 1986, at 171; Kubicky, *A MIDI Project*, BYTE, June 1986, at 199.

6. Goldberg & Bernstein, *Music Copyrights and the New Technologies*, N.Y.L.J., Jan. 15, 1988, at 2, col. 1 [hereinafter N.Y.L.J.]; Rockwell, *Electronics is Challenging Traditions of Music*, N.Y. Times, Aug. 7, 1986, at C19, col. 3.

7. Milano, *E-mu Emulator Digital Sampling Keyboard*, KEYBOARD, Jan. 1985, at 70, 72. Drummers often combine a live drum's sound with the sound of a previously sampled instrument; this was done on Bruce Springsteen's "Dancing in the Dark" single. Levy, *supra* note 3, at 108. For a more detailed discussion of the mechanics of sound sampling, see *infra* text accompanying notes 42-48.

8. Rockwell, *supra* note 6, at C19, col. 4 (quoting John Glasel, President of Local 802, New York, AFM).

9. Levy, *supra* note 3, at 90. Sampling has played a role in almost every pop song heard on the radio today. See Miller, *supra* note 3, at 1, col. 1; 25, col. 2.

10. Dupler, *Digital Sampling: Is It Theft?*, BILLBOARD, Aug. 2, 1986, at 1, 74 (quoting a digital sampling equipment manufacturer's promoter). See also Miller, *supra* note 3, at 1, col. 1; DeCurtis, *Who Owns A Sound? Copyright Questions Raised by Digital Sampling Devices*, ROLLING STONE, Dec. 4, 1986, at 13, 13.

11. "Everyone is sampling now. . . . Everyone is sampling each other which I think is great. I think it's really funny." Moran, *supra* note 3, at 15, col. 1 (quoting Marston of My Life With the Thrill Kill Kult, a synth-punk group that even takes samples from horror movie soundtracks).

ists' sound samples it has fostered,¹² has created panic among musicians.¹³ Musicians¹⁴ fear digital sampling mainly for two reasons. First, since sampling has the "frightening"¹⁵ ability to fabricate an individual musician's live performance, many producers and recording engineers have found they can save money and time¹⁶ by using samples instead of live musicians for recording purposes. Although some commentators maintain that sampling's threat is minimal because its capabilities are limited,¹⁷ many others feel that as digital technology improves, "computers [will] make musicians extinct in the recording studio."¹⁸ Since samples of leading musicians are easily bought, sold, and traded on the open market,¹⁹ recording engineers who want that musician's sound can buy it on disc instead of hiring the live musician himself to record it. This forces the musician to actually compete against *himself* for jobs. According to several commentators, sampling has already resulted in higher unemployment among musicians.²⁰ In fact, some suggest that digital sampling devices threaten the very existence of acoustic

12. Many recording engineers often sample musicians—with or without their knowledge and consent—for their own personal libraries. Pareles, *Digital Technology Changing Music*, N.Y. Times, Oct. 16, 1986, at C23, col. 6.

13. DeCurtis, *supra* note 10, at 13 (quoting producer Phil Ramone).

14. Although both the "traditional," or "acoustic," musicians and the keyboard players who sample or utilize sampling technology are, in fact, musicians, for clarity this Note will refer to the latter as "samplers" or "technicians."

15. Fleischer, *President's Report: Synthesizers—Summing Up*, OVERTURE, Mar. 1986, at 9, 9.

16. Dupler, *supra* note 10, at 74 (quoting producer Freddie Bastone).

17. Goldstein, *Acoustical Music Here to Stay—Electronics Not a Threat*, OVERTURE, July 1985, at 1; Telephone interview with Frederick Lesemann, University of Southern California Professor/Director of Music Theory & Composition (Nov. 17, 1987) [hereinafter Lesemann Interview]. For the limits of today's technology, see *infra* text accompanying notes 61-69.

18. Levy, *supra* note 3, at 90 (quoting Michael Boddicker, one of today's top synthesizer programmers, as saying, "It's one-man show time."); Porter, *Microcomputers in the Recording Studio*, COMPUTERS & ELECTRONICS, Mar. 1984, at 72, 98 (quoting Grammy-winning recording engineer Roger Nichols).

19. Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1726 (1987) (authored by Bruce Mc Giverin) [hereinafter Note, *Electronic Appropriation*]. In fact, sales personnel of digital sampling manufacturers boast that they sell digital samples of Los Angeles's "finest studio musicians." Wise, *Another Look at NAMM Show*, OVERTURE, July 1985, at 6, 6. The Kurzweil 250 features drum sounds "recorded in New York with the help of such musicians as Phil Collins and the Thompson Twins." Morgan, *The Kurzweil 250 Digital Synthesizer*, 11 BYTE 279, 288 (1986).

20. Rockwell, *supra* note 6, at C19, col. 4 (quoting John Glasel, President of New York's AFM Local 802); Levy, *supra* note 3, at 90. Especially hard hit so far have been drummers, guitarists, and reed players. Fleischer, *President's Report: More Synthesizer Challenges*, OVERTURE, Jan. 1986, at 9, 9; Richards, *Electronic Education*, OVERTURE, Feb. 1986, at 1, 1.

instruments.²¹

The second cause for concern centers around the unauthorized appropriation of the "performer's auditory identity"²² for someone else's use. Many musicians regard the use of an unauthorized sample of their tone as "stealing" it.²³ In the competitive music business, a performer's main concern is protecting his unique and successful style against any imitator; musicians "who have developed unique or distinctive styles seek to maintain their distinction and the concomitant economic advantage therein."²⁴

Beyond its economic implications, however, digital sampling also threatens musicians with a loss of control over the uses of their own sound. One commentator likens sampled musicians to "anonymous contributors to musical sperm banks," explaining, "A single drum hit in 1981 can, in theory, be the basis of a backbeat on a pop single in 1985—without the drummer's knowledge or consent."²⁵ While some musicians are troubled by the loss of control of their musical identity, others are willing to forego it for a reasonable price. Today some musicians consent to their music being sampled and are paid for their contributions,²⁶ although they cannot demand a set payment because the American Federation of Musicians (AFM) has not yet set specific fee guidelines for sampling sessions as it has for live recording sessions.²⁷ Others consent to play for a sampling session but then feel exploited when the sampler later prominently features their unique sound, unaltered, without crediting them for their contribution.²⁸ The most offensive sampling occurs without the samplee's knowledge or consent (let alone payment or attri-

21. Rockwell, *supra* note 6, at C19, col. 1.

22. Note, *Electronic Appropriation*, *supra* note 19, at 1725.

23. Interview of Liberty DeVitto, drummer for Billy Joel, by David Mahl in St. Louis (July 24, 1990) ("If I played it and you used it [via sampling] without my permission, it's called stealing."); Wise, *supra* note 19, at 6 ("Why is it necessary for these manufacturers to steal the sounds we've spent our lives developing?"). On the other hand, some sampling technicians feel that musicians are "flattered to hear their samples used." Dupler, *supra* note 10, at 74 (quoting Bobby Nathan, co-owner of Unique Recording studio).

24. Lang, *Performance and the Right of the Performing Artist*, 21 COPYRIGHT L. SYMP. (ASCAP) 69, 72 (1974); Note, *Electronic Appropriation*, *supra* note 19, at 1738.

25. Levy, *supra* note 3, at 108.

26. The producer of Yes's "Owner of a Lonely Heart" sampled Alan White, Yes's drummer, with White's permission and paid him for his efforts. White's sample was later used on the "Beat Box" album by the Art of Noise. Pareles, *supra* note 12, at C23, col. 6.

27. *Id.* The AFM has fee schedules for live performances and recording sessions. Some musicians who play for a "sampling session" negotiate a fee based on the AFM's general live "session" fees schedule. If the artist is sampled from a recording instead of a live performance, theoretically he can demand a "reuse" fee from the sampler; however, this is impossible to enforce. Telephone interview with Bill Peterson, contract negotiator at Local 47, Los Angeles, AFM (Apr. 26, 1989).

28. David Earl Johnson wanted a share of Jan Hammer's royalties for Hammer using samples of Johnson's rare antique African and conga drums in the "Miami Vice" televi-

bution), either in the studio²⁹ or off of a recording.³⁰

This recent technology thus raises new legal questions over the ownership of sound. The ability to duplicate a performer's actual tone was unforeseen by the drafters of our copyright and other intellectual property laws. The law, therefore, does not define who owns the performance of a single note.³¹ Thus, even if sampling is done from a copyrighted sound recording without authorization, it is not patently illegal. With the law so uncertain, some artists have attempted to take matters into their own hands. For example, in an attempt to preserve any rights in his sound that may later be declared to exist, Frank Zappa affixed a label to his recent album, warning buyers against unauthorized sampling.³² Meanwhile, other artists have brought their disputes to court.³³ As the cost of sampling equipment decreases³⁴ and its technology improves,³⁵ lawsuits will become more commonplace unless industry standards are set or the current laws are revised.

This Note suggests that a federal Right of Publicity Act is the most effective way to balance the competing interests of musicians who are sampled without authorization and computer musicians who use sam-

sion series theme. Johnson's local AFM would not help him pursue payment. DeCurtis, *supra* note 10, at 13; Dupler, *supra* note 10, at 74; Pareles, *supra* note 12, at C23, col. 6.

29. Yes's singer, Chris Squire, was sampled live in the studio by his producer without his consent and the sample was used on a single by the Art of Noise. Although this greatly upset him, he has not taken any legal action. Pareles, *supra* note 12, at C23, col. 6.

30. Tom Lord-Alge admits to sampling many artists from their recordings such as the Tower of Power horns and Bruce Springsteen's "Whoa". Miller, *supra* note 3, at 1, col. 1.

31. Pareles, *supra* note 12, at C23, col. 6.

32. On Zappa's "Jazz From Hell" album, the warning reads, "[U]nauthorized reproduction/sampling is a violation of applicable laws and subject to criminal prosecution." Miller, *supra* note 3, at 25, col. 3. Zappa himself has used digital sampling in several of his recordings, although he has always obtained a prior signed waiver of the amateur samples' rights. Lesemann Interview, *supra* note 17. For their part, the individual studios using sampling have set guidelines for their employees that categorize "infringing" and "noninfringing" samples.

33. *Island Records, Inc. v. Next Plateau Records, Inc.*, No. 87-8165 (S.D.N.Y. filed Nov. 17, 1987); *Thomas v. Diamond*, No. 87-7048 (S.D.N.Y. filed Oct. 1, 1987); *Castor v. Def Jam Records*, No. 87-6159 (S.D.N.Y. filed Aug. 25, 1987). *Island Records* and *Thomas* were settled; *Castor* is still in discovery.

34. Sampling technology is now "affordable to the masses." Pareles, *supra* note 12, at C23, col. 5. Even consumers will soon "have the musical performing and recording capabilities of such [artists] as Peter Gabriel and bands like Genesis at their fingertips." Moran, *Sampling the Implications of a New Technology*, Daily Trojan, Oct. 25, 1988, at 10, col. 2 (U.S. Cal.) [hereinafter *Sampling Implications*]. Whereas the original Fairlight sampler cost \$30,000 upon its introduction in 1975, that same level of sampling equipment can be purchased today for about \$1500, Pareles, *supra* note 12, at C23, col. 5, and Casio's SK-1 digital sampler is available for a mere \$70. *Sampling Implications, supra* at 10, col. 2.

35. For a description of the state of today's technology, see *infra* text accompanying notes 57-69.

pling technology to express their own creative ideas.³⁶ This statute would have similar coverage to current court interpretation of the right of publicity, but it would ensure that musicians' rights are uniformly enforceable nationwide.

II. OVERVIEW

A. HISTORICAL CONTEXT

The advent of digital sampling is certainly not the first time technology has outpaced intellectual property law. For example, both photocopying and sound recording technology, advances that affected creators' rights in their creations, were unforeseen when the copyright law was first drafted. Congress eventually responded to these innovations by amending the copyright law to allow for protection against unauthorized duplication by means of these new inventions.³⁷

Today, Congress recognizes that the computer age raises even greater challenges to our current protection of intellectual property³⁸ due to the proliferation of information stored in electronic digital form³⁹ and its unprecedented vulnerability to misappropriation.⁴⁰ Authorities in intellectual property law have suggested to Congress that new techniques may be needed to successfully protect creators against infringement.⁴¹

B. THE TECHNIQUE OF DIGITAL SOUND SAMPLING

Depending on one's sophistication, digital sound sampling can be described as either the digital deconstruction and reconstruction of sound,⁴² or a tone's aural "photocopy." Every sound produces a unique waveform; a wave's shape can identify a sound like a fingerprint can

36. Other possible solutions include, *inter alia*, state copyright protection, unfair competition law, and trademark protection. These alternatives, in the author's opinion, are less satisfactory than a federal right of publicity, and are beyond the scope of this Note.

37. W. STRONG, *THE COPYRIGHT BOOK: A PRACTICAL GUIDE* (2d ed. 1984). See *Dowling v. United States*, 473 U.S. 207, 211 n.4, 224-25 (1985) (dictum); H.R. REP. NO. 92-487, 92d Cong., 1st Sess. 2 (1971), reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1567 (amendment protecting sound recordings resulted from harm caused by record and tape piracy).

38. See *Copyright and Technological Change: Hearings Before the Subcomm. on the Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 91 (1983) (testimony of Frederick Weingarten, Program Manager, Communication & Information Technologies Program, Office of Technology Assessment) [hereinafter *Hearings*].

39. *Id.* at 91.

40. *Id.*

41. *Id.* at 97.

42. *Sampling Implications*, *supra* note 34, at 10, col. 1.

identify an individual.⁴³ To sample a sound, a technician uses a microphone to transmit the soundwave's vibrations to a digital-audio-system (analog-to-digital converter). This converter reduces the waveform to a series of binary numbers (digits) that represents the wave's shape. This is done by measuring (sampling) the wave's voltage, or the amplitude of the signal, at regular intervals of up to 48,000 times a second or more.⁴⁴ These measurements are then stored on a computer disk. To reconstruct this sound, the data is fed back into the digital-audio-system at the same interval-rate at which it was sampled. The data is converted to a musical tone by a digital-to-analog converter which allows a synthesizer keyboard to control the production of a duplicate of the original soundwave and its sound.⁴⁵ To engineer new sounds, the data can be altered while it is in the computer's data base and the sound will then be reproduced in a "derivative format."⁴⁶

Once a tone is sampled, the keyboard can access not only the exact note that was sampled, but any note within the range of an octave below the sampled note and an octave above it. By sampling several notes in several octaves and storing them on different keys, a technician can produce any note or sequence of notes within the range of his keyboard.⁴⁷ One commentator likens this process to cloning an entire organism from the DNA in a single cell.⁴⁸

C. MUSICAL TONE QUALITY AND DIGITAL SAMPLING

A musician's sound on his instrument, or tone, is the "thing" that the digital sampler stores and recreates on demand. Many musicians spend their lives developing a unique tone, and it becomes part of their "persona"—an expression of their individuality. This identifiable sound is valuable in and of itself because it is frequently the basis for a performer's getting or keeping a job.⁴⁹

43. N.Y.L.J., *supra* note 6, at 2, col. 2.

44. Monforte, *The Digital Reproduction of Sound*, SCI. AM., Dec. 1984, at 78, 82. For accurate reproduction of a sound, technicians suggest a minimum sampling rate of at least 40,000 samples per second, although 25,000 per second is felt to be "adequate." Yavelow, *supra* note 5, at 175.

45. Monforte, *supra* note 44, at 78-79.

46. ENT. & SPORTS LAW., *supra* note 4, at 3, 3. The process of engineering a good sample and later utilizing it to produce a sound is difficult and takes study and practice to perfect. Milano, *supra* note 7, at 72. Arguably, the sampler has rights and a legally recognized interest in his creative labor of taking and reproducing the sample. However, these rights are beyond the scope of this Note.

47. Milano, *supra* note 7, at 72.

48. Pareles, *supra* note 12, at C23, col. 4. For a more detailed explanation of digital sound sampling, see Yavelow, *supra* note 5, at 174-75; Monforte, *supra* note 44, at 78.

49. Note, *Electronic Appropriation*, *supra* note 19, at 1725-27.

Tone is often confused with another musical component, "style."⁵⁰ Tone is a separate concept that refers to the timbre, resonance, and attack and decay of the individual note played or sung by the performer. Style, on the other hand, refers to a musician's interpretation—including his phrasing, emphasis, and diction of a *sequence* of notes. Musicians can have both identifiable tone quality and identifiable styles. For example, Jascha Heifetz, Isaac Stern, and James Galway⁵¹ are musicians with both "signature" tones and attributable styles. Their unique tone qualities on their instruments enable their audiences to identify them on the basis of only a single note.⁵² Furthermore, they also have their own interpretive styles that enable their listeners to identify them after hearing a few phrases.

Not every instrument, however, is equally capable of allowing a unique tone. Some instruments, such as the concert grand piano, by result of their structure do not allow a player to greatly manipulate their sound. At the other end of the spectrum is the human voice, which is identifiable as being unique to the individual performer by even the most inexperienced layman. Between these two extremes falls a continuum of instruments, each with a varying amount of unique tone potential.

For example, the oboe allows a performer to develop a highly identifiable tone.⁵³ The oboist's tone depends on both the oboist's "aural image"⁵⁴—his idea of the sound he aims to project—and the interplay between the characteristics of his instrument, his reed, and his own physical being. While playing, the oboist makes constant adjustments to bring his tone closer to his desired aural image.⁵⁵ However, achievement of this goal is affected by his instrument's material component (whether it is wood or plastic and its quality), its make and model, and its condition and state of repair. Furthermore, the oboe's double reed⁵⁶ is handmade by the oboist to meet his individual needs and has a significant effect on his tone. The reed cane's texture, hardness, resilience,

50. Justice Hand seems to have made this error in *Capitol Records v. Mercury Records Corp.*. In his argument that a music "performance" is original and merits protection, his choice of words indicates that he is referring to a musician's identifiable tone:

Musical notes are composed of a 'fundamental note' with harmonics and overtones which do not appear on the score. There may indeed be instruments . . . 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 . . . original . . .

221 F.2d 657, 664 (2d Cir. 1955) (dissent).

51. Heifetz and Stern are violinists; Galway is a flutist.

52. See Pareles, *supra* note 12, at C23, col. 6.

53. See J. LIGHT, *THE OBOE REED BOOK* 91-92 (1983).

54. *Id.* at 92.

55. Tancibudek, *Oboe and the Human Voice*, *DOUBLE REED*, Apr. 1980, at 6-7.

56. The double reed is the mouthpiece of the oboe.

shape, diameter, length, and thickness all contribute to its sound, as does the manner in which the oboist binds it onto the cork staple and shaves it down in preparation for playing. Finally, the oboist's tone is also affected by the structure of the performer's mouth, throat, and nasal passage; the air pressure used to support the vibrating reed and its placement on the cane; the performer's embouchure; and the presence, frequency, and variance of his vibrato. While some of the factors contributing to the individual oboist's identifiable tone—such as the performer's physical characteristics—are immutable, he studies and practices manipulating the other factors for years. The unique tone quality that results is the product of the interplay between the oboist's idea about his desired sound and the characteristics of his "equipment."

The technology of digital sampling is constantly improving, thus allowing for more convincing sound reproductions. For example, the length of the sample taken improves the playback's sound. While yesterday's samplers could sample a mere fraction of a second's worth of tone,⁵⁷ today's crudest instruments can sample a full second, and the top-of-the line Synclavier can sample over a minute.⁵⁸ This enables the better current machines to convincingly sample and reproduce the human voice;⁵⁹ the Kurzweil 250 can even emulate a full choir or a symphony orchestra, as well as each of the individual instruments in the orchestra.⁶⁰

However, today's samplers cannot yet entirely replace all live musical performances. First, even today's best samplers cannot sample the soundwave quickly enough to reflect all adjustments made by an actual solo performer,⁶¹ especially on a string instrument. Furthermore, in these situations—such as a violinist's or cellist's vibrato, or the strum of an acoustic guitar⁶²—the sampling rate can exceed the MIDI⁶³ transmission rate.⁶⁴ This limitation results in a less-believable tone being repro-

57. Milano, *supra* note 7, at 74.

58. *Sampling Implications*, *supra* note 34, at 10, col. 2. The Synclavier sells for over \$200,000.

59. Stevie Wonder sampled his own voice for the "scat" portion of "Part-Time Lover" so he could play (instead of sing) the intricate improvisational part. Pareles, *supra* note 12, at C23, col. 5. Jon St. James broke new ground when he sampled Stacey Q's voice for her "I-I-I-I Need You" refrain in "Two of Hearts." *Sampling Implications*, *supra* note 34, at 10, col. 2. Additionally, B-Movie Matinee used a sample of actor Harrison Ford's voice in one of its singles. Levy, *supra* note 3, at 108.

60. Yavelow, *supra* note 5, at 178; Levy, *supra* note 3, at 108.

61. Moore, *The Dysfunctions of MIDI*, *COMPUTER MUSIC J.*, Spring 1988, at 19, 23-25.

62. Levy, *supra* note 3, at 90.

63. A Musical Instrument Digital Interface (MIDI) is a device used by a technician to enable his keyboard to recall a sample stored in the computer's memory.

64. Moore, *supra* note 61, at 23-25.

duced by the synthesizer.⁶⁵

Second, today's digital samplers cannot match the phrasing, interpretation, and artistry of a live performer.⁶⁶ Thus, while an individual sampled note can sound incredibly realistic, a series of notes may not.⁶⁷ Thus the equipment capable of taking longer samples can store a sequence of notes and their phrasing,⁶⁸ it is currently impossible to teach the computer to phrase appropriately when a different sequence of notes is later played on the keyboard.⁶⁹

III. DIGITAL SAMPLING AND A NATIONAL RIGHT OF PUBLICITY

A. SHORTCOMINGS OF THE COPYRIGHT ACT REGARDING DIGITAL SAMPLING

While copyright law may be the first potential source of protection against unauthorized sampling that comes to mind, performers need to look elsewhere for timely and effective solutions to the problems posed by this new technology. This is for two main reasons. First, copyright law is not the most effective manner in which to protect the musicians' economic interests or to further their goal of maintaining control over the uses of their sound.⁷⁰ Second, Congress has shown longstanding disinterest in amending the Copyright Act⁷¹ to more fully protect musicians' economic and personal interests.

1. *Copyright Law Both Underprotects and Overprotects*

Copyright law, even if interpreted broadly, at best would only protect the sampled musician in limited circumstances, and even then would protect only his economic rights. In addition, extending copyright protection to musical tone would discourage creative musical efforts.

65. See Doerschuk, *Howard Jones: Techno-Rock's Top Solo Synthesist*, KEYBOARD, May 1985, at 46, 48.

66. Lesemann Interview, *supra* note 17; Pareles, *supra* note 12, at C23, col. 5.

67. Darter & Armbruster, *Dave Grusin: A Top Film Composer and Record Producer Goes Back Out on the Road*, KEYBOARD, July 1985, at 36, 41.

68. Levy, *supra* note 3, at 89 (e.g., Frank Sinatra's phrasing of a short lick could be stored and replayed as a sequence on a flute).

69. This inability might actually *benefit* musicians by putting a premium on their personal artistry. Lesemann Interview, *supra* note 17. However, this will only be true until technology improves to the point where digital samplers can also reproduce this element—at which time live performances would arguably become unnecessary.

70. "Sound sampling is the epitome of technology trying to squeeze into copyright law where it just doesn't fit." Pareles, *supra* note 12, at C23, col. 4 (quoting M. William Krasilovsky).

71. 17 U.S.C. §§ 101-914 (1982 & Supp. III 1985).

First, the Copyright Act protects only "fixed works of authorship."⁷² Thus, a musician sampled from a live performance falls outside of the law's protection entirely. While a "work of authorship" is defined broadly and was intended to evolve with current technology,⁷³ its application to a single note on a copyrighted sound recording is uncertain.⁷⁴ It is doubtful that a particular musician's tone comes under the classification of a "work" to allow protection against its infringement.⁷⁵

Even if the sample is taken from a copyrighted sound recording, there is still probably no legal protection for the musician. A sound recording is defined in the Copyright Act as a "work[] that result[s] from the fixation of a *series* of musical, spoken, or other sounds."⁷⁶ Since a sample taken from a recording usually uses only one or two notes, most commentators note that the sound recording itself is not infringed and, thus, there is no prohibition against its use.⁷⁷ In fact, neither the musician's nor the copyright holder's permission to take or use a sample is probably necessary.⁷⁸

However, rights could possibly be afforded to the copyright holder under section 114(b), which forbids recapture of the "actual sounds fixed in the sound recording."⁷⁹ Perhaps the copyright holder/musician sampled through a recording could claim protection based on his right to reproduce and copy the recording or his right to make derivative works.⁸⁰ This, however, depends on the threshold finding that a musician's tone is a "work" and is therefore protected by the Copyright Act.

Furthermore, the test for copyright infringement requires the court to find that the new recording was substantially similar to the plaintiff's and was more than a *de minimis* appropriation.⁸¹ This would frequently be an impossible standard for both the live-sampled and the recording-sampled performer to meet since most samples appropriate only a few seconds of a musician's tone, are often altered before use on

72. *Id.* § 102(a).

73. See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 53 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5666; WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 627 (7th Cir. 1982).

74. See Fleischmann, *The Impact of Digital Technology on Copyright Law*, 8 COMPUTER/L.J. 1, 11 (1987).

75. See *id.* at 12; N.Y.L.J., *supra* note 6, at 2, col. 2; Note, *Electronic Appropriation*, *supra* note 19, at 1735 n.72.

76. 17 U.S.C. § 101 (emphasis added).

77. See, e.g., Dupler, *supra* note 10, at 74 (quoting Krasilovsky) (Copyright covers only "the sequence of notes in a composition, not the actual notes.") (emphasis added).

78. Pareles, *supra* note 12, at C23, col. 4.

79. 17 U.S.C. § 114(b).

80. *Id.* § 106(1)-(3). See Note, *Electronic Appropriation*, *supra* note 19, at 1732; Holland & Dupler, *Experts Doubt Legality of Sampling*, BILLBOARD, Aug. 9, 1986, 1, 1.

81. See Warner Bros. v. American Broadcasting Cos., 720 F.2d 231 (2d Cir. 1983); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

a new recording, and compose only one portion of that new recording. Finally, any protection afforded to the musician would cover only his economic interests and not his personal or proprietary interests.⁸²

Besides the underprotection of sampled musicians under the Copyright Act, copyright law would also be overprotective of their tone. Affording copyright protection to musical tone would give rise to a cause of action for its imitation⁸³ if the imitation amounted to more than a "fair use."⁸⁴ The very mastery of a musical instrument involves listening to and imitating the tones of other musicians. Allowing a musician to reserve a tone quality for his sole use would inhibit others' creative efforts and would not only involve the courts in problematic line-drawing but would be contrary to the Copyright Act's purpose of encouraging creative endeavors.⁸⁵ Musicians do not require that their tones be set aside and protected against imitation; they only request redress against their actual unauthorized appropriation.

Thus, at best, only the musician sampled from a copyrighted sound recording, and not from a live performance, *might* be protected under the Copyright Act and then only to the extent that his economic interests coincided with those of the copyright owner, usually the record company. However, the record company most likely would also produce recordings made by digital samplers themselves and would probably not want to "pick sides" between their acoustic and electronic musicians.⁸⁶ Therefore, the sampled musicians would still be left with no standing to enforce against infringements.

The shortcomings of copyright protection—unclear coverage of a musician's tone, the substantial similarity test, protection of mainly economic interests, the Act's overprotectiveness, and the lack of standing to sue—are caused by the universal nature of the Copyright Act. These aspects of the law are beneficial to the other creators it protects. Therefore, even if Congress were eager to protect musicians from unauthorized sampling, it would probably not amend the Copyright Act to

82. Note, *Electronic Appropriation*, *supra* note 19, at 1738; Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) ("There are possibilities of injury to the creator other than merely economic ones, these the copyright statute does not protect."); see Case Comment, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies*, 90 HARV. L. REV. 473, 477 n.36 (1976).

83. Imitation does not constitute a copyright infringement under the Copyright Act. NOTES OF COMM. ON JUDICIARY, 17 U.S.C.A. § 114(b).

84. 17 U.S.C. § 107. The fair use defense could protect appropriation of tone if the court found that it was insubstantial in relation to the new work into which it was incorporated. See *id.* § 107(3).

85. See N.Y.L.J., *supra* note 6, at 2, col. 2.

86. Note, *Electronic Appropriation*, *supra* note 19, at 1730, 1745. For a thorough analysis of digital sampling and the 1976 Copyright Act, see *id.*, at 1727-38.

effectuate this policy due to the inability to reconcile the Copyright Act's universal scope with the unique nature of an infringement via digital sampling.

2. *Congress's Refusal to Amend the Copyright Act to Increase Artists' Protection*

Congress has shown a consistent unwillingness to amend the Copyright Act to afford musicians and performers more complete protection. Performing artists have felt inadequately protected by American intellectual property law for several decades. In fact, the concerns of today's acoustical instrumentalists about digital sampling are strikingly similar to musicians' complaints about the unauthorized taping of radio broadcasts over fifty years ago. In the 1930s musicians, concerned about the "unauthorized commercial exploitation" of their performances through the use of phonograph recordings,⁸⁷ lobbied Congress for a change in the copyright law. Concerned about increased musician unemployment caused by competition with recordings,⁸⁸ musicians asked for the "right to control or regulate the result of [their] efforts"⁸⁹ and supported a bill proposed by Representative Daly⁹⁰ that protected an artist's interpretation of a composition. According to their spokesman, the musicians then, as now, believed that "no person should be able to profit by [the musicians'] efforts unless [the musicians] shall be entitled to a share of such profit."⁹¹ The Daly bill's requested revisions of the copyright law were never enacted, although most states adopted statutes or common law causes of action that protected many of these interests.⁹²

There is little indication that today's Congress has dramatically shifted its view towards affording greater protection to musicians by amending the Copyright Act. Realistic pragmatism, then, as well as the

87. *Revision of Copyright Laws: Hearings Before the House Comm. on Patents*, 74th Cong., 2d Sess. 655 (1936) (statement of Fred Waring, President of the Nat'l Ass'n of Performing Artists) [hereinafter *Revision Hearings*].

88. *Id.* at 662-63 (statement of Samuel Tabak) (stating that "more than 50 percent" of his Local AFM was unemployed due to the trend to "do away with the use of the human being as an instrumentalist and to substitute mechanization").

89. *Id.* at 658 (statement of Fred Waring).

90. H.R. 10632, 74th Cong., 2d Sess. (1936).

91. *Revision of Copyright Laws: Hearings Before the House Comm. on Patents*, 74th Cong., 2d Sess. at 658 (1936) (statement of Fred Waring, President of the Nat'l Ass'n of Performing Artists).

92. These include unfair competition, unfair trade practice, passing off, misappropriation, misrepresentation, common-law copyright, defamation, right of privacy, and right of publicity. Some states have enacted record piracy statutes, *see, e.g.*, CAL. CIV. CODE § 980(a)(2) (West Supp. 1989). Others have codified "moral rights" legislation, which protects the author/creator's personal rights in his creation (such as the right of paternity, the right to be known as the author of the work, and the right of integrity of the work—the right to prevent others from deforming the work). *See, e.g., id.* § 980(a)(1).

shortcomings of the Copyright Act discussed above, point towards finding other solutions for this problem.

B. TREATMENT OF DIGITAL SAMPLING UNDER THE RIGHT OF PUBLICITY

As an outgrowth of the right of privacy, the common-law right of publicity had its roots in the context of advertising and endorsements. Recognizing the right of celebrities to control the commercial use of their names and likenesses as their main form of livelihood,⁹³ the right of publicity is aimed at protecting the goodwill arising from the public's recognition of an individual against appropriation and exploitation.⁹⁴ This will then benefit society⁹⁵ by "encourag[ing] talented people . . . to perfect and display their talents"⁹⁶ because the performer will be able to enjoy "the fruits of his own industry free from unjustified interference"⁹⁷ from free-riders hoping to gain from his efforts.

The right of publicity protects not only economic rights, but also proprietary rights⁹⁸ and personal rights.⁹⁹ According to Lockean and natural law definitions, property is that which is created through the fruits of one's labor and talents.¹⁰⁰ Thus, a performer can have a property right in his performance.¹⁰¹ The personal rights protected are the performer's interests in exploiting his talent and controlling his public

93. "Established performers seek to control their exposure so as not to diminish public interest in their talent." Lang, *supra* note 24, at 72. See Gordon & Honig, *The Celebrity Rights Act*, ENT. & SPORTS LAW., Summer/Fall 1988, at 1.

94. *Groucho Marx Productions, Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981); *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981); Moskin, *Make Way For the Stars: Copyright Preemption and the Right of Publicity*, 33 COPYRIGHT L. SYMP. (ASCAP) 159, 177 (1987).

95. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966) ("No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."). Society also benefits when creative efforts are encouraged. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y OF USA 111, 116 (1980) [hereinafter BULL.].

96. See Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMPLE L.Q. 977, 989 (1982).

97. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970); Comment, *The Twilight Zone: Meanderings in the Area of Performers' Rights*, 9 UCLA L. REV. 819, 819 (1962) (authored by Richard Goldstein & Arthur Kessler) [hereinafter Comment, *The Twilight Zone*].

98. "A majority of courts recognize that the right of publicity constitutes property and is proprietary in nature." Hoffmann, *The Right of Publicity—Heirs' Right, Advertisers' Windfall, or Courts' Nightmare?*, 31 DEPAUL L. REV. 1, 24 (1981).

99. BULL., *supra* note 95, at 116; Gordon & Honig, *supra* note 93, at 2.

100. J. LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 25-36 (L. DeKoster, ed. 1978). See Ausness, *supra* note 97, at 986.

101. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-79 (1977). Some

identity.¹⁰²

1. *Current Common Law Cause of Action*

In a right of publicity action, the plaintiff must prove unpermitted use of his "persona, dignity or likeness."¹⁰³ However, courts disagree about what "attributes" are protected under this standard.¹⁰⁴ Several courts have expansively interpreted the right's boundaries. Beyond appropriation of visual likeness,¹⁰⁵ plaintiffs have been allowed to recover for defendant's appropriation of plaintiff's act,¹⁰⁶ speaking style and voice,¹⁰⁷ performing style,¹⁰⁸ physical impression,¹⁰⁹ characterization,¹¹⁰ a phrase associated with the plaintiff,¹¹¹ and even the distinctive markings on a racing car.¹¹²

In a recent landmark decision, *Midler v. Ford Motor Co.*,¹¹³ the Ninth Circuit held that deliberate imitation of a singer's distinctive voice is actionable under the right of publicity. Midler claimed that, after she refused an offer to sing in a Ford television advertisement, Ford's advertising agency hired one of her back-up singers to sing "as much as possible like the Bette Midler record, 'Do You Want to Dance?'"¹¹⁴ The resulting advertisement played on national television.

commentators combine this property interest with the economic interest and call it "performance value." See, e.g., Note, *Electronic Appropriation*, *supra* note 19, at 1739.

102. Note, *Electronic Appropriation*, *supra* note 19, at 1738 (labeled "recognition value"); Ausness, *supra* note 96, at 978.

103. 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION 375 (2d ed. 1984).

104. Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People By the Media*, 88 YALE L.J. 1577, 1590 (1979).

105. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

106. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

107. *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 725, 248 N.Y.S.2d 809, 811 (1964) (although case was not decided on right of publicity grounds, it uses property and recognition values analysis to find infringement: "A broadcaster's voice and style of talking is . . . his personality, a form of art expression, and his distinctive and valuable property." "The significant element, however, is that his voice and style of talking, which in his profession as a news announcer is the foundation and source of employment and income, were appropriated by defendant . . ."). See also *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

108. *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

109. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

110. *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. (BNA) 541 (Super. Ct. L.A. County 1972), *rev'd on other grounds*, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (Cal. Ct. App. 1971).

111. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

112. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

113. 849 F.2d 460 (9th Cir. 1988). This suit has spawned a new flurry of suits under the right of publicity. Some plaintiffs in these pending actions are Bobby Darin's son and Tom Waits. Anderson, *Soundalike Suit*, A.B.A.J., Jan. 1990, at 24, 24.

114. 849 F.2d at 461.

In reversing the district court's summary judgement entered for the defendants, the court wrote: "The human voice is one of the most palpable ways identity is manifested. . . . The singer manifests herself in the song. To impersonate her voice is to pirate her identity."¹¹⁵ The court held that, since the defendants had "deliberately imitated" Midler's voice, they had tortiously "appropriated what [was] not theirs."¹¹⁶ Upon remand, a jury awarded Midler \$400,000 in damages.¹¹⁷

On the other hand, not all courts have extended the boundaries of an actionable "likeness" that far. For example, in *Booth v. Colgate-Palmolive Co.*,¹¹⁸ the New York District Court strictly construed the term when it denied actress Shirley Booth recovery against defendant, who used an imitation of her television character's voice on a commercial. The court simply stated that the advertisement's anonymous voice-over was not an infringement of Booth's "appearance, likeness, signature, or personality."¹¹⁹

2. *Possible Interpretation of the Right of Publicity to Include Musicians' Tone*

Despite the uncertainty *Booth* created regarding whether the right of publicity protects against an imitation of one's voice, courts could interpret a sampled musician's tone as within the right. This is consistent with both the rationales supporting the right of publicity and interpretive case law.

a. *Protection of Economic Interests*

Sampling a musician's tone and later using that tone without authorization for one's own ends is exploitive. This unjust enrichment violates the sampled musician's economic interests and runs contrary to

115. *Id.* at 463.

116. *Id.*

117. Seager, *Adam West Loses His Claim Over 'Batman' Portrayal*, Daily J., Jan. 18, 1990, at 1, col. 1.

118. 362 F. Supp. 343 (S.D.N.Y. 1973).

119. *Id.* at 347. Other courts have also denied recovery for defendant's imitation of plaintiff's voice and style; however, these plaintiffs brought their cases under the state's unfair competition (passing-off) statute and did not raise a right of publicity claim. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Davis v. Trans World Airlines*, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969) (*dicta* also states that no "personal rights" of plaintiffs were violated). Adam West, who brought a suit for "character infringement" under the right of publicity, was unsuccessful. *West v. Leech & Ass'n*, No. NCC-372-00-B, slip op. (L.A. Super. Ct. Jan. 17, 1990). The Los Angeles Superior Court refused to extend *Midler* to cover an imitation of his Batman character's mannerisms, voice patterns, body movements, and gestures. Seager, *supra* note 117, at 1, col. 1.

the right of publicity.¹²⁰ Under this rationale, a sampler must have prior permission to take a sample and must give sufficient consideration to do so. This negotiated payment should reflect the musician's time spent in the sampling session or the value of the use of a sample of his tone from a recording. Further, the payment should also reflect proper compensation for the continuous and indefinite use to which the engineer can later use the sample or the price for which he can sell it. The payment should reflect these factors because the ability to reproduce the sampled musician's sound at will "undercuts that performer's ability to earn a living as an artist."¹²¹ This effect goes against the right of publicity's goal of encouraging creative endeavors by protecting the value of performers' skills and talents for the benefit of society in general.¹²²

This view is supported by the Supreme Court's holding in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹²³ which found that the defendant's unauthorized "appropriation of the very activity by which the entertainer acquired his reputation in the first place" violated his right of publicity. Although this opinion also categorized the harm as the "publish[ing of] an entire act for which the performer ordinarily gets paid,"¹²⁴ the Court was also concerned that this appropriation went "to the heart of petitioner's ability to earn a living as an entertainer."¹²⁵ Similarly, a musician's tone is a major factor affecting whether he gains employment and achieves notoriety.¹²⁶ While sampling this tone appropriates only a few seconds of his sound, it has the potential of taking away his "entire act" in the future if he is later replaced in a recording session by his sampled tone, and thus it threatens his way of making a living.¹²⁷

120. One cannot "reap where [he] has not sown." *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918) (decided on unfair competition grounds). To profit from the identity values of another is unfair enrichment. Ausness, *supra* note 96, at 991; Note, *Intellectual Property—Performer's Style—A Quest for Ascertainment, Recognition, and Protection*, 52 DENVER L.J. 561, 568 (1975) (authored by Cheryl Hodgson) [hereinafter Note, *Intellectual Property*]. See also *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wisc. 2d 163, 175, 218 N.W.2d 705, 710 (1974) (The wrong derives from the "appropriation of the plaintiff's time, effort, and money.").

121. Note, *Electronic Appropriation*, *supra* note 19, at 1743.

122. See Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 683 (1981).

123. 433 U.S. 562, 576 (1977).

124. *Id.* at 574.

125. *Id.* at 576.

126. See *supra* notes 49-56 and accompanying text.

127. As sampled musician David Earl Johnson complains, "[Jan Hammer]'s got me and my best sounds for life, and there's no compensation." Dupler, *supra* note 10, at 74.

b. *Protection of Property Interests*

Digital sampling can violate the musician's property interest in his tone, which is protected by the right of publicity. As stated above, musical tone is often the product of several years of creative labor. Intuitively, one should not be able to appropriate this property without payment and consent.

Equity should act to protect property.¹²⁸ When faced with questions about fruits of creative labor left unprotected by statutory law, the courts frequently have expanded the definition of property to allow legal protection.¹²⁹ This was acknowledged by the Second Circuit in *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which stated that "the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."¹³⁰ In *Midler*, the court described the harm suffered by the artist as an appropriation of her "proprietary interest" in her own identity.¹³¹ Clearly, a musician's tone has pecuniary worth; in fact, its very appropriation for defendant's commercial gain illustrates its value.¹³²

Voice imitation cases refusing protection, most of them decided on grounds other than on the right of publicity, are distinguishable from tone-sampling plaintiffs' claims. First, the plaintiffs in *Booth v. Colgate-Palmolive Co.*,¹³³ *Sinatra v. Goodyear Tire & Rubber Co.*,¹³⁴ and *Davis v. Trans World Airlines*¹³⁵ did not claim actual *appropriation of their tones*, but only *imitation of their styles*.¹³⁶ In some jurisdictions, even the style imitation claim would succeed.¹³⁷ Digital sampling, however, enables defendants to do more than merely imitate performance styles.

128. Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 612 (1942).

129. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305, 305 (1979); Note, *Intellectual Property*, *supra* note 121, at 561; Comment, *The Twilight Zone*, *supra* note 98, at 843.

130. 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

131. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (quoting *Mot-schenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974)).

132. See *Canessa v. J.I. Kislak, Inc.*, 350 N.J. Super. 327, 351, 235 A.2d 62, 74 (1967). This argument can also be applied by analogy to the copyright requirement of originality; this requirement is presumed met if someone else found the material distinctive enough to copy (or appropriate). *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 250 (1903).

133. 362 F. Supp. 343 (S.D.N.Y. 1973).

134. 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971).

135. 297 F. Supp. 1145 (C.D. Cal. 1969).

136. Nancy Sinatra, for example, did not even claim that her voice was unique. *Sinatra*, 435 F.2d at 716.

137. The imitation of a performer's style is successful in some jurisdictions and fails in others. STRONG, *supra* note 37, at 13. For a Note urging universal recognition of this claim, see Note, *Intellectual Property*, *supra* note 120. For an explanation of the difference between tone and style, see *supra* text accompanying notes 50-52.

Instead, it reproduces a performer's tone. The courts that refuse to protect style appear to be unwilling to enter a new area that would require extensive line-drawing, especially in an area as amorphous as "style."¹³⁸ This concern is not necessarily present in tone appropriation cases because expert testimony could show actual appropriation by comparing the sampled musician's soundwaves with the technician's reproduced soundwaves.¹³⁹ Furthermore, none of these plaintiffs appears to have shown any economic damage arising from defendants' imitations; sampled plaintiffs would likely be able to make such a showing. Also, all of the defendants in the style imitation cases were able to show that they had valid license agreements to use the character¹⁴⁰ or the copyrighted songs¹⁴¹ that were the vehicles of the imitations. Again, this defense would not apply to defendants taking and using samples without authorization, except for perhaps the rare case in which the defendant would own the copyright to a recording that he sampled.

The only two voice imitation cases brought under a right of publicity claim reach conflicting results. In the earlier case, actress Shirley Booth claimed infringement of a copyrighted character ("Hazel") whom she had previously portrayed on television using only her normal speaking voice. The court found that "imitation of [her] voice without more" was not an infringement.¹⁴² Conversely, in the recent *Midler* case, a "deliberate" imitation of the singer's voice was found actionable.¹⁴³

However, neither of these cases controls the tone sampling plaintiff's case because they deal only with imitation, not with an actual taking. To the extent that these cases are instructive, the *Midler* case, involving a singer, is more analogous to the sampled musician's situation than the *Booth* case, involving an actress. A music performer's tone constitutes *more* than a character's speaking voice. This is due to the property element in tone. Unlike one's natural speaking voice, a musician's tone is the product of intellectual and creative labor. Also, a musician's tone is more integral both to his persona and to his prospects for future work than is a character's voice to an actor. Musical tone remains relatively the same for the length of his career; it is an identify-

138. See *Sinatra*, 435 F.2d at 717-18 ("the inherent difficulty of protecting or policing a 'performance' . . . imposes problems of supervision that are almost impossible for a court of equity"). See also *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 845 (S.D.N.Y. 1975) (attribute cannot be too difficult or abstract for the court to deal with); Note, *Intellectual Property*, *supra* note 120, at 561.

139. If the two waves' charts are identical, there must have been sampling. ENT. & SPORTS LAW., *supra* note 4, at 4; N.Y.L.J., *supra* note 6, at 2, col. 2. However, this showing would be more difficult if the technician had somehow altered the original sample.

140. *Booth*.

141. *Sinatra, Davis*.

142. *Booth*, 362 F. Supp. at 347.

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

ing characteristic, as well as a factor in a musician's ability to find work. To the public, a musician's tone becomes synonymous with his identity. It transcends whatever musical piece he is playing at the moment. Conversely, in presenting a characterization, the actor subsumes his actual personality to that of the character's. The character and its voice are not a permanent part of an actor's persona; frequently a character has a persona and voice all his own, one very different from the actor who portrays him. The public's association of the character's characteristics with the actor usually changes once the actor performs a new role. Furthermore, an actor's portrayal of a character's voice has little or no effect on the actor's ability to find future work.

c. Protection of Personal Interests

Third, digital sampling infringes on more than a musician's economic and property interests. It also takes away his personal right to control his identity, which is protected by the right of publicity.¹⁴⁴ The right of publicity protects "those facets of the celebrity's persona which are most readily identifiable"¹⁴⁵ and gives individuals a monopoly over their "personas."¹⁴⁶ Therefore, the right of publicity should extend to allow recovery for appropriation of "any recognizable attribute of a person that has become marketable as a result of that person's efforts."¹⁴⁷

As stated previously, musical tone quality is tantamount to a performer's identity.¹⁴⁸ It is the musician's only way to identify himself to an audience who usually does not view his performances but must recognize him from his sound. The audience associates the musician with his tone; the tone becomes a part of his persona.¹⁴⁹ One's persona deserves protection due to its value to the individual; "the persona partly defines the individual and . . . individuals ought to have control over how their personas are presented to others."¹⁵⁰

144. *Id.* at 463-64; Cotten, *Torts—The Right of Publicity—Protecting a Celebrity's Identity*, 52 TENN. L. REV. 123, 137 (1984).

145. BULL., *supra* note 95, at 114.

146. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 216 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L.J. 1567, 1572 (1983) (authored by Marc Apfelbaum) [hereinafter Note, *One Pea in Two Pods?*].

147. Felcher & Rubin, *supra* note 104, at 1601.

148. See Roeder, *supra* note 82, at 557 ("[A] musician . . . does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality . . .").

149. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); Note, *Electronic Appropriation*, *supra* note 19, at 1740. This is the basis of David Earl Johnson's claim. DeCurtis, *supra* note 10, at 13.

150. Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1190 (1987) (authored by J. Eugene Salomon, Jr.) [hereinafter Note, *The*

When a musician is sampled without his authorization, the right to control the use of his tone, his persona, is lost. The "intrusion into the individual's sphere of decision-making, which is central to him as an autonomous member of society,"¹⁵¹ imposes another's choices on him regarding the use of his persona. This intrusion violates the musician's personhood.¹⁵² For example, if Wayne Newton's voice appeared on the soundtrack for a pornographic movie through use of a sound sampler, this would not only irreparably damage decades of goodwill that he has established (an economic interest), but it would also violate his right to choose how his personality is portrayed to the public. Consequently, the courts should recognize that without exclusive control over one's tone, the performer's "recognition value" has little utility.¹⁵³

This view is also consistent with case law. Although *Lahr v. Adell Chemical Co.* was brought on unfair competition grounds, the court found "recognition value" in a human voice.¹⁵⁴ This implies that a sound associated with a performer can be considered a "likeness" and thereby covered by the right of publicity. The Supreme Court has also held that an expression of one's personality, if "unique" and "one man's alone," is protectible.¹⁵⁵

C. A FEDERAL RIGHT OF PUBLICITY

While judicial interpretation could easily extend the right of publicity to protect against appropriation of musical tone, the states' various interpretations of the concept and codifications¹⁵⁶ of the right have led to a confusing overlap with other actions and brought upon conflicting results. For example, besides disagreeing about the scope of one's "likeness," states differ in their view of who may bring an action under a right of publicity claim, whether the right is descendible, and the scope of the remedy available.¹⁵⁷ The flexibility of state common law has ena-

Case for a Federal Statute]; see also Note, *Electronic Appropriation*, *supra* note 19, at 1738-40.

151. Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 730 (1982) (authored by Alisa M. Weisman) [hereinafter Note, *Publicity as an Aspect*].

152. Personhood theory maintains that some things categorized as "property" should be even more stringently protected because they are inalienable or they are closely bound up with the individual's persona. See generally Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61 (1982).

153. Ausness, *supra* note 96, at 978.

154. 300 F.2d 256 (1st Cir. 1962).

155. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 250 (1903) (case was brought under the Copyright Act).

156. See, e.g., CAL. CIV. CODE § 3344 (West Supp. 1989).

157. Note, *The Case for a Federal Statute*, *supra* note 150, at 1180-84.

bled the right of publicity to become available.¹⁵⁸ However, due to the national scope of the entertainment and music industries, performers' rights will only be adequately protected under a uniform federal statute.¹⁵⁹ Congress has the authority to enact such a statute under the Commerce Clause.¹⁶⁰

The statute should clearly specify what attributes, such as a musician's tone quality, are protected. It should also specify whether the right is descendible.¹⁶¹ Two other key provisions should address standing to sue and the scope of remedies available.

1. *Who Can Sue?*

The right of publicity has its roots in protecting a celebrity's control over his likeness. While most states require a plaintiff to have a celebrity status to bring a right of publicity action,¹⁶² the rationales underlying the right do not support such a restriction. First, the economic/unjust enrichment rationale supports applying the right of publicity equally to both celebrities and non-celebrities; in both cases the defendant is appropriating the sweat of another's brow for his own commercial benefit. Not only does this deprive the sampled musicians of payment, but it also threatens their way of making a living in the future. This threat is arguably even more ominous to the non-celebrity performer than the celebrity since the celebrity, by reason of his notoriety and performance style, will still be offered live engagements for special or feature performances. Alternatively, the anonymous studio musician could be completely replaced by a generic sample taken of his instrument.

Second, property analysis reveals that both the celebrity and non-celebrity musician deserve to be compensated for the hours of creative labor and effort invested in their work. Third, control of identity/persona rationale applies equally to both public and private plaintiffs¹⁶³ since the harm lies in the denial of the right to make decisions about how one's identity is used. Finally, eliminating the public/private distinction would simplify administration since courts would not have to

158. Note, *Electronic Appropriation*, *supra* note 19, at 1738 ("Historically, state law, particularly state common law, has proven more flexible than copyright in adjusting to the exploitative potential of new technologies.").

159. For a Note advocating this approach, see Note, *The Case for a Federal Statute*, *supra* note 150.

160. U.S. CONST. art. I, § 8, cl. 3.

161. A discussion of the competing viewpoints concerning this aspect is beyond the scope of this Note.

162. The right is often defined as "the right of a public figure to control the commercial use of any matter closely identified with him in the mind of the public." Moskin, *supra* note 94, at 174 (emphasis omitted).

163. Note, *The Case for a Federal Statute*, *supra* note 150, at 1197.

determine whether a plaintiff was a celebrity before allowing recovery.¹⁶⁴

The seminal Supreme Court case on the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁶⁵ is ambiguous concerning the celebrity requirement. At one point, the Court, in distinguishing Mr. Zacchini from the plaintiff in another case, stated that the latter was not a "performer, a person with a name having commercial value, or any claim to a 'right of publicity.'"¹⁶⁶ Yet, throughout the rest of the opinion, the right of publicity was discussed simply in terms of an "individual" or a "performer." Furthermore, much of the *Zacchini* analysis turned on the fact that the plaintiff earned his livelihood from the likeness that was appropriated.¹⁶⁷

The *Midler* case also touches on this issue. There, the court stated that a person's identity is manifested through his singing voice, "especially . . . a singer of renown."¹⁶⁸ This language implies that all singers, with or without renown, have some sort of protectible identity interest in their tones, although language used later in the opinion indicates that the holding is limited to celebrities.¹⁶⁹ The Superior Court of New Jersey, on the other hand, has recognized the identity interests of all performers and has extended the protection against appropriation of one's likeness to a non-celebrity plaintiff.¹⁷⁰

In any event, sampled musicians, whether celebrity or not, are "performers" and their tones (likenesses) have "commercial value." Non-celebrity musicians depend on their musical sound for their livelihood just as much as their celebrity counterparts. Because eliminating the celebrity distinction is congruous with the right to publicity rationales, would simplify administration, and is not inconsistent with Supreme Court case law, the statute should eliminate this standing requirement.

Furthermore, standing should not be limited to those musicians who can show they have a "unique" tone.¹⁷¹ To recover, a plaintiff should merely have to show that defendant's unauthorized use of a sam-

164. Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 203 (1983).

165. 433 U.S. 562 (1977).

166. *Id.* at 571.

167. *Id.* at 576.

168. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (emphasis added).

169. The Ninth Circuit limited its holding in *Midler* to a deliberate imitation of the voice of a singer who is "widely known." 849 F.2d at 463.

170. *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1976) (although the court labeled this case a "right of privacy" action, it is really a right of publicity suit because of the appropriation of plaintiffs' likeness for defendant's commercial gain).

171. The *Midler* court disagreed with this proposition. There the Ninth Circuit held that not every voice imitation is actionable; "only . . . a distinctive voice of a professional

ple of his tone has injured him.¹⁷² This is also consistent with the policies behind the right of publicity. For example, if a percussionist who lacks an identifiable tone works for hours in the studio—at no small expense—to achieve a special sound and another person later appropriates (samples) this sound, this percussionist has just as much of a claim against a defendant on an unjust enrichment theory as does a drummer with a “signature” hi-hat tone.¹⁷³ Again, this simplifies administration because the court does not have to determine a tone’s originality.

2. *The Remedy*

The right of publicity should be enforced by the full array of remedial options.¹⁷⁴ This is consistent with current case law.¹⁷⁵

The plaintiff’s stature—celebrity or non-celebrity, with or without identifiable tone—should play a role in the calculation of damages. Another factor should be the defendant’s use of the unauthorized sample, such as direct reproduction or for use in producing a derivative sound. Since damages could be difficult to prove for some plaintiffs, the courts should allow general damages to be awarded based on the plaintiff’s right to control his persona. The courts should also permit the plaintiff to show compensatory damages, calculated either on an unjust enrichment basis or a fair market value formula, at the plaintiff’s option.¹⁷⁶ With the proper factual showing, the court should be permitted to award special, and perhaps punitive, damages to the plaintiff. Punitive damages are especially necessary to protect the personhood value inherent in the non-celebrity musician’s tone.¹⁷⁷ Without the threat of punitive damages, defendants would have little to deter them from opting to sample a plaintiff and pay the low compensatory damage award later if they were caught. Thus, the threat of punitive damages is necessary to prevent defendants from profiting from their wrongdoing.

Injunctions are necessary to minimize multiple uses of a sample and to deter the unauthorized sampling of those who would have less

singer [who] is widely known and is deliberately imitated” presents a cause of action. 849 F.2d at 463.

172. Celebrity status should, however, be considered in assessing the amount of damages. See *infra* text accompanying notes 176-77.

173. Many engineers sample sounds for just this very reason. It is much cheaper, easier, and faster to appropriate an “old” sound than to come up with a unique sound. Miller, *supra* note 3, at 25, col. 2; Dupler, *supra* note 10, at 74; see also Miller, *supra* note 3, at 25, col. 1 (quoting Mr. Lord-Alge) (“We’re all blatantly stealing from everyone else. . . . Any record is fair game . . .”).

174. The remedies should include general, compensatory, special, and punitive damages; injunctive relief; and declaratory relief.

175. See, e.g., *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 847 (S.D.N.Y. 1975).

176. Note, *The Case for a Federal Statute*, *supra* note 150, at 1205.

177. *Id.* at 1206.

motivation to sue, such as non-celebrities who would recover smaller damages. In addition, declaratory relief would be helpful in establishing guidelines for future conduct.¹⁷⁸

D. PREEMPTION

The 1976 Copyright Act includes a preemption provision,¹⁷⁹ which applies specifically to some rights granted by state law. By its express terms, this provision does not preempt "any rights or remedies under any other Federal Statute."¹⁸⁰ Thus, if a federal right of publicity statute is enacted, its provisions will be unaffected by the Copyright Act.

However, until a federal statute is enacted, non-preemption of state publicity claims are somewhat less certain. The preemption provision states that two conditions must be met for a state action to be preempted by the Copyright Act. First, the state law must create legal or equitable rights equivalent to those granted under federal copyright law, and, second, the state law must pertain to fixed works of authorship within the subject matter of the Copyright Act.¹⁸¹ Thus, the state's power over subject matter not within the scope of the Copyright Act, such as an unfixed performance or something that is not a work of authorship, is preserved.¹⁸²

As stated above,¹⁸³ a musical tone is probably not a work of authorship; it does not embody an idea, but rather a persona or an identity. Thus, it lies outside of the Copyright Act and state laws protecting it are not preempted. The cases are in widespread agreement that the Copyright Act does not preempt a state cause of action for the right of publicity.¹⁸⁴ Most commentators seem to agree as well,¹⁸⁵ basing this decision on the different nature of the interests protected by the two

178. Note, *Publicity as an Aspect*, *supra* note 151, at 767.

179. 17 U.S.C. § 301.

180. *Id.* § 301(d).

181. *Id.* § 301(a).

182. *Id.* § 301(b); H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 132 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5747-48. Congress's intent regarding the scope of this provision is unclear. Originally, this bill listed several examples of types of rights that were not preempted by the Copyright Act—among them was the right of publicity. Under pressure from the Justice Department to delete the express non-preemption of misappropriation, the House deleted the entire list of examples from the bill. The debate over its deletion shows confusion over what intent was expressed by this deletion. See 122 CONG. REC. H10910 (Sept. 22, 1976). Without a clearly stated preference, one cannot conclude that Congress intended to preempt the right of publicity by remaining silent on the issue. Moskin, *supra* note 94, at 188 n.155; Shipley, *supra* note 122, at 705-06.

183. See *supra* text accompanying notes 72-75.

184. See, e.g., *Price v. Hal Roach Studios, Inc.*, 412 U.S. 546 n.20 (1973); *Factors, Etc. v. Pro Arts, Inc.*, 496 F. Supp. 1090, 1099-1100 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (not preempted because it does not fall within subject matter of Copyright Act, nor is it an "equivalent right" since it requires

doctrines.¹⁸⁶

Two noteworthy cases in this area are *Baltimore Orioles, Inc. v. Major League Baseball Players Association*,¹⁸⁷ and *Midler v. Ford Motor Co.*¹⁸⁸ The position of musicians sampled from a recording¹⁸⁹ must be distinguished from that of the baseball players in *Baltimore Orioles*. In that case, the Major League Baseball Clubs owned the copyright to telecasts of baseball games. The players claimed that the broadcasts, made without their consent, violated their rights of publicity in their individual performances. The Seventh Circuit held that this claim was preempted by the Copyright Act because, once taped, the performances were fixed in a tangible—and, thus, copyrightable—form, and the players' rights in these fixed performances were equivalent to the copyright owner's rights under section 106.¹⁹⁰ This conflict between the players' rights in their individual performances and the copyright owner's rights to reproduce, distribute, perform, and display its copyrighted broadcasts forced the court to find that the players' claim was preempted.¹⁹¹

However, unlike the plaintiffs in *Baltimore Orioles*, a sampled musician's right of publicity claim is not a claim to a specific copyrighted performance. Instead, it is more like the situation in *Midler*, in which the artist's rights to the sound of her voice were not preempted by the Copyright Act. The sampled musician claims a right to his overall tone, universally used throughout all of his performances. This, since it is "unfixed," falls outside of the material encompassed by the Copyright Act and is not preempted.¹⁹² This approach is also supported by language in *Baltimore Orioles* in which the court states that the right of publicity is preempted "to the extent that it is claimed in a tangible

elements not required for copyright cause of action); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980).

185. See, e.g., 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.01[b], I-II; Note, *Electronic Appropriation*, *supra* note 19, at 1744; Moskin, *supra* note 94, at 160; Kwall, *supra* note 164, at 206 n.68; Ausness, *supra* note 96, at 1023; cf. Note, *One Pea in Two Pods?*, *supra* note 146, at 1593; Shipley, *supra* note 122, at 722-23.

186. Note, *Electronic Appropriation*, *supra* note 19, at 1744 (publicity protects identity and recognition value—not within copyright protection); Kwall, *supra* note 164, at 206 n.68 (publicity protects intangible attributes—outside scope of copyright protection). If there were a conflict between the goals of the copyright law and the right of publicity, the latter would be preempted. See U.S. CONST. art. VI, cl. 2.

187. 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987).

188. 849 F.2d 460 (9th Cir. 1988).

189. The publicity rights of a musician sampled from a live performance clearly are not preempted by the Copyright Act since the performance is not fixed in a tangible medium.

190. 805 F.2d at 663.

191. *Id.* at 676 and n.24.

192. *Midler*, 849 F.2d at 464.

work within the subject matter of copyright."¹⁹³

IV. CONCLUSION

The technique of digital sound sampling raises "questions that strain the modern boundaries of law, morality, and aesthetics."¹⁹⁴ The new technology blurs the distinction between infringing on an artist's creative work and permissibly using portions of that artist's creations.¹⁹⁵ With no law controlling the appropriation of a musician's tone, society permits the unauthorized sampler to "reap where he has not sown." This is at the expense of musicians, and in the long run, society's own cultural well-being. Musicians feel threatened by the loss of control over their work and their tonal identities; samplers desire to remain free to use any new artistic technique to express their creative ideas.¹⁹⁶ Since enlarging the musician's rights necessarily imposes restraints on the samplers, some balancing of these rights is required.¹⁹⁷ This balance should strive to maintain the musician's economic, property, and personal rights in his musical tone quality while allowing the samplers an equitable degree of access to musicians' tones. Congress realizes that the current law is unable to protect creators against the rapid advances of technology and that a new law is needed.¹⁹⁸ Immediate action is required to provide both musicians and samplers a greater degree of certainty over the acceptable norms for using this new technology,¹⁹⁹ currently the lack of certainty inhibits not only acoustic musicians, but sampling musicians as well.

Amending the Copyright Act is not the best answer to the challenges posed by digital sampling technology. We have seen the uneven, conflicting, and distorted results that have occurred in past years when lawyers, clients, and the courts were forced to fit new concepts and

193. 805 F.2d at 678 n.26.

194. Miller, *supra* note 3, at 1, col. 1.

195. ENT. & SPORTS LAW., *supra* note 4, at 3.

196. *Id.*

197. BULL., *supra* note 95, at 112 ("One man's right is another man's restraint, and to set levels of protection . . . only in response to the needs of one group . . . distorts the function of [intellectual property] laws . . .").

198. *Hearings*, *supra* note 38, at 20.

199. Samplers and musicians alike are pleading for guidance from the AFM. See, e.g., DeCurtis, *supra* note 10, at 13 (quoting Krasilovsky); Richards, *supra* note 20, at 1; Carlin, *Letter to Editor: Sampling Confrontation Refreshing*, OVERTURE, Nov. 1985, at 9, 9. The AFM has currently been unable to arrive upon a fee schedule due to the fact that its membership consists both of acoustical musicians, who would like to see sampling regulated, and computer musicians, who demand unrestricted use of sampling technology. One proposal was a system of payment in which, for example, if four electronic keyboard musicians were hired to replace a twenty-piece orchestra, the four electronic musicians would be paid at the twenty-piece rate. This would remove the economic incentive to replace acoustic instruments with samplers. Richards, *supra* note 20, at 1.

technologies into the old language of the Copyright Act while Congress debated the merits of extending its protection.²⁰⁰ Instead, the musician can be better protected against unauthorized sound sampling by the right of publicity, expanded to protect tone as a part of his persona, or likeness. This protection should, furthermore, be made uniform nationwide by enacting a federal statute allowing all sampled plaintiffs to have standing, in order to avoid forcing the reluctant courts to draw lines in an amorphous area. The federal right of publicity would be able to stand side-by-side with the Copyright Act.

A right of publicity statute, however, will only protect musicians against unauthorized sampling. Authorized sampling accompanied by fair payment is beyond its scope. Some mechanism is also needed, then, to ensure that musicians' interests are safeguarded in any fee negotiation process accompanying sampling since the individual musicians are at a disadvantage when negotiating with corporate producers. While the AFM may be a logical body to implement sampling payment schedules, any payment standards eventually set by the AFM will not protect those musicians who are not union members. Instead, one commentator suggests the creation of a license system, which would allow a sampler to compensate a musician at a rate determined by a preset scale for a sample of his tone.²⁰¹ A government agency²⁰² or a private organization²⁰³ could then be set in place to formulate fee structures and means of enforcement.

Music insiders agree that the music industry itself cannot solve the problems that the new technology of digital sampling presents. Our legal system must make some fundamental changes in its treatment of a musician's sound.²⁰⁴ The best alternative would be to enact a federal Right of Publicity Act.

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200. STRONG, *supra* note 37, at 181.

201. Note, *The Case for a Federal Statute*, *supra* note 150, at 1194.

202. Fleischmann, *supra* note 74, at 21.

203. This appears to work well for choreographers. One commentator writes that their self-enforced customs and guidelines work better for them than do the newly-enacted provisions in the Copyright Act enacted for their benefit. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 318-19 (1984).

204. *Sampling Implications*, *supra* note 34, at 10, col. 6 (quoting Jon St. James).

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