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CARSWELL

Digital Samplers: Can Copyright Protect Music from the Numbers Game?

*Mark G. Quail**

This article argues that the Canadian Copyright Act *will not protect musical compositions from digital sampling. Recent technological improvements have permitted musicians to capitalize on a single sound from another's composition, thereby safely circumventing the substantial similarity requirement. Single sounds, sounds embodied in copyright works and samples comprised of several notes are all examined in relation to the Act and the case law. The author concludes that the Act's focus on harmony and melody does not extend to cover the other important elements of popular music such as rhythm and timbre. Musicians who use samples, therefore, have much leeway before their work is deemed an infringement. The author suggests that the Act be amended to include protection for these other elements. Other remedies for the original composer, including recourse to moral rights and the tort of appropriation of personality, are also examined.*

Cet article suggère que la Loi canadienne sur le droit d'auteur ne protègera pas les oeuvres musicales de l'echantillonnage numérique. Des améliorations technologiques récentes permettent aux musiciens de reproduire un simple son emprunté d'un composition d'un autre artiste, une telle reproduction échappant à la notion de partie substantielle. L'auteur examine à la lumière des dispositions législatives et de la jurisprudence, la situation quant à la reproduction de sons uniques, de sons inclus dans des oeuvres protégées par droit d'auteur et d'échantillons comprenant plusieurs

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notes. L'auteur conclut que les notions de mélodie et d'harmonie enchassées dans la législation actuelle sont inadéquates pour protéger certains éléments importants de la musique populaire, tels que le rythme et le timbre. Par conséquent, les musiciens qui utilisent des échantillons bénéficient d'une grande marge de manoeuvre avant que l'on puisse conclure que leur création viole les droits de l'auteur original. L'auteur suggère que des amendements devraient être apportées à la législation afin de spécifiquement protéger ces autres éléments. Certains autres recours qui peuvent être disponibles à l'auteur original, à l'instar des recours pour atteinte aux droits moraux et au délit d'appropriation de la personnalité, sont également examinés.

1. INTRODUCTION

With present-day advances in musical technology, musicians and composers have new and powerful tools for the creation of musical compositions. These electronic tools, in the form of digital samplers and sequencers, are changing the way music is created. But as well as opening up wide vistas for artistic creation, this computer-enhanced technology has created legal problems. Digital samplers pose among the most engaging of new problems because they can record, with great accuracy, any sound and play it back exactly as it originally sounded. A musician can now sample an interesting drum sound from another artist's album and use that sound in a new composition. As well, a musician can be sampled playing live in the studio and, once that sound is in the sampler's memory, that musician's abilities are not needed any further.

The problems are manifest. Samplers provide an easy avenue to inexpensive sounds from which songs can be created, but in so doing, it could be argued that musicians using samplers are infringing the copyright of the work from which the sounds were taken. A common variation of this problem for copyright arises when someone samples a piece of work that is distinctive of another artist and then incorporates that sample into a new work. Examples of such samples would be a James Brown scream, a piece of Eddie Van Halen's guitar work, or Phil Collins' snare drum.[1] Samplers also remove the need

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1 See generally S. Dupler, "Digital Sampling: Is It Theft?" (1986) 98:31 *Billboard* 1; S. Dupler & B. Holland, "Experts Doubt Legality of Sampling" (1986) 98:32 *Billboard* 4; M. Miller, "The Questionable Ethics of Modern Creativity" *The [Toronto] Globe and Mail* (7 September 1987) B1. For academic reviews of the matter see E. Fleischmann, "The Impact of Digital Technology on Copyright Law" (1988) 70 J. Pat. & T.M. Off. Soc'y 5 at 15-17; B. McGiverin, "Digital

for live musicians in the studio. This phenomenon gives musicians cause to worry because in the United States "[t]he total wages paid to session musicians have declined every year for the past eight years, and the availability of first-rate samples may prove too much of a temptation to producers working within . . . tight budgets."[2]

There are enough legal difficulties in providing protection for complete songs, and this is even more true for fragments of material. To date, there has been no judicial statement on whether there is protection for smaller pieces of material that have been lifted from an artist's work by a sampler. The central question raised by samplers is this: "Who (if anyone) owns a sound?"[3] Is a sound that comes out of a song protected by the current copyright laws? If not, should it be?

My view is that Canada's current *Copyright Act*[4] will not protect recorded works from being digitally sampled. To illustrate this point I will examine the various situations in which samplers are currently used. I will first deal with the question of copyright in a single sound. The status of a single sound and that of a series of notes that have been lifted from a recorded work will also be examined. This article will also deal with moral rights, derivative works, the sampling of live music and the tort of appropriation of personality. The focus will be on the Canadian law, but the article will draw on law from the United States and England. Before I discuss these matters it is necessary to provide a brief description of the technology so as to illustrate why samplers are such a powerful force in the composition of songs.

Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds" (1987) 87 Columbia L. Rev. 1723; J. Newton, "Digital Sampling: The Copyright Considerations of New Technological Use of Musical Peformance" (1989) Comm./Ent. L.J. 671; J.C. Thom, "Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology" (1988) 8 Loyola Ent. L.J. 297; R. Wells, "You Can't Always Get What You Want but Digital Sampling Can Get What You Need!" (1989) 22 Akron L. Rev. 691; L. Bently, "Sampling and Copyright: Is the Law on the Right Track?" [1989] J. Bus. L. 113, [1989] J. Bus. L. 405; M. McGraw, "Sound Sampling Protection and Infringement in Today's Music Industry" (1989) 4 Hi. Tech. L.J. 147.

2 A. DeCurtis, "Who Owns a Sound?" *Rolling Stone* (4 December 1986) 13.

3 Ibid.

4 R.S.C. 1985, c. C-42 (the "Act").

2. THE TECHNOLOGY

A digital sampler can be described as a computerized combination of a tape recorder and a camera.[5] A sampler allows a musician to record any sound through the use of a microphone or directly from some other source using its input jacks. These sounds are stored in the memory of the sampler's microprocessor. The musician can also utilize prerecorded sounds stored on micro floppy disks through the sampler's disk drive. The prerecorded disks can contain a variety of sounds: anything from animals to special effects to other musical instruments.

Once the sound is in the sampler, the musician can then use the sampler's built-in functions to alter the parameters of the sound. For example, the pitch of a snare drum can be changed so that it will play back in a different key, simply by pushing the required buttons on the sampler. The musician can then add in the rest of the drum kit by using the same procedure and altering the parameters of each sound. Thus, the bass drum can sound as if it were being played in a large concert hall with all the tonal colour that is usually produced, and the tom drums could sound as if they were played in an echo chamber. The sampler allows the musician great control over the sound of the work because in practice it would be extremely difficult to put together a conventional drum kit that had such a wide variety of sound character.

The photographic aspect can be described as follows. A digital sampler that is fed a sound takes, in effect, a picture of it. Every second of the sound that is sampled is recorded at 44,100 KHz. In other words, the sampler divides every second of a sound into 44,100 separate parts and converts it into numbers that are stored in the sampler's memory. When this sound is played back the resolution is roughly equivalent to the upper range that the human ear can detect, so there is virtually no way the ear can differentiate between the original sound and the playback sound.

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5 See generally "Sampling Techniques," a pamphlet originally printed by Strumenti Musicali and reprinted by the Akai Electronics Company. It is available from most Akai distributors; Editors of Keyboard Magazine, *Synthesizer Basics* (Milwaukee: Hal Leonard Publishing Corp., 1984); Terry Fryer's columns on sampling in Keyboard Magazine, January to December 1986.

The electrical voltage of a sampler, which is measured in bits and is normally described as the dynamic range, adds to the realism of the playback. Most samplers have a 12 bit (2 to the 12th power) resolution. It would probably require between 18 and 22 (2 to the 18th power and 2 to the 22nd power) bits to deceive the human brain.

Because the sound is converted into numbers by the digital sampler, there is nothing lost or added in the playback, such as the tape hiss found in analog equipment. The musician can alter the numbers to change the parameters of the sound. For example, any pop singer's voice could be sampled, the parameters changed and played back so that it sounded one octave higher than the original. The digital capability is the key to sampling. This new technology can manipulate sound in any way in which the musician is inspired. However, just as a brush is the tool of the painter, the sampler is also only a tool of a musician. Whether a musician uses a sampler or not, songwriting still requires inspiration and a talent for the organization of sounds.

(a) Single Sounds

Section 5(1) of the Act states:

> Subject to this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in *every original literary, dramatic, musical and artistic work.* [Emphasis added.]

Section 2 defines the emphasized portion (in relevant part):

> "every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as . . . dramatic or dramatico-musical works, musical works or compositions with or without words.

Can a single sound be considered a "musical work" so as to afford it protection? Musical work is defined in section 2 of the Act as

> [a]ny combination of melody and harmony, or either of them, printed, reduced to writing or otherwise graphically produced or reproduced.

"Harmony" can be defined as

> [t]hat aspect of music consisting of simultaneously sounded pitches (i.e. chords) as opposed to simultaneously sounded melodies or lines. . . . The term sometimes connotes pleasant sound, but properly it is applied to any collection

> of pitches sounded either simultaneously or in such a way as to cause them to function as a simultaneity.[6]

"Melody" is

> [a] succession of single pitches perceived as such, in contrast to harmony, which consists of pitches sounded simultaneously or perceived primarily as constituting a simultaneity.[7]

From these standard definitions it is clear that harmony and melody involve more than one single sound or musical note. They are the products of the manipulation of a combination of notes or sounds. It would therefore seem that the definition of musical work as requiring harmony and melody excludes individual notes from protection under the Act as a "musical work."

The case law supports this view. In *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*,[8] the issue was whether the word "Exxon," a word invented for the use of the plaintiff company as a trade-mark and trade name, was eligible for copyright protection. In the English Court of Appeal, Stephenson L.J. affirmed the decision in the court below that copyright could not subsist in that single word. Stephenson L.J. quoted extensively from the trial Judge, Graham J.:

> As I have already stated, the question that I have to decide is, shortly stated, whether Exxon is an "original literary work" within s. 2 of the 1956 Act? I do not think it is. . . . [T]he mere fact that a single word is invented and that research or labour was involved in its invention does not in itself in my judgment necessarily enable it to qualify as an original literary work within s. 2 of the 1956 Act.[9]

He continued:

> [T]hat the word alone and by itself cannot properly be considered as a "literary *work*", the subject of copyright under the Act. It becomes part of a "literary work" within the Act when it is embodied in the poem, but it is the poem as a composition which is a work within the Act and not the word itself.[10]

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6 P.M. Randel, *Harvard Concise Dictionary of Music* (Cambridge, Mass.: Belknap Press, 1978) at 211.

7 Ibid. at 304. See also J.A. Westrup & F.L. Harrison, *The New College Encyclopedia of Music* (New York: W.W. Norton & Co., 1976); D. Arnold, *The New Oxford Companion to Music*, vols 1 & 2 (Oxford: Oxford University Press, 1984).

8 [1982] Ch. 119, [1981] 3 All E.R. 241 (C.A.).

9 Ibid. at 244 (All E.R.).

10 Ibid.

At trial[11] Graham J. referred to the American case of *Life Music Inc. v. Wonderland Music Co.*,[12] where copyright was claimed in the word "supercalifragilisticexpialidocious." Here a motion for an interlocutory injunction was denied as the plaintiff failed to make out a prima facie case of infringement. Graham J. noted that copyright in the word may have been assumed in this case but that there was no real argument on this point and therefore the case would have no "persuasive authority."[13] Because of the *Exxon* decision and its clear statement of the status of the single word, it is unlikely that a court would explore the concept of an assumed copyright and open this issue again for discussion. The parallel between a single word and a single sound is obvious and if faced with such a question it is likely that the Canadian courts would find that a single sound is not afforded copyright protection.

One might ask, however, whether the term "musical compositions" from section 2 of the Act is broader. Could it be construed as covering individual sounds? In *Apple Computer Inc. v. Mackintosh Computers Ltd.*[14] it was held that on a physical level, computer chips that held programs and records that held musical works were analogous. Using this line of thought, the Court had no reservations about extending copyright protection to the new technology as a literary work.[15]

If "literary work" can be extended in such a fashion, cannot "musical compositions" be harnessed likewise to protect a composer's work from sampling? Reed J. examined sections 2 and 3 of the Act in the *Apple Computers* decision and concluded:

> The general words, both "whatever may be the mode or form of its expression" in s. 2(*y*) and "in any material form whatever" in s. 3, it is said, must be interpreted by reference to the particular examples which follow in each case. . . .
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> In my view counsel's arguments based on the context of the Act and on the specific wording of the sections thereof are conclusively answered by s. 3

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11 [1982] Ch. 119 at 122, [1981] 2 All E.R. 495 (Ch.).

12 241 F.Supp. 653 (S.D.N.Y. 1965).

13 Above, note 11 at 504 (All E.R.).

14 (1986), [1987] 1 F.C. 173, 8 C.I.P.R. 153, 10 C.P.R. (3d) 1, additional reasons at (1987), 14 C.I.P.R. 315 (T.D.), varied (1987), [1988] 1 F.C. 673, 16 C.I.P.R. 15, 18 C.P.R. (3d) 129 (C.A.), aff'd [1990] 2 S.C.R. 209, 30 C.P.R. (3d) 257.

15 Ibid. at 30 (10 C.P.R.).

> itself. Section 3 provides that "copyright means the sole right to produce or reproduce the work . . . *in any material form whatever*." In my view that clearly covers the program as embodied in the ROM chip. To find otherwise, it seems to me, would require reading words into s. 3 of the *Copyright Act* which are not there.[16]

Can such reasoning extend to the reproduction of one note in some other material form? Given the approach in *Exxon* to the building blocks of communication (words, notes) one cannot assume that it can. These single building blocks remain in the realm of idea and have not crossed into the area of expression as they stand by themselves. Policy considerations must be noted here against such an extension, for if copyright is granted in a single sound, that copyright owner is thereby given a monopoly on an item (the building block) whose restricted use would be disastrous for the creative arts.

A further question arises here. If a single sound cannot be categorized as a musical work, can it be covered under the broader definition in section 2 of the Act as an "original artistic work"? In *DRG Inc. v. Datafile Ltd.*, Reed J. wrote, "In my view the phrase 'artistic work' is used merely as a generic description of the type of works which find expression in a visual medium as opposed to works of literary, musical dramatic expression."[17] It could be reasonably argued, therefore, that "artistic work" is meant to cover material arts and not aural arts.

One further factor that should be considered here is found in *Canadian Admiral Corp. v. Rediffusion Inc.*,[18] which required that the subject matter be "fixed" before it is afforded copyright protection, i.e., in the case of a musical work, "printed, reduced to writing, or otherwise graphically produced or reproduced."[19] Thus, it would seem, under Canadian copyright law a sound is not afforded protection unless it is both fixed and part of a larger musical composition.

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16 Ibid. at 32-33.

17 (1987), [1988] 2 F.C. 243, 17 C.I.P.R. 136, 18 C.P.R. (3d) 538 at 546 (T.D.), aff'd (1991), 35 C.P.R. (3d) 243 (C.A.).

18 [1954] Ex. C.R. 382 at 394, 20 C.P.R. 75. For commentary on this case see R.-M. Perry, "Copyright in Motion Pictures and Other Mechanical Contrivances" (1972) 5 C.P.R. (2d) 256.

19 Act, s. 2 ("musical work"). Fixation is discussed clearly in J.E. Mosher, "20th Century Music: The Impoverishment in Copyright Law of a Strategy of Forms" (1989) 5 I.P.J. 51.

One final issue is whether a single sound can be a "compilation" and therefore protected under the Act. Compilation appears in the Act under the definition of "literary work" in section 2 and exists entirely to protect collections of work that serve some literary purpose. Although each single sound has three components, pitch, loudness and timbre,[20] it would not come within the generally held definition of compilation[21] because none of the three components can be made manifest without the other two and they therefore could not be said to be a compilation. Each exists only as an idea. Also, a single sound can hardly be said to have a literary purpose.

3. SINGLE SOUNDS EMBODIED IN COPYRIGHT WORKS

Section 5(3) of the Act provides that copyright shall subsist in records and other contrivances by means of which sounds may be mechanically reproduced. Section 5(4) states:

> Notwithstanding subsection 3(1), for the purposes of this Act "copyright" means, in respect of any record, perforated role or other contrivance by means of which sounds may be mechanically reproduced, the sole right to reproduce any such contrivance or any substantial part thereof in any material form.

Section 3(1) of the Act reads in part:

> For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever.

The result of these sections is that in Canada, "within any phonorecord or tape there are two works (the musical composition and the sound recording) which are protected from unauthorized reproduc-

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20 Above, note 6. *Pitch* is defined as the perceived highness or loudness of a sound. It is a function primarily of frequency, though at some extremes of frequency intensity may also affect the perception of pitch. *Loudness* is the perceived characteristic of a sound that is a function of its intensity, i.e., of the physical energy that the sounding body transmits to the surrounding medium. *Timbre*, or tone colour, is the quality ("colour") of a pitch as produced on a specific instrument, as distinct from the different quality of the same pitch if played on some other instrument.

21 Laddie, Prescott & Victoria, *The Modern Law of Copyright* (London: Butterworths, 1980) at 24.

tion."[22] Section 3(1) protects authors and subsections 5(3) and 5(4) protect record producers.[23]

The question that arises here is whether a single sound taken from a a work in which copyright protection already exists constitutes an infringement. Assume that a musician in the studio needs a particular drum sound for a song. The musician takes the compact disk version of Phil Collins' *No Jacket Required* and samples the sound of Collins' snare drum from one of the songs. From there the drum sound is built using the technology earlier described. The musician uses the sample as found and does not change any parameters, so that the snare drum in the new song sounds exactly like Collins', although the new song sounds nothing like Phil Collins' song. In a case like this, one might ask, why should a sound from a previous work be protected? If a musician really wanted that Phil Collins drum sound, he or she could have spent the many hours required in the studio to create the same ambience and resonance that Collins' drums have. In doing so the musician would not have infringed anyone's copyright. In this capacity samplers are a labour-saving device but not a talent-saving device because utilizing the samples and turning them into complete songs still requires talent and creativity. With the present constraints of the law, if a single sound from a musical composition will not be protected, then a single sound from a copyrighted work will not be protected either. The test for substantiality delineated below applies to works embodied in mechanical contrivances as well, and as such one note will not be regarded as a substantial portion. However, if what is being copied is the sound that is indicative of Phil Collins' style, there may be a possible source of protection using misappropriation of personality. This will be discussed later.

4. SAMPLES COMPRISED OF SEVERAL NOTES

At present the most noticeable use of samples is found where a recognizable series of notes is sampled and incorporated unaltered into a new work such that it is recognizable to an audience as being

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22 J. Keon, *A Performing Right for Sound Recordings: An Analysis* (Ottawa: Minister of Supply & Services Canada, 1980) at 5.

23 Ibid.

from another song.[24] To date there have been a number of infringement actions commenced where musicians have sampled a 3- or 4-second piece of another's work and incorporated it into their own.[25] This practice is common among rap or "hip-hop" musicians. A good digital sampler has the capability to store several seconds of material depending on the size of its memory. This has enabled hip-hop musicians to take samples of other popular records, usually older ones, and use them to punctuate and accent their own work. It should be stressed here that in most cases the hip-hop musician is creating a new work from the samples. These new works rarely sound like the original in tempo, melody or harmony except to the extent that the sample is used. The sample is normally used sporadically throughout the song. Because of the sampler's digital capability, the playback sound of the sampled work is exactly that of the original (if none of the parameters are changed). It sounds as if a second record player with the impugned copyrighted work is being played over the new work. In musician's parlance this is called "mixing."

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24 This form of sampling is by far the easiest to detect, for obvious reasons, as no parameters are altered. See the Beastie Boys' "She's Crafty," where they have sampled a section of Led Zeppelin's "The Ocean"; LL Cool J's "I'm Bad," where he has sampled Isaac Hayes' "Theme From Shaft"; Tone-Loc's "Wild Thing," which uses the guitar riff from Van Halen's "Jamie's Cryin' "; De La Soul's "Transmitting Live From Mars," which uses a segment from The Turtles' "You Showed Me"; Sinead O'Connor's "I Am Stretched On Your Grave," which uses a segment of James Brown's "Funky Drummer."

25 The most recent and well-publicized example of this has been the action for 1.7 million dollars filed in the U.S. District Court for the Central District of California by recording artists Flo and Eddie, former singers for The Turtles and owners of the group's recordings against Tommy Boy Records, the rap group De La Soul and producer Paul Huston. Here 12 seconds of the Turtles' song "You Showed Me" was used in a loop throughout the entire song "Transmitting Live From Mars" from De La Soul's *Three Feet and Rising* album (*Entertainment Law & Finance* (August 1989) 8). This case was settled in June 1990 for an undisclosed amount. To date no sampling case has proceeded to trial. At the New Music Seminar's panel on sampling on July 17, 1990, in New York City, panelist and lawyer Eric Greenspan explained that it is likely that most sampling cases will be settled, as neither side in such matters (oftentimes record companies on both sides) wants to risk an adverse precedent. Every record company has artists that sample, so a decision against sampling or in favour of it could wreak havoc with the way they conduct business. Increasingly, record companies have turned to the administrative process of clearing samples and agreeing on some form of compensation for the artist sampled rather than proceeding to litigation.

Whether infringement occurs depends upon whether the samples are a "substantial part" (sections 3(1) and 5(4) of the Act) of the original work. There are, as well, several requirements from the cases on musical copyright infringement. The Canadian law on this issue has borrowed from the British and American case law. The approaches taken by all are very similar.

In the typical case of musical plagiarism, the plaintiff is normally trying to show that the defendant has written a song that has appropriated part of the melody or harmony of the plaintiff's work. In recent times, the law has also dealt with songs that have appropriated only a few notes comprising a short musical motif.[26] But these cases have usually involved the "heart" of a composition, and so have found infringement. The best examples of the typical case are *Gondos v. Hardy*[27] in Canada and *Bright Tunes Music Corp. v. Harrisongs Music Ltd.*[28] from the United States. Both cases involved songs that were claimed to be similar, both on the written page and to the listener's ear. It is important to note here that the alleged infringing songs sounded similar to the plaintiff's song in that a substantial piece of a musical phrasing appeared in both. No court has yet considered infringement in respect of samples. At present, an infringement action has four requirements. It must be shown that the defendant had access to the plaintiff's work; the works in question must be similar, visually, on a written scale (normally called "striking similarity"); a substantial portion of the plaintiff's work must have been copied; and, finally, there must exist some similarity that an audience of average listeners could appreciate.[29]

If musician A composes a song using an unaltered sample of a short line of notes from the song of musician B, proving access would pose no difficulty. But what of striking similarity? "Assuming there is evidence of access, the trier of fact must then determine whether

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26 *Elsmere Music Inc. v. National Broadcasting Co.*, 482 F.Supp. 741 (S.D.N.Y. 1980).

27 (1982), 38 O.R. (2d) 555, 64 C.P.R. (2d) 145 (H.C.).

28 420 F.Supp. 177 (S.D.N.Y. 1976).

29 See generally C. Crowe, "The Song You Write May Not Be Your Own" (1984) I.P.J. 29 at 60-61, and J.G. Sherman, "Musical Copyright Infringement: The Requirement of Substantial Similarity" (1977) 22 A.S.C.A.P. Copyright Law Symposium 81 at 145.

the similarities are so striking as to permit an inference of copying."[30] Thus Diplock L.J. in *Francis, Day & Hunter Ltd. v. Bron* said:

> [I]t is well established that to constitute infringement of copyright in any literary, dramatic or musical work there must be present two elements: First, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived. . . . But, while the copyright work must be the source from which the infringing work is derived, it need not be the direct source . . . there must be a causal connexion between the copyright work and the infringing work. To borrow an expression once fashionable in the law of negligence, the copyright work must be shown to be a causa sine qua non of the infringing work.[31]

Striking or objective similarity was defined earlier to mean the similarities between the work on the written page, i.e., whether the alleged infringing song used the same notes in the same place as the impugned copyrighted song.

In our scenario, musician A samples a line of four or five notes and uses it to punctuate his new song. The harmony and melody line are completely different from that of musician B's song, the only similarity being the sampled line. Is this enough to be considered sufficient objective similarity? If the sample is used only as a form of punctuation and does not constitute a sine qua non, and if the harmony and melody lines are not similar, the test of striking similarity will not be met.[32]

If, however, a plaintiff did succeed in proving access and striking similarity, he or she must also prove that a substantial part of the work was copied or else there is no infringement.[33] Substantial similarity only comes into play once copying, proved by the first two fac-

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30 Crowe, above, note 29 at 43.

31 [1963] Ch. 587, [1963] 2 All E.R. 16 at 27 (C.A.). See also Crowe, above, note 29 at 40-41.

32 In M.C. Hammer's 1990 hit "U Can't Touch This" the hook line from Rick James' "Superfreak" was used in a loop throughout the song, certainly an example of a sine qua non. James was given a writing credit for this track.

33 H.G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed. (Toronto: Carswell, 1967) at 341, citing *Kantel v. Grant*, [1933] Ex. C.R. 84 at 96; *Cardwell v. Leduc*, [1963] Ex. C.R. 207 at 219, 23 Fox Pat. C. 99 at 110, 41 C.P.R. 167. Judge Frank, in *Arnstein v. Porter*, 154 F.2d 464 at 468 (2nd Cir. 1946), noted, "[I]f there are no similarities, no amount of evidence of access will suffice to prove copying."

tors, has been established.[34] The case of *Ravenscroft v. Herbert* outlines four factors to be considered when dealing with substantiality:

1. volume of material taken;

2. quality of material taken;

3. intention on the part of the defendant to take for the purpose of saving labour; and

4. the extent to which the two works compete for the same market.[35]

Concerning the volume taken or quantity, the case law indicates that whether infringement has occurred depends "much more upon the quality than the quantity of what is taken."[36] In such musical works cases as noted below where infringement was found, it was the heart of the composition that was appropriated.

In the case of *Elsmere Music Inc. v. NBC*, Goettel D.J. held that the defendant's use of four notes of the plaintiff's song "I Love New York" did constitute copyright infringement because the piece taken was the heart of the composition.[37] However, the circumstances surrounding the use of this song enabled it to be classified as a parody and therefore to come under the fair use provisions. The action was ultimately dismissed. The use of the "heart of the composition" was obviously crucial here because of the small amount of music used in the parody. It was easily recognized by the lay

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34 Crowe, above, note 29 at 51.

35 [1980] R.P.C. 193 at 203 (Ch.).

36 *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.) per Lord Reid at 469; per Lord Hodson at 477; per Lord Pearce at 481. Also, the Australian case of *Kalamazoo (Aust.) Pty Ltd. v. Compact Business Systems Pty Ltd.* (1986), 5 I.P.R. 213 at 237-238 (Qld.) stresses that the court must look at the works in question as a a whole when faced with the submission that each piece of the work is not eligible for copyright protection because of the lack of originality when viewed separately. Support for this position is also found in *Ladbroke*. Therefore, if litigating such a matter, the defendant musician could not make the submission that the plaintiff has no claim, for lack of copyright, in the small piece that was sampled (as a small, separate piece). The defendant musician would want to argue that what was taken was not a substantial portion of the original song.

37 Above, note 26 at 744.

public as being part of another popular work. If the defendants had used the same four notes with different timing and emphasis to create an unrecognizable work, it would not have infringed copyright.[38]

Another case dealing with individual components of a larger work of art is worth considering here. In *Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd.*[39] Buckley L.J. held that the reproduction of one frame of a cinematograph film into posters and magazine photographs constituted copyright infringement under the U.K. *Copyright Act* of 1956. His reasons for judgment focused on the meaning of "copy" in relation to several sections of the U.K. *Copyright Act* so as to establish that "a single frame is a part of the film of which it forms an integer, and by making a print from a single frame . . . they made a copy of the film within the intendment . . . of the Act."[40]

Buckley L.J.'s examination of the term "substantial" in this case was limited to its use with regard to each separate print. He noted:

> The acts restricted by the copyright in the cinematograph film are the making of the copy of the film or any substantial part of it; that is to say, making any print, negative, tape, or other article on which that film or a substantial part or any part of that film or a substantial part, is recorded.[41]

Templeman L.J., in his concurring judgment, also stated this premise with regard to the application of the U.K. Act to one frame of the film:

> It seems to me that it can apply with perfect sense . . . to a part of a frame; if it is only part of a frame which is to be produced, then it may be that one has to see whether what is reproduced is a substantial part of that frame and therefore, comes within the infringement context.[42]

Because of the distinctive differences between the form of film and song, this case may not be applicable to a sampling scenario.

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38 In *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 at 80 (2nd Cir. 1940), the Court noted: "[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism."

39 [1979] F.S.R. 494, [1981] R.P.R. 283 (Ch.), rev'd [1981] R.P.C. 292 (C.A.).

40 Ibid. at 297 ([1981] R.P.C. 292).

41 Ibid. at 296.

42 Ibid. at 299.

One frame will be a substantial part of a film, especially if it is of the leading characters and easily recognized by the public. Whether a line of several notes is substantial in that it is recognized by the public will depend on what series of notes is used. However, in most cases, a line of a few notes does not have the density of images that one frame of film does. Five notes are but five pieces of information, whereas one frame of film is composed of scores, if not hundreds of pieces of information.

The case law also answers the question of how one determines what constitutes the heart of the composition or the quality portion of the musical work. In *Arnstein v. Porter* it was noted that "The test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant."[43] Sherman suggests the reason for the audience test lies in the *Porter* case:

> [The] plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derives from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's work so much of what is pleasing to ears of . . . the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.[44]

Sherman quotes one commentator on "substantiality" as saying:

> In order for a performance of part of a copyrighted selection to give rise to a cause of action, the performer must have performed enough of the selection so that the ordinary layman could recognize it.[45]

The same approach was utilized earlier in *Hawkes & Son (London) Ltd. v. Paramount Film Service Ltd.*,[46] where it was decided that a 20-second portion that was taken from a song approximately 4 minutes in length did constitute infringement because that portion would be recognized by any person. As well, in *Robertson v. Batten,*

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43 Above, note 33 at 468. See also Sherman, above, note 29 at 96.

44 Sherman, above, note 29 at 96, citing *Arnstein v. Porter*, above, note 33 at 473.

45 Sherman, above, note 29 at 95, citing Wyckoff, "Defences Peculiar to Actions Based on Infringement of Musical Copyrights" (1954) 5 Copyright L. Symposium 256 at 267. Sherman elaborates on when the audience test should be applied at 119-121. He argues that for music more sophisticated than popular music the trier of fact may require expert witnesses to raise his ability to discern similarities. With regard to popular music one can assume that the average pop music listener will fill the requirements.

46 [1934] 1 Ch. 593 at 604 (C.A.).

Barton, Durstine & Osborn Inc., the Court found infringement where the defendants copied "from the plaintiff's work that portion of it upon which its popular appeal, and, hence, its commercial success depends."[47] Given this trend in the law, quantity and quality will not be examined separately by the courts, but quantity will be contingent upon quality.

With regard to "intention on the part of the defendant to take for the purpose of saving himself labour,"[48] a court would have to consider the nature of the art form from which the alleged infringement arises. In the case of sampling and rap music, part of the artistry of musical collage involves harnessing sounds from the past and piecing them together in new form. The fact that sampling saves labour is irrelevant to this art form because in order to achieve the proper musical effect one has to look to prior recorded works that were a part of the cultural soundscape. To overlook this would do a disservice to the whole of the creative arts, and it is therefore submitted that examinations for intention should be tempered.

It is to be expected that the issue of competition would not be considered in Canadian law. Unlike English and American law (in which "substantial similarity is determined with reference to the artistic and financial importance to the plaintiff's work of the portion appropriated"[49]), under Canadian law no real consideration is given to the element of financial importance. In *R. v. James Lorimer & Co.*, Mahoney J. wrote:

> The Act is clear. Infringement does not require that the infringing work compete in the marketplace with that infringed; it requires only that the infringer do something that the copyright owner alone has the right to do.[50]

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47 146 F.Supp. 795 (S.D.Cal. 1956).

48 Above, note 35 at 203.

49 Sherman, above, note 29 at 92, and see Sherman's note 92. This is also echoed in Nimmer, *Nimmer on Copyright* (New York: Matthew Bender & Co., 1987) at 13.03[A], 13-39, where he quotes Story J. as saying, "If so much is taken that the value of the original is sensibly diminished, or the labours of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point to constitute a piracy *pro tanto*."

50 [1984] 1 F.C. 1065 at 1073 (C.A.). See also *British Columbia Jockey Club v. Standen (Winbar Publications)*, [1983] 4 W.W.R. 537 (B.C. S.C.), aff'd [1985] 6 W.W.R. 683 (B.C. C.A.), where both courts briefly considered the issue of competition but did not base their decisions on it.

There are no Canadian cases that discuss substantial similarity in detail. *Gondos v. Hardy*[51] and *Verge v. Imperial Oil Ltd.*[52] focus almost entirely on matters of access and striking similarity. From the American and English cases one can infer that if a portion of a musical work is either the heart of the composition or is easily recognized by the public, and is used without authorization, then infringement occurs. Yet sampling technology still forces the question: how much of another song, if any, can be sampled without being classified as infringement? Some American commentators[53] as well as many musicians would argue that sampling even one note is infringement. However, as the Act is silent on the point and as there have been no judicial decisions dealing directly with the matter, one can only speculate on a possible outcome.

As a test case is unlikely to appear in the near future,[54] one obvious solution would be to amend the Act. However, this may prove to be both philosophically difficult and administratively onerous, as what is required is a move away from the traditional European-based protection for print technology[55] upon which the Act is grounded to a more Afro-centric approach which would allow protection of individual sounds and beats as well as harmony and melody.[56] The fact that the Act requires that songs be transcribed and fixed on paper in order to acquire legal protection illustrates its foundation upon the protection for print. What is significant about this sort of requirement, as Frith notes, "is what is not copyrightable – timbre, rhythm, the very qualities that became, with the rise of recording, central to pop [music] pleasure."[57]

If a composer copies another's melody line, that composer must expect to pay for it, the main issue being whether it was a sub-

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51 Above, note 27.
52 (1987), 13 C.I.P.R. 176, 15 C.P.R. (3d) 187 (Fed. T.D.), aff'd (1988), 23 C.P.R. (2d) 159 (Fed. C.A.).
53 Above, note 1. See generally Thom and Wells.
54 Generally, above, note 25.
55 P. Sanderson, *Musicians and the Law in Canada* (Toronto: Carswell, 1985) at 31.
56 S. Frith, ed., *Facing The Music* (New York: Pantheon Books, 1988) at 122.
57 Ibid.

stantial quote or not.[58] And whereas it was and is relatively easy to copy a melody line, to do the same for rhythm and timbre (and have the same result) is something else. Samplers have allowed composers to make this leap. Given the roots of the term "musical work" in the Act, it cannot reasonably be expected that the wording will be able to govern the rapid changes that new musical technology brings. If sampling is to be covered in a forthcoming version of the Act, the wording will have to embrace the concept of music on African and Afro-American terms as well as European.

4. THE SAMPLING OF LIVE MUSIC

If a musician with a sampler records the sounds of a saxophonist and stores them on a floppy disk to use them later when composing a song, have the sax player's rights been infringed? At present in Canada there is neither an established body of common law protection nor any statutory protection for performance rights.[59] The same situation exists under the U.S. Act. Referring to the legal status of the musical performer, one commentator has written, "Unless he is also the composer of the musical composition, his rights are limited to his ability to contract."[60]

Where the sax player does not play a song, but merely plays a series of single notes in no particular order so that the sampler could record them, no song is being infringed. The law relating to the protection of sounds has already been explored and from this it was determined that the argument against the copyright of particular sounds was very strong. Normally, if this were studio time, this musician would be paid the rates for session work as established by the Musicians' Union. The difference here, however, is that now the musician with the sampler has those sounds for life and he need not hire another sax player again for studio work. Session work provides much-needed income for musicians since few can survive on the

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58 Ibid.

59 B.M. Green, "Protection of Musical Performers' Rights In Their Performances" (1980), 48 C.P.R. (2d) 113 at 130.

60 H.C. Hayes, "Performance Rights in Sound Recordings: How Far to the Horizon?" (1982) 27 A.S.C.A.P. Copyright L. Symposium 113 at 118.

money from live performances alone. When working in a studio, a musician should make it clear that he will not allow sampling without permission. As well as supporting this position, the Musicians' Union should establish a special sampling pay rate based on substance and not time. Since the recording of samples takes almost no time, a special rate would allow for the quality of the work taken and not the time that it took to record.

Until a performer's right is granted in sound recordings, today's working musician must focus on the ability to contract.

5. POSSIBLE REMEDIES FOR THE ORIGINAL COMPOSER: MORAL RIGHTS

Sections 14.1 and 28.2 of the Act present one possible route for the artist whose work has been copied.[61] Section 28.2(1) states:

> The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
> (a) distorted, mutilated or otherwise modified.

This section makes no reference to substantiality and therefore would indicate that if any portion of an artist's work was modified or altered that artist might have an action under this section. This, however, is open to argument because if the portion taken is so small that no member of the public recognizes its origins, then how is the original artist's reputation harmed by its use? If there was a substantial portion copied, recognizable to the lay public as being part of the artist's work, and if the author could prove that the infringing work is prejudicial to the honour and reputation of the artist, then that artist could conceivably succeed in a moral rights action and get an order restraining further public exposure of the song.

While actions based on passing off or defamation are possible, one commentator has noted that the burdens of proof carry insurmountable difficulties.[62] "[T]he Canadian composer is apt to rely on

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61 *Copyright Act*, s. 14.1, as en. R.S.C. 1985 (4th Supp.), s. 4; s. 28.2, as en. R.S.C. 1985 (4th Supp.), c. 10, s. 6.

62 P. Tackaberry, "Look What They Done to My Song, Ma: The Songwriter's Moral Right of Integrity in Canada and the United States" (1989) 6 Can. Intell. Prop. Rev. 122 at 128.

the moral rights as contained in sections [28.1] and [28.2] since an action based on these sections entails a comparatively light evidentiary burden."[63]

Given the decision in *Snow v. Eaton Centre Ltd.*,[64] in which O'Brien J. noted that the red ribbons tied around the sculpted geese's necks did distort or modify the work and created an effect that was "prejudicial to the plaintiff's honour and reputation," it would seem that a musician may succeed in a moral rights infringement action on the basis of damaged reputation.[65]

6. DERIVATIVE WORKS

There is no express provision for derivative works in the Act. However, such common derivative works as translations, sound recordings, fictionalizations and musical arrangements are dealt with directly and otherwise,[66] and the concept may have a possible application to the topic of sampling.

As a Canadian definition of derivative work is not available, it is helpful to begin by considering the U.S. *Copyright Act*, which defines a derivative work as

> a work based upon one or more preexisting works such as a translation, musical arrangement, dramatization, recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted.[67]

In Canada, a derivative literary, dramatic or musical work qualifies

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63 Ibid.

64 (1982), 70 C.P.R. (2d) 105 at 106 (Ont. H.C.). For a commentary on this case see D. Vaver, "Snow v. The Eaton Centre: Wreaths on Sculpture Prove Accolade For Artists' Moral Rights" (1983) 8 Can. Bus. L.J. 81.

65 Above, note 62 at 129-130, arguing by analogy. For more analysis of moral rights see David Vaver's articles, "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?" (1988) 14 Monash U. L. Rev. 284, and "Authors' Moral Rights – Reform Proposals in Canada: Charter or Barter of Rights For Creators?" (1987) 25 Osgoode Hall L.J. 749.

66 W.J. Braithwaite, "Derivative Works in Canadian Copyright Law" (1982) 20 Osgoode Hall L.J. 192 at 193. See also J.A. Leventhal, "Derivative Works and Copyright Infringement: A Case For Copyrighting Ideas" (1985) 1 I.P.J. 271; R.G. Benson, "Legal Protection for Arrangements of Musical Works: A Modern Perspective" (1989), 22 C.P.R. (3d) 97.

67 The *Copyright Act* of 1976, 17 U.S.C., s. 101 (the "U.S. Act").

for copyright if it is original.[68] If a songwriter exercises sufficient independent input (i.e., time, effort, judgment and skill) into a new work, then that work will be considered original and eligible for copyright.[69] A second songwriter who does not exercise enough original input is simply a copyist and has no right to obtain copyright.[70]

Pursuant to section 3(1) of the Canadian Act, a copyright owner has the sole right to produce certain derivative works. The Act specifies which types of derivative works are included.[71] Excluded from this list are musical works. One commentator notes:

> [I]n Canada the owner of copyright in a musical work will be able to claim the exclusive right to produce an adaptation or arrangement based on his original composition only where the later work reproduces the original musical work or any substantial part of it in a material form.[72]

Thus, while a record company who owns copyright in the mechanical contrivance has exclusive right to produce derivative works, it would seem that the copyright owner of the song itself does not. This discrepancy should be corrected in future versions of the Act and illustrates the importance of substantiality. Under American law, unauthorized incorporation of another's work into one's own is "subject to the requirement of substantial similarity."[73] The same test would apply in Canada.

To succeed in an action against the musician with the sampler for infringing the right to make derivative works, the plaintiff will have to argue that the work was substantially derived from and substantially similar to the plaintiff's work. Most of the songs that incorporate a 3- or 4-second piece would not be found to infringe the right to produce a derivative work because these songs are rarely based on the preexisting work. In most cases they use the sample to punctuate and accent their own songs. However, each case would have to be

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68 Braithwaite, above, note 66 at 194.
69 Ibid. at 195-196, citing *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, above, note 36.
70 Braithwaite, above, note 66 at 196.
71 Included are translations, dramatizations, novelizations, phonograph records and cinematographic films.
72 Braithwaite, above, note 66 at 202.
73 Nimmer, above, note 49, 3.06. at 3-22.2, note 2.

determined on its individual facts, and certainly no blanket statement could be made judging whether they infringe or not.

7. APPROPRIATION OF PERSONALITY

Robert G. Howell succinctly describes the tort of appropriation of personality:

> [It] provides a celebrity with an exclusivity of enjoyment and usage of the marketing potential attaching to his persona. It is a common law proprietary response, closely paralleling the American right of publicity principle, which is also a proprietary response, but one which developed as recently as 1953 from the personal right of privacy.[74]

In Howell's comparison of the two Ontario cases *Krouse v. Chrysler Canada Ltd.*[75] and *Athans v. Canadian Adventure Camps Ltd.*[76] he argues that the concept of appropriation should be the guiding principle for development of the law in this area instead of the concept of misrepresentation as was espoused by the Court of Appeal in *Krouse*. Howell points to Henry J.'s approach in *Athans* as the more appropriate route:

> The commercial use of his representational image by the defendants without his consent constituted an invasion and *pro tanto* an impairment of his exclusive right to market his personality and this, in my opinion, constitutes an aspect of the tort of appropriation of personality.[77]

Howell argues that Henry J.'s use of "representational image" must be used carefully because of the nature of this common law tort as opposed to the statutory protection levied by copyrights and trademarks:[78]

> The true object of proprietary protection in the appropriation of personality tort is the celebrity's personality as a commodity with a marketable business value. The celebrity's name, image, voice, etc. are simply *indicia* of that property. This is acknowledged in *Krouse* and in *Athans* itself.[79]

Using this approach, a plaintiff whose work has been sampled would

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74 R.G. Howell, "The Common Law Appropriation of Personality Tort" (1986) 2 I.P.J. 149 at 197.

75 (1973), 1 O.R. (2d) 225, 40 D.L.R. (3d) 15 (C.A.).

76 (1977), 17 O.R. (2d) 425, 80 D.L.R. (3d) 583 (H.C.).

77 *Athans*, above, note 76 at 595 (D.L.R.), cited by Howell, above, note 74 at 174.

78 Above, note 74 at 175.

79 Ibid. at 175-176, citing *Krouse*, above, note 75 at 22, 26, 28-30 (D.L.R.), and *Athans*, above, note 76 at 592 (D.L.R.).

have to prove these facts: that the recording clearly indicated the plaintiff, that there is damage or unjust enrichment flowing from the usage, that there is no public interest in the publicity that would preclude the application of the tort, and finally that there is a

> nexus between the celebrity and the advertisement [i.e., the newer song writer's addition] that upon an application of the principles and policies applicable to the American torts of general misappropriation and the right of publicity, a court can characterize as a *usage* of the plaintiff's personality by the defendant for his gain.[80] [Emphasis in original.]

The American case of *Midler v. Ford Motor Co.*[81] could have some impact on future Canadian cases. Singer Bette Midler sued Ford and the advertising agency of Young and Rubicam for using a "sound-alike" singer intentionally to imitate her in a car commercial. On appeal the Court found that the respondents had appropriated Midler's identity in using the "sound-alike." Noonan J. noted:

> A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with the sound of a voice, "the other stands before me". A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity.[82]

As the Canadian courts have opted to protect property rights of performers with respect to personal indicia when it involves confusion in the minds of the public,[83] this case might well be followed in Canada.

The development and application of this principle would depend on the nature of the alleged misappropriating work. One would have to see how much the song relies on the personality of the plaintiff for its substance. If the use of the plaintiff's work is substantial, it could be argued that the defendant who makes money from the plaintiff's personality is unjustly enriched. Though it might be difficult to prove a corresponding deprivation through record sales, the obvious loss for the plaintiff is that he or she was not required for the session work in the studio and this resulted in a loss of income.

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80 Above, note 74 at 177.

81 849 F.2d 460, 7 U.S.P.Q. 2d 1398 (9th Cir. 1988). See also K.L. Turner, "Do You Want to Dance" Around the Law? Learn the Latest Steps from the Ninth Circuit in *Midler v. Ford Motor Company*" (1989) 23 Loy. L.A. L. Rev. 601.

82 Above, note 81 at 1401 (U.S.P.Q.).

83 Above, note 76 at 590-592 (D.L.R.).

The opposing argument would be one of policy. Since the arts and entertainment industry is built on developments in style and work, it is quite common to see younger performers adopting from the older performers the styles that they find pleasing and thus continuing to develop the art form. Such is the nature of the creative arts, and one has to wonder whether it would be beneficial or even possible to stifle such practices.

As this area of the law is in its developmental stages, it is relatively open to interpretation by the courts. The policy objective of guarding artistic freedom should be protected by requiring the plaintiff/performer to meet a strict test in proving appropriation.

8. CONCLUSION

The *Copyright Act* and the common law are inadequate to protect composers, record producers and record companies from digital sampling. Given the common practice of record companies of clearing samples through their own administrative channels, one can assume that the simplest and most expedient method of solving the problem is through contract and not copyright.

Although there are other possible solutions outside copyright protection which a plaintiff composer may seek to utilize, should a musician have to look beyond the Act that was designed with creators in mind? To adopt an amendment to the Act that accommodates rhythm and timbre instead of just melody and harmony would at least help put the problem of the numbers game to rest and return some certainty to the musical creative process.