Hofstra Property Law Journal

Volume 5 | Issue 1 Article 8

9-1-1992

To Clear or Not to Clear: Licensing Digital Samples

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NOTE

TO CLEAR OR NOT TO CLEAR: LICENSING DIGITAL SAMPLES

I. INTRODUCTION[1]

Much of today's most exciting music incorporates samples. A sample is a piece of another sound recording and/or musical composition.[2] When a new vocal part is overlaid on a musical foundation of samples, the resulting work may simultaneously evoke in the listener new reactions and old memories.

Until quite recently, the practice of licensing a sample use (also known as "sample clearance") has been haphazard, at best.[3] However, as a result of the recent surge of popularity of sample use in the music industry, copyright owners of samples are being increasingly educated about the potential for lucrative contractual arrangements with record companies. Along similar lines, in an effort to avoid litigation over copyright infringement claims, record companies are becoming more cautious in their use of unlicensed samples.[4]

Due to a recent federal court's decision in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*,[5] litigation is now a viable option

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1. An earlier version of this Note was awarded First Prize in the 1992 ASCAP Nathan Burkan Memorial Competition for Hofstra University School of Law. The author wishes to thank David Colchamiro, Charles Roberts and Professor Leon Friedman for their patience, assistance and support.

2. Robert G. Sugarman & Joseph P. Salvo, *Sampling Case Makes Labels Sweat*, NAT'L L.J., Mar. 16, 1992, at 34; *see also* Nicholas Jennings, *The Big Rap Attack: A Black Form Conquers the Mainstream*, MACLEANS, Nov. 12, 1990, at 74 (defining sampling as "a kind of creative borrowing from other recordings").

3. Sugarman & Salvo, *supra* note 2.

4. *Id.; see also* Janine McAdams, *New Sampling Suit Targets Terminator X*, BILLBOARD, Feb. 15, 1992, at 12; Stan Soocher, *Sampling Ruling Leaves Questions; Between Rap and a Hard Place*, ENT. L. & FIN., Jan. 1992, at 7 (discussing Jellybean Productions Inc. v. Atlantic Records Corp., 91 Civ. 8411 (S.D.N.Y. filed Dec. 13, 1991)).

5. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991). The court in *Grand Upright* issued a preliminary injunction against the defendants, rap artist Biz Markie and his record company, prohibiting their unlicensed use of

for both the copyright owner of a sound recording and the copyright owner of a musical composition which is sampled. In *Grand Upright*, the perspective of the Federal Court of the Southern District of New York was clear; its decision began with a quote from Exodus, "Thou shalt not steal,"[6] and ended by referring the case to the United States Attorney for possible criminal proceedings against the infringing parties.[7]

In the following Note, the author discusses the creation of a sample, the state of the law regarding sample use and copyright infringement, and the fair use defense. Then, in the hope of avoiding sample clearance litigation altogether, a sample clearance procedure designed to avoid licensing problems is suggested.

II. THE DIGITAL SAMPLING PROCESS

Sound may be captured and stored in either an analog or digital recorder. When a sound is recorded using the analog process, a transducer in the microphone receives the sound and vibrates at the same level as the sound.[8] This vibration becomes an electrical signal which varies in the same pattern as the sounds.[9] This signal is then stored on magnetic tape.[10] When the tape is played, the brain hears a close approximation of the original sound.[11]

Another method of recording sound is the digital process. In the digital process, sound is captured by a transducer in the microphone, which first translates the analog electrical signal to a digital binary signal, then stores that signal in a computer.[12] The conversion occurs through a circuit which periodically records a voltage level of the electrical signal and generates a digital representation of its value.[13] The signals that are stored are given a binary numerical value and can then be recalled from the memory of the computer.[14] A digital

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digital samples from plaintiff's 1960's hit song *Alone Again (Naturally)*, on Biz Markie's album, *I Need A Haircut*.

6. *Id.* at 183 (quoting *Exodus*, 20:15).

7. *Id.* at 184 n.3; *see also* Soocher, *supra* note 4, at 7.

8. Note, *Original Digital: No More Free Samples*, 64 S. CAL. L. REV. 135, 137 (1990) [hereinafter *Original Digital*].

9. *Id.* at 137..

10. *Id.* at 137 n.12.

11. Note, *Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance*, 11 HASTINGS COMM. & ENT. L.J. 671, 672 (1989).

12. *Original Digital, supra* note 8, at 137.

13. Comment, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 148 (1989).

14. *Original Digital, supra* note 8, at 137.

recording of a song is, therefore, a series of binary values, each representing a distinct moment of the song's duration.[15] Once a song is stored using the digital process it is simple to alter each separate encoded piece of the signal by rearranging, replacing or respacing the binary codes.[16] This altering of the original binary code can be used to turn the original sounds into new sounds, varying in tempo, tone and pitch.

The machines used to store, alter and replay samples are relatively inexpensive, enabling virtually anyone to become a sampler.[17] When sampling devices were first introduced in 1975 the price per unit started at approximately $30,000.00.[18] As the technology was perfected and the machines were more widely produced, sampling devices gradually became less expensive.[19] By 1990 a low-level, limited capacity device could be purchased for under $100.00.[20]

The incorporation of an older work into a new one is by no means a recent phenomenon. As early as 1845, Justice Story stated that "[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original, throughout . . . ."[21] And, of course, well before the introduction of digital sound sampling devices, visual artists were using old works as foundations for new works.[22] Incorporation of an older work into a new one could be considered a recognition of the importance of that work to the contemporary artist. Collage artists have for decades taken the work of others to expand the dimensions of their own work.[23] For example, the famous Dadaist, Marcel Duchamp,[24] used a copy of Leonardo's *Mona Lisa*[25] and added a

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15. Note, *Digital Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987).

16. *Id.* at 1725.

17. *Original Digital, supra* note 8, at 138.

18. *Id.* at 140.

19. *Id.*

20. *Id.*

21. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1854) (No. 4,436).

22. *See* GEORGE HEARD HAMILTON, PAINTING AND SCULPTURE IN EUROPE 1880 -1940 247 (3d ed. 1981). The author noted that, "in May 1912, [Pablo Picasso] created the first collage (from the French verb *coller*, to paste or glue). This was a small oval *Still Life with Chair Caning* . . . . [Georges] Braque followed in September with the first of his *papiers colles* or compositions of pasted papers . . . ." *Id.*

23. *Id.*

24. HORST WOLDEMAR JANSON, HISTORY OF ART 660 (2d ed. 1977). Marcel Duchamp (1887 - 1968) was one of the founders of the modern art movement known as "Dadaism."

> [T]he mechanized mass killing of the First World War [drove] Duchamp to despair. Together with a number of others who shared his attitude, he launched in

moustache to create his own work, entitled *LHOOQ*[26]. The contemporary artist Robert Rauschenberg often uses photographs to decoupage the sides of sculptures, as on his *Odalisk*[27]. Other collage artists routinely use scraps of paintings, drawings and newspapers in their work.[28]

Rap artists can be viewed as the musical equivalent of the aforementioned visual collage artists, because they too use the work of others as a basis for their own creations.[29] If the new musical genre of rap music is to flourish, though, the legitimacy of sampling as an integral part of the genre must necessarily be acknowledged. The strict definition of music as "vocal or instrumental sounds having rhythm, melody, or harmony"[30] has already been expanded to include that which is created by use of machinery, e.g., synthesizers, which create synthetic sound.[31] The next logical step must be to le-

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protest a movement called Dada (or Dadaism). The term, meaning "hobbyhorse" in French, was reportedly picked at random from a dictionary, but as an infantile "all-purpose word," it perfectly fitted the spirit of the movement. Dada has often been called nihilistic, and its declared purpose was indeed to make clear to the public at large that all established values, moral or aesthetic, had been rendered meaningless by the catastrophe of the great war.

Id.

25. *Id.* at 418-21. "[T]he distinction of being the earliest High Renaissance master belongs to Leonardo da Vinci [(1452 - 1519)] . . . ." *Id.* at 418. The Renaissance period (meaning "rebirth" in French) in the history of fine arts is labelled as such because the era was seen as a rebirth of the culturally replete period of classical antiquity, after the culturally bereft period of the middle ages. Leonardo painted his most famous portrait, the *Mona Lisa* in 1503-5, at the height of the Renaissance period. *Id.*

26. *Id.* at 660. "[T]he letters LHOOQ . . . when pronounced in French, make an off-color pun." *Id.*

27. *Id.* at 677. "Robert Rauschenberg (born 1925), . . . [l]ike a composer making music out of the noises of everyday life, . . . constructed works of art from the trash of urban civilization. *Odalisk* is a box covered with a miscellany of pasted images—comic strips, photos, [magazine] clippings . . . ." *Id.*

28. *Id.* at 661-62. For example, *1 Copper Plate 1 Zinc Plate 1 Rubber Cloth 2 Calipers 1 Drainpipe Telescope 1 Piping Man* by the German Dadaist Max Ernst (1891 - 1976), is largely composed of snippets from illustrations of machinery. Moreover, Hans Arp (1887 - 1966) "invented a new kind of collage whose elements . . . were arranged 'according to the rules of chance'." *Id.* at 661.

29. Gordon Chambers & Joan Morgan, *Droppin' Knowledge: A Rap Roundtable*, ESSENCE, Sept. 1992, at 83 (quoting rap artist Heavy D as stating "[t]he thing about rappers is we can take any kind of music—country, opera, soul, R & B, jazz—and add it to ours and turn it into something else").

30. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1490 (1976).

31. *Copyright Considerations, supra* note 11, at 674 n.14; *see also* Comment, *Digital Sampling and Signature Sound: Protection Under Copyright and Non-Copyright Law*, 6 ENT. & SPORTS L. REV. 61, 65 n.20 (1989).

gitimize the work of artists who create using machinery—digital samplers—which separate and recompose pieces of sounds from the works of others. Once the legitimacy of this new genre is recognized, the musical community can then decide on reasonable licensing schemes for samples which will benefit both the rap artists and the owners of the copyrights in the original works.

III. THE STATE OF THE LAW

A. *The Constitution*

The Constitution of the United States grants Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[32] Federal copyright protection gives artists a limited incentive to create new works.[33] The theory behind American copyright protection is that if people are given an incentive to create, they will be stimulated to do so and the public as a whole will benefit.[34] Thus, if the artist knows that her work will result in fame and notoriety of authorship, control over when and how the work is used, and monetary rewards resulting from its use by others, she will be more inclined to create and disseminate her work.[35]

The terms used in article one, section eight of the Constitution (often called the "Copyright Clause") have been interpreted broadly by case law. For instance, in *Goldstein v. California*, the Supreme Court held an author to be anyone "to whom anything owes its origin."[36] However, this standard is so flexible that almost any amount of originality, no matter how small, appears to be sufficient to give someone the appellation "author."[37] The term "writings" has also been defined very broadly. It may be interpreted to mean "the product of [its creator's] intellectual invention,"[38] and to include "any physical rendering of the fruits of creative, intellectual or aesthetic labor."[39] The Copyright Clause was originally intended to protect

32. U.S. CONST. art. I, § 8, cl. 8.
33. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
34. *Id.*
35. *Id.*
36. Goldstein v. California, 412 U.S. 546, 561 (1973) (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).
37. Baker v. Selden, 101 U.S. 99, 100 (1879).
38. *Burrow-Giles Lithographic Co.*, 111 U.S. at 60.
39. *Goldstein*, 412 U.S. at 561.

only maps, charts and books,[40] but has since been extended to include, among other things, the creative work of musicians and architects.[41] It is not enough to merely copy a work.[42] However, a copying in which a sequence or order is changed may be enough to qualify a work as a writing and enable it to receive federal protection.[43]

When a rap artist takes a sample and incorporates it into her work, the result may be considered a new original writing because the new work is a rearrangement and expansion of the sampled work. If the rap artist and her work satisfy the constitutional definitions of "author," "original" and "writing," constitutional recognition and protection of her work is both appropriate and just.

B. *The Copyright Act of 1976*

Even if a work is constitutionally copyrightable, in order to be protected under the Copyright Act of 1976,[44] it must still fulfill certain statutory requirements.

> Copyright protection subsists, in accordance with this title, in *original works of authorship fixed* in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[45]

The term "original" can be interpreted to mean at least a small amount of independent creativity.[46] However, "[t]o support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium."[47] So long as those conditions are met, though, an original

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40. *Id.*

41. 17 U.S.C. §§ 102(a)(2) (governing musical works, became effective February, 1831), 102(a)(7) (governing sound recordings, became effective January, 1978), 102(a)(8) (governing architectural works, became effective December, 1990).

42. *See* U.S. v. Hamilton, 583 F.2d 448 (9th Cir. 1978). In *Hamilton*, court had to determine whether an exact duplication by defendant of plaintiff's map constituted a copyright infringement. The defendant claimed that since plaintiff's map lacked originality it did not hold a valid copyright, and thus, duplication would not be an infringement. The court, though, found that plaintiff's map had the requisite amount of originality in its selection, design and synthesis to be deemed a copyrightable work. *Id.*

43. Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 111 S. Ct. 1282, 1289 (1991).

44. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-914 (1991)) [hereinafter Act].

45. 17 U.S.C. § 102 (emphasis added).

46. U.S. v. Hamilton, 583 F.2d at 450.

47. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976); *see also* Rogers

work of authorship may be created.

The term "authorship" can be construed as meaning the person creating a work who is applying for copyright protection, or her agent or assignee.[48] It should be noted that under *Jones v. Virgin Records*[49], if the record company which owns the copyright in the sound recording fails to sue an unlicensed sampler, the principal performer has standing to sue as an "equitable owner" of the copyright, providing the artist retained a royalty interest when the title to the copyright was transferred to the record company.[50] Types of works considered "works of authorship" presently include literary works, musical works, dramatic works, pantomimes, choreography, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works.[51] The true scope of the phrase, though, has purposely been left undefined by Congress so that it may include future forms of creative works.[52] For instance, a recent provision was specifically created to protect computer programs engrafted onto microchips.[53]

The last requirement for protection under the Act is that the work be "fixed."[54] "Fixation," as stated in the statute, refers to any means of transforming an idea into a tangible form.[55] The Act was specifically designed to protect only that which was fixed, because any attempt to protect unfixed ideas would create a myriad of unsolvable administrative problems.[56]

C. *Copyright In Sound Recordings*

Record piracy deprives record manufacturers of income and,

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v. Koons, 960 F.2d 301 (2d Cir. 1992). For a discussion of the *Rogers* case, see *infra* note 104 and accompanying text.

48. 17 U.S.C. §§ 201(a) (regarding initial ownership), 201(d) (regarding transfers of ownership), 201(b) (regarding works made for hire).

49. 643 F. Supp. 1153 (S.D.N.Y. 1986).

50. *Id.*

51. 17 U.S.C. § 102.

52. *See Goldstein*, 412 U.S. at 566.

53. Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901-914).

54. 17 U.S.C. § 102.

55. 17 U.S.C. § 101. This section states that "a work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." *Id.*

56. RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT UNFAIR COMPETITION AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL AND ARTISTIC WORKS 22 (5th ed. 1990).

more importantly from the copyright point of view, deprives the recording artists (performers) of their royalties. Due to this concern, Congress sought to protect performers and their artistic contributions. Thus, the 1971 Sound Recording Act was born.[57]

> The purpose of [the Sound Recording Act] is twofold. First, Section 1 . . . creates a limited copyright in sound recordings, as such, making unlawful the unauthorized reproduction and sale of copyrighted sound recordings. . . .
> Second, Section 2 . . . provides that persons engaging in the unauthorized use of copyrighted musical works in recordings shall be subject to all the provisions of title 17 dealing with infringement of copyrights and, in the case of willful infringement for profit, to criminal prosecution. . . .[58]

Under the current Sound Recording Act, sound recordings fixed and published on or after February 15, 1972 are federally protected.[59] Sound recordings fixed prior to February 15, 1972 are ineligible for federal statutory protection but may be protected under state common law.[60]

D. *Common Law Protection and State Statutes*

The United States Constitution provides Congress with the power to protect and compensate, and therefore encourage, artistic creation.[61] Congress has done so by passing and amending the federal copyright laws. State laws that regulate matters already regulated by federal copyright law are therefore preempted and invalid under the Supremacy Clause.[62] In addition, state laws that regulate matters that could be regulated by federal copyright law but have been left unregulated are also invalid.[63] However, state law can grant non-copyright rights to copyrightable subject matter. Furthermore, state law may grant rights equivalent to copyright to works

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57. Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 114 (1988)).

58. H. REP. No. 92-487, 92d Cong., 1st Sess. 1566, 1567 (1971).

59. 17 U.S.C. §§ 102(a)(7), 301(c).

60. For example, in the case of *Goldstein v. California*, the petitioners were convicted under a California statute that made it a criminal offense to pirate recordings by others. The Supreme Court held that "[u]ntil and unless Congress takes further action with respect to recordings fixed prior to February 15, 1972, the California statute may be enforced against acts of piracy. . . ." 412 U.S. at 571. *See also* BROWN & DENICOLA, *supra* note 56, at 601-02; *see also infra* part III(D).

61. U.S. CONST. art. I, § 8, cl. 8; *see also supra* note 32 and accompanying text.

62. U.S. CONST. art. VI.

63. 17 U.S.C. § 301(a).

that are not federally copyrightable.

For example, some courts have acknowledged that performers have a common law right to protection of their voices. California has even given state statutory protection to artists' "likenesses" when used for commercial purposes[64]. "Likeness" has been construed to mean almost anything with which an artist can be closely identified, including her voice.[65] Although the parallel New York statute[66] does not explicitly include the term "likeness," the statute's legislative intent has been interpreted to extend protection to an artist's right to profit from her identity in any way.[67] Therefore, at least in California, a performer whose voice is sampled may have standing to sue for unauthorized commercial use of her likeness.

Additionally, it is arguable that if the sample is recognizable, the rap artist is either "passing off"[68] the work as her own, or is engaging in "unfair competition"[69] in the same market as the sampled artist. Thus, if it is reasonably likely that audiences may be confused as to whether the record is by the rap artist or the owner of the original copyright, damage to the career and reputation of the sampled artist can be claimed.

Also, since live performances are unfixed, and therefore unprotected by federal copyright law,[70] states are not preempted from regulating the use of sampled sounds taken from a live performance. Thus, an action could be brought for the common law tort of "misappropriation."[71] Under this cause of action, the court determines

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64. CAL. CIV. CODE § 3344 (Deering 1988).

65. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). "A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested." *Id.* at 463.

66. N.Y. CIV. RIGHTS LAW §§ 50-1 (McKinney 1987).

67. *See* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978). "[N]umerous cases [in New York] . . . expressly recognize a right of recovery . . . for violations of an individual's property interest in his likeness or reputation." *Id.* at 728.

68. Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962); *see also* Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981); *but see* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970) (holding that "[d]efendants did not pass-off; that is, they did not mislead the public into thinking their commercials were the product of plaintiff or anyone else").

69. *See* Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir. 1975). In this case the Fifth Circuit stated that "[u]fair competition is almost universally regarded as a question of whether the defendant is passing off his goods or services as those of the plaintiff by virtue of substantial similarity between the two, leading to confusion on the part of potential customers." *Id.* at 1010.

70. 17 U.S.C. § 102(a). The Act protects all expressions only upon fixation in a tangible medium. *Id.*

71. The most well-known case in this area is *International News Service v. Associated*

whether the artist has taken the work of another and made it appear as if the work is hers alone. If it seems to the court that the new work is extremely similar to the work of the sampled artist, and that the new work will directly compete with the work of the sampled artist, the creator of the new work could very well lose this type of action.

In addition, an action may be brought by members of the American Federation of Musicians (AFM).[72] This musician's union, with a membership of over 170,000, has an agreement with the recording industry which calls for minimum scale payments to musicians whose work appears on albums released by record company signatories.[73] If an AFM member's work on a sound recording is then sampled, the musician may be able to make a claim for payment for re-use of her services.[74]

Yet another potential cause of action against unlicensed samplers can be based upon the Lanham Act.[75] Specifically, if a particular sound is attributed to or associated with a performer, (such as James Brown's scream or the sound of Phil Collins' drumbeats), there may be grounds for a trademark-related action against the sampling artist. In addition, if no credit is given to the copyright owners of the musical composition and/or the sound recording the sampler may be guilty of "false designation of origin."[76] The performer may also bring suit if she is not properly credited on the record label.[77]

The large selection of possible federal and state causes of action

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Press, 248 U.S. 215 (1918). The court was asked to decide whether defendant's unauthorized publication of news information gathered by plaintiff, prior to plaintiff's publication, constituted a common law tort. The court decided that the peculiar value of news is directly proportional to its "freshness," and held that "[d]efendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own." *Id.* at 242.

72. Telephone Interview with Donald DiGrazia, Administrative Assistant to the President of the American Federation of Musicians (May 1, 1992); *see also* Steven R. Gordon & Charles J. Sanders, *Unfair Competition, Other Legal Doctrines in Sampling*, N.Y.L.J., May 2, 1989, at 5.

73. *See* Gordon & Sanders, *supra* note 72, at 5.

74. *See* Telephone Interview with Donald DiGrazia, *supra* note 72.

75. Trademark (Lanham) Act of 1946 as amended at 15 U.S.C. §§ 1051-1127 (1988).

76. 15 U.S.C § 1125(a).

77. *See* Smith v. Montoro, 648 F.2d 602, 604 (9th Cir. 1981) (holding that plaintiff actor did have a valid claim for "reverse passing off," due to defendant film distributor's removal of his name from both film credits and advertising material in connection with the film); *see supra* note 68 and accompanying text.

make it relatively simple to bring suit for an unlicensed sample use.' The test to determine infringement is set forth below.

IV. THE TEST TO DETERMINE COPYRIGHT INFRINGEMENT

In order to establish that copyright infringement has occurred, it must be proved that (1) the plaintiff owns a valid copyright in the material alleged to have been infringed; (2) the defendant copied from the plaintiff's copyrighted work, and; (3) the defendant's copying constitutes an unlawful taking.[78]

Samplers can defend against infringement actions in a number of ways. If the owner of the original work has failed to comply with statutory formalities she may not own a valid copyright,[79] and therefore she may not have standing to sue under the Federal statute.[80] If her copyrighted work lacks originality or the subject matter is uncopyrightable, she would likewise be unable to sue under the Federal statute.[81] Furthermore, assuming the work was properly copyrighted and properly copyrightable, if the defendant shows that the amount of the work taken was insubstantial, the use would be considered "de minimis,"[82] and would not be deemed an infringement.[83] Under the "de minimis" principle, a material and substantial part of the work must have been copied to constitute infringement.[84] "The question is

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78. MELVILLE NIMMER, NIMMER ON COPYRIGHT, § 13.01 (1987); *see also* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

79. 17 U.S.C. § 408(a) provides that: "the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708."

80. 17 U.S.C. § 501(b) provides that: "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411 [which requires registration before a suit can be started] to institute an action for any infringement of that particular right committed while he or she is the owner of it."

81. She could perhaps bring suit for passing off, unfair competition or misappropriation, though. *See supra* notes 68-71 and accompanying text.

82. The phrase "de minimis" is derived from "de minimis non curat lex," which is defined as "[s]omething or some act which . . . does not rise to a level of sufficient importance to be dealt with judicially." BARRON'S LAW DICTIONARY 125 (2d ed. 1984).

83. *Cf.* Soocher, *supra* note 4, at 7.

> [Regarding the Grand Upright decision, there was no discussion of] whether a quick use of a brief snippet of a sample would fulfill the substantial similarity test and whether that quick use could ever be a fair use . . . . Stewart Levy of New York's Eisenberg Tanchum & Levy [stated], "[t]his isn't the seminal case everyone wanted. That is, how much of a sample can you use before you must ask for permission?"

Id.

84. *See supra* note 82 and accompanying text.

one of quality rather than quantity, and is to be determined by the character of the [original] work and the relative value [to the original work] of the material taken."[85]

The court would also have to determine whether any similarity which exists between the two works relates to material which constitutes a substantial portion of the plaintiff's work, both qualitatively and quantitatively.[86] But the court may also consider the relative value of the segment to the defendant's work as a whole. If the portion taken is of minimal value or does not make up either the "hook"[87] or a large portion of the new selection, then the court may hold that no infringement has taken place. Furthermore, the court may decline to find infringement where the similarity of the works comes only from factors not essential to the popularity or distinctiveness of the sampled work, such as a handclap or one drumbeat.[88]

V. THE FAIR USE DEFENSE

Frequently musicians and those in the music industry make the mistake of believing that there is a black letter rule that up to four bars of another's musical work may be used without permission.[89] This mistaken belief may stem from a misunderstanding of the "fair use" defense doctrine. This doctrine recognizes that copyrighted material may be used without obtaining permission from its author, under certain limited circumstances.[90] Fair uses of a copyrighted work include critiques, commentary and research.[91] The four factors

85. M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470, 477 (E.D.S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924).

86. *See* NIMMER, *supra* note 78, § 13.03; *see also* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d. Cir. 1936). In *Sheldon*, Judge Learned Hand, finding infringement against the defendant, held "it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Id.* at 56.

87. The textbook definition of a "hook" is "a curved device for catching, holding or pulling." Merriam-Webster Dictionary 340 (1974). In the music business the term "hook" refers to that part of a song which is most memorable—generally the chorus.

88. The definition of which factors are non-essential differs depending on the speaker. In the complaint filed as a prelude to *Tuff 'N' Rumble Management Inc. v. Def Jam Recordings Inc.*, (91 Civ. 8687 (S.D.N.Y. filed December 23, 1991)), the plaintiff claimed that the defendant had sampled a drum track and that the track was a crucial element of the infringing work, and that in general, it is the drum track and the lead vocal which form the musical basis of rap and hip-hop recordings. Sugarman & Salvo, *supra* note 2. If it is non-essential to the sampled work but essential to the new work, a separate issue is raised, which will not be addressed in this Note.

89. SIDNEY SHEMEL & WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 149 (6th ed. 1990).

90. 17 U.S.C. § 107.

91. *Id.*

to be considered in determining whether a use is a fair use are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the market for or value of the copyrighted work.[92]

A. *Purpose and Character of the Use*

This element relates to whether the user's new work is of a commercial or a non-profit, educational nature.[93] When a sampler is faced with the necessity of raising a fair use defense, this element can be crucial. Though members of the music industry would certainly concede that records are created for profit, there are other motives inherent in the creator's choice of samples that can and should be considered. In some cases the sampled portion is incorporated into the song to give a nod of recognition to a seminal artist.[94] The sample is a gesture of respect, a symbol that the rap artist knows her roots and is grateful to her musical ancestors.[95] To date, the large majority of samples have been taken from the historically established musical genres of rhythm and blues, jazz and funk.[96] When a rap artist samples a particular musician as a gesture of respect, there is an educational and critical element that should be weighed against the profit motive in determining the true purpose and character of the use. Educating listeners to the roots of the music they hear by incorporating older genres into new works could also serve to create a new audience for the original (sampled) work. This form of "free advertising" for the sampled work should also be considered by the court.

B. *Nature of the Copyrighted Work*

This element considers whether or not the sampled work has

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92. *Id.*

93. MCA, Inc. v. Wilson, 677 F.2d. 180, 182 (2d. Cir. 1981).

94. Jason Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 773 (1991).

95. *Id.*

96. *See* BLACK SHEEP, A WOLF IN SHEEP'S CLOTHING (Mercury Records 1991) (containing samples from several rhythm and blues artists, including Paul Butterfield and Jimmy McGriff); DIGITAL UNDERGROUND, SONS OF THE P (Tommy Boy Music 1991) (containing samples from funk artists Sly and the Family Stone and Funkadelic); A TRIBE CALLED QUEST, THE LOW END THEORY (Zomba Recording Corp. 1991) (containing a sample from jazz artist Grant Green). *See also* Havelock Nelson, *Moe Bee's Buzz on Miles' Hip-Hop Set*, BILLBOARD, Apr. 11, 1992, at 18.

been published.[97] Although the Act did away with pre- and post-publication distinctions in terms of protection,[98] it is still an extremely important element in the context of a fair use defense. In recent cases, courts have held against the fair use defense primarily because the copyrighted material was unpublished.[99] The lack of publication was deemed by these courts to be proof of intent to use the work only privately.[100] Since unpublished works have not yet been exploited, the right to first publication is especially valuable.[101]

It should be noted that live transmissions, though technically unpublished, are federally protected against infringement.[102] Thus, if a sampler records a transmission of an artist performing a song, the work is protected as if it had been formally published. Although the work cannot be registered prior to transmission (because it does not exist prior to transmission), the copyright owner is federally protected so long as the work is registered within three months of the original transmission and notice is served upon potential infringers ten to thirty days prior to the transmission.[103]

C. *Amount and Substantiality of the Use*

This element of the doctrine relates to the quantity and quality taken from the copyrighted work.[104] Any unauthorized use of material that is recognizable as having originated in another copyrighted work is a potential infringement.[105] Attorneys for a rap group may suggest, for example, the deletion of a phrase from a well-known

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97. "The fact that a work is unpublished is a critical element of its 'nature'." Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564 (1985) (quoting MELVILLE NIMMER, NIMMER ON COPYRIGHT, § 13.05[A]). In *Harper*, the court found that the fair use doctrine did not sanction the unauthorized publication of quotations from former President Gerald R. Ford's unpublished autobiography in The Nation magazine, because the portions used were not accompanied by commentary, research or criticism.

98. *See* BROWN & DENICOLA, *supra* note 56, at 24.

99. *Harper & Row Publishers, Inc.*, 471 U.S. at 569; Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987). *But cf.* Wright v. Warner Books, Inc., 953 F.2d 731,740 (2d Cir. 1991) (The Second Circuit held that "[n]either *Salinger, Harper & Row* nor any other case, however, erected a *per se* rule regarding unpublished works. The fair use test remains a totality inquiry, tailored to the particular facts of each case.").

100. *Harper & Row Publishers, Inc.*, 471 U.S. at 564; *Salinger*, 811 F.2d at 97.

101. Pushman v. New York Graphic Society, Inc., 39 N.E.2d 249, 250 (1942); *see also International News Service*, 248 U.S. at 215.

102. 17 U.S.C. § 411(b).

103. 17 U.S.C. § 502.

104. Rogers v. Koons, 960 F.2d. 301, 311 (2d Cir. 1992). In *Rogers*, the court held that sculptor Jeff Koons infringed the copyright of photographer Art Rogers by sculpting a three-dimensional rendition of Rogers' photograph, *Puppies*. *Id.* at 301.

105. *Id.* at 311.

funk composition because the voice and the lyrics are easily recognizable to an ordinary reasonable person.[106] If either the quantity or the quality of the sample are enough to be recognizable, a fair use defense would most likely be unsuccessful and thus, permission for the use should be sought.

In general, courts have held that this recognition should be that of an ordinary reasonable person.[107] What constitutes an "ordinary reasonable person" is anyone who, after listening to both the copyrighted and the new works, can hear a similarity.[108] This does not account for uses which have been mechanically altered. Perhaps licensing should be required of these, also. "You can avoid trouble by altering the sound (filtering, processing, and so on) beyond the point of immediate recognition. Who's to say that you didn't create the resulting sound from your own imagination?"[109] The use is there, although the sample in these cases seems more of a starting point than an end result. The same, though, can be said of any sample. The studio engineer may clean up or sweeten, tone down or sharpen a work during the mastering process.[110] The engineer's "tune-up" does not necessarily mean that the work is any less the product of the artist. However, the engineer does receive label credit for her efforts, which may imply that her actions play some part in the creative result.

Similarly, when a sampler takes a drumbeat and speeds it up to a tempo four times as fast as it was originally, the new drumbeat can be viewed as the product of the creativity of both the original artist and the sampler. In a perfectly moral world, the sampler would seek permission for the use of the drumbeat and would compensate the owner of the copyright for the use. In the real world, though, the test is: "will they catch me?" If the sound has been altered beyond recognition, it is not likely the sampler will be caught, and thus permission will not be sought.

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106. Soocher, *supra* note 4, at 7. Jody Pope, Esq., of Carro, Spanbock, Kaster & Cuiffo, attorneys for the sampled artist in *Grand Upright*, stated that, "[t]his case clearly establishes that if a reasonable listener can recognize a sample as the work of someone else, it's enough for an infringement." *Id.*

107. *See* Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944) (holding that "[t]he two works . . . should be considered and tested . . . by the observations and impressions of the average reasonable reader and spectator").

108. *Id.*

109. THOMAS PORCELLO, THE ETHICS OF DIGITAL AUDIO SAMPLING: ENGINEER'S DISCOURSE 46, 54 (1991) (quoting Susan Alvaro, *What is Musical Property: the Ethics of Sampling*, KEYBOARD, Oct. 1986, 10, 157).

110. *Id.* at 54-5; *see also* Marcus, *supra* note 94, at 777.

D. *Effect of the Use Upon the Market for or Value of the Copyrighted Work*

The Supreme Court has deemed this to be the "single most important element of fair use."[111] If the selection containing the sample appeals to the same audience that purchases the music of the sampled artist, the court may make a determination of infringement.[112] Therefore, if a rap artist uses samples that are easily identifiable to her and her target audience, a finding of infringement is more likely to result than if the artist samples from a genre unfamiliar to her and her audience. However, if the sample is unfamiliar, there is little chance she will choose to sample from it. Either way, the rap artist will probably lose on this point.

One recent wrinkle in the trend toward sampling certain musical genres has been the melding of rap and heavy metal styles.[113] This began in 1986 when Run-D.M.C. collaborated with Aerosmith to duet on *Walk This Way*.[114] The song soon rose high on the Billboard Magazine[115] sales charts[116] due, in large part, to its appeal to and purchase by both rap listeners and heavy metal fans. This trend continued with the Beastie Boys' use of portions of heavy metal and hard rock songs on their multi-platinum rap album *Licensed to Ill*.[117] More recently, the heavy metal group Anthrax toured with best-selling rap artists Public Enemy,[118] during which they regularly duetted on Public Enemy's *Bring the Noise*.[119] The tour was a first

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111. *Harper & Row Publishers, Inc.*, 471 U.S. at 566.

112. *Rogers*, 960 F.2d at 311-2.

113. Victoria Starr, *Anthrax, Public Enemy, Primus, Young Black Teenagers; The Ritz, New York*, BILLBOARD, Oct. 12, 1991, at 35; Thom Duffy, *Spread the Noise*, BILLBOARD, Oct. 12, 1991, at 32; *see also* Craig Rosen & Paul Grein, *Aerosmith: Back in the Saddle Again*, BILLBOARD, Aug. 17, 1991, at 1. "In 1986, [Aerosmith] was featured on Run-D.M.C.'s remake of [*Walk This Way*] that would serve as a bridge between the rap and rock worlds. It paved the way for the similar pairing of hard rockers Anthrax and [rappers] Public Enemy on the recently released Anthrax version of *Bring the Noise*." *Id.*

114. RUN-D.M.C., *Walk This Way, on* RAISING HELL (Profile Records 1986).

115. Billboard Magazine is a weekly magazine specializing in disseminating music industry news.

116. The track rose to number 4 on the Pop Music chart and number 8 on the R & B chart. *Liner notes to* RUN-D.M.C., TOGETHER FOREVER GREATEST HITS 1983-1991 (Profile Records 1991).

117. BEASTIE BOYS, LICENSED TO ILL (Def Jam Records 1986). *Licensed To Ill* eventually reached the number one spot on the Billboard Top 200 Album Chart, where it remained for six weeks. Deborah Russell, *White Rap Starting To Find Its Way: But Faces Some 'Credibility' Roadblocks*, BILLBOARD, Sept. 28, 1991, at 5.

118. Duffy, *supra* note 113 and accompanying text.

119. *Id.*; *see also* Moira McCormick, *Where is Rap Heading*, BILLBOARD, Nov. 23, 1991, at R3 (quoting rap artist MC Lyte who, in discussing rap music's past and future,

in that it appealed to two completely different segments of the record-buying public.[120] Of course, purchasing a rap album which contains one track using a heavy metal sample is a far smaller investment than purchasing a concert ticket for a show which will be a combination of rap and heavy metal. Nevertheless, due to the ever more popular melding of genres, there is an increasing likelihood that a rap work will have an effect on the original work's market value. As more and more genre-melding occurs, this element of the fair use doctrine will more often be decided in favor of the copyright owners. Therefore, whether the artist samples from traditionally used genres or more exotic musical styles, the defense of fair use must slowly but surely disintegrate in the sampling context.

Rappers may claim that their selections, if popular, will serve only to enhance the market for the original work.[121] A valid defense could possibly be raised if it could be proven, perhaps through use of SoundScan[122] figures, that sales of the original work have increased since the release of the work containing the sample. At this time, though, proof of such a claim is difficult.

In sum, the fair use defense will probably be unsuccessful in the digital sampling context. Most courts will agree that sampling constitutes a commercial use[123] and, whether the taking is of a published or an unpublished work,[124] if it is recognizable[125] and if it interferes with the market value of the copyrighted work in any way,[126] the use will likely be deemed an infringement. There is, then, only one way to protect against infringement suits. Do not infringe. Always seek permission if there is the slightest chance of an action being brought.[127] A suggested sample clearance procedure is discussed hereinafter.

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states, "I definitely think it's heading in all different types of directions . . . what started with Run-D.M.C. and Aerosmith, now there's Anthrax with Public Enemy").

120. Duffy, *supra* note 113 and accompanying text.

121. Steven R. Gordon & Charles J. Sanders, *The Rap on Sampling: Theft or Innovation?*, N.Y.L.J., Apr. 28, 1989, at 5.

122. "SoundScan gathers point-of-sale information from approximately 9,000 retail and discount locations in the U.S., and passes the information to subscribers through a Management Information System each week." Telephone Interview with Michael Fine, Co-Founder of SoundScan, Inc. (May 1, 1992).

123. *See supra* part V(A).

124. *See supra* part V(B).

125. *See supra* part V(C).

126. *See supra* part V(D).

127. Steven R. Gordon & Charles J. Sanders, *Roadblocks to Legal Protection in Sampling*, N.Y.L.J., May 19, 1989, at 6.

VI. A Suggested Sample Clearance Procedure

Although the following procedure may seem somewhat time-consuming, it should prevent any subsequent infringement actions which could either cost the sampling artist a great deal of money or completely prevent the release of her work.

A. *Obtain All Necessary Sample Information And Underlying Music*

The easiest way to obtain information on the samples is to provide pre-printed sheets to the artist while she is in the studio creating the new work. These forms should ask for the title of the sampled song, performer, writer, names of album, record and publishing companies and a sample description. The description of the sample should consist of the length of the sample and a description of what is taken: vocals, instruments, etc. If this information is not written down while the sample is being used in the studio, it may never again be accessible to the artist since the album may have been borrowed, or the artist may forget the source of her sample.[128]

Often the artist will not realize the true amount she has taken, so an independent analysis by the person in charge of negotiating the sample clearance deals (hereinafter known as the "negotiator") is important. The negotiator must listen to the artist's new work (hereinafter known as the "selection") and each sampled song, and use her own informed judgment as to what must be cleared.

B. *Decide What Must Be Cleared*

The assumption that, "if you sample the record you are automatically sampling the song"[129] is incorrect. It is not always necessary to clear the rights to both the sound recording and the musical composition.[130] In the easy case, if the artist re-records a piece of a song, she has made no use of the sound recording and therefore need only license the musical composition rights. The more difficult case involves a use of the sound recording which does not include use of the musical composition, for example, using a scream that is not part of either the lyrics or the music of the song, but which is unique to one particular rendition of the song. In such a case, only sound re-

128. Sandra Bodovitz, *'Sampling': A Lawyer's Nightmare*, CAL. L. & BUS., June 3, 1991, at 21.

129. *Id.* at 21 (quoting Jay Cooper, Esq. of Cooper, Epstein & Hurewitz).

130. Robert G. Sugarman & Joseph P. Salvo, *Sampling Gives Law a New Mix*, NAT'L L.J., Nov. 11, 1991, at 21.

cording rights need be licensed. It is often hard, though, to tell where screams end and musical composition begins. This can be a tricky determination, and one that may be challenged in court.

C. *Negotiate The Deal*

1. Confirm Ownership of the Copyrights and Contact Owners

When a sample use request is made, most owners will agree to commit to making a formal agreement in the future. This is so because sampling technology is becoming so widespread that owners generally prefer to grant permission up front (and work out specific deal points later), rather than refuse permission and begin a mutually strained relationship.[131] Be aware, though, that some owners never allow sample usage, and others must, according to recording contracts with their artists, obtain the artist's permission before even beginning negotiations for a sample clearance deal.

2. Choose the Type of Deal to Offer

There are five standard types of sample clearance deals: free license, flat fee, royalty arrangement, co-ownership and assignment of copyright.[132]

(a) Free License

These licenses are given when use is just barely above "de minimis,"[133] or when the copyright owner believes that no use was made of her work, despite the license request.

(b) Flat Fee

A flat fee payment is a one-time sum paid to the copyright owner for the use of her work.[134] Deciding whether to offer a flat fee is contingent upon whether, in the opinion of the negotiator, the selection is going to sell well. If the opinion is that the selection will not, a royalty deal, discussed below, may be wiser.[135] If the opinion is that the selection will sell well, or the artist's record company has indicated its intent to release the selection as a single, a flat fee offer may be the best strategy. Flat fees can be conditioned on sales of up to a certain amount of records, with "rollover" payments becoming

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131. Note, *Current and Suggested Business Practices for the Licensing of Digital Samples*, 11 LOYOLA ENT. L.J. 479, 501-2 (1991); *see also* Gordon & Sanders, *supra* note 127 and accompanying text.

132. *Suggested Business Practices*, *supra* note 131, at 498.

133. *Id.*

134. Sugarman & Salvo, *supra* note 130, at 22.

135. *See Suggested Business Practices*, *supra* note 131, at 499 n.96.

due as sales increase.[136] This limits the risk to all parties, because the artist does not have to pay a huge initial sum and hope to recoup it later, and the owner does not have to ask for a huge sum up front to guard against having no share in what could be a tremendous hit.

(c) Royalty Arrangement

In a royalty arrangement,[137] the copyright owner is given some percentage of the royalties received from the selection by the sampling artist. This arrangement, which may be made with or without an advance payment[138] to the copyright owner, is the safest arrangement in many cases. Unless an advance payment is negotiated, no initial payments need be made to the copyright owner, and the actual cost of the sample license could be nothing if the record fails to sell well.

(d) Co-Ownership or Co-Publishing

In a co-ownership arrangement, both the owner and the artist are paid a portion of all income derived from the selection, and each party has a portion of all rights inherent in copyright ownership.[139] The result of this type of arrangement is that each party is responsible for separately administering her portion of the rights to the selection.[140]

If the parties opt instead for a co-publishing agreement, they will share income from the selection, but the artist will retain sole ownership of the copyright in the selection.[141] This arrangement protects the owner from any liability in subsequent infringement actions.[142]

(e) Assignment of Copyright

In this arrangement, the copyright in the new selection is granted to the owner of the copyright in the sample. This is generally used only when a selection is little more than a new version of the sampled work.[143]

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136. For instance, a mutually decided upon payment can be due at each incremental 100,000 unit level of sales of the selection.

137. *See* Sugarman & Salvo, *supra* note 130, at 22; *Suggested Business Practices, supra* note 131, at 499.

138. Id.

139. Sugarman & Salvo, note 130, at 23.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Suggested Business Practices, supra* note 131, at 501 n.104.

D. *Obtain Label Copy*

As soon as a deal is closed, the negotiator should ask whether label credit is desired. Several courts have emphasized the importance of label credit, so whether or not credit is desired, the final sample clearance license agreement should contain a clause stating that failure to give credit is not a breach of the agreement. It has been held that the lack of label credit can breach a material element of a contract if credit is specifically bargained for.[144] Furthermore, miscrediting of the source is actionable,[145] as is accurate but incomplete credit.[146] Therefore, it is wise to both offer the option of credit and make a diligent effort to see that it appears correctly and in full on the record label.

There is a strategic consideration that must be addressed in the label credit context. For example, if the negotiator has cleared only the sound recording rights, and not the musical composition rights, giving label credit to the licensing owner may alert the owner of the unlicensed rights to a possible infringement. Therefore, when only one of the rights has been cleared, it may be unwise to offer label credit, and if label credit is insisted upon in these circumstances, it may be best to negotiate for the heretofore unlicensed copyright.

Making the effort to follow a careful sample clearance procedure is the only way to prevent problems that can lead to copyright infringement litigation. Attention to detail and creating a written history of every act leading to each separate sample clearance agreement can only benefit the negotiator and the sampling artist in the long run.

VII. CONCLUSION

In order to avoid costly and time-consuming copyright infringement actions, rap artists and their representatives must start to view the creation of a musical work using samples as incorporating both a creative endeavor and a series of necessary business arrangements with those who own the copyrights in the sampled works. If this consideration is absent, the situation may be resolved through litigation, in which the rap artist will probably be unsuccessful. Therefore, rap artists must be prepared to work with copyright owners to ensure that agreements amenable to all parties are reached. If rap artists

144. Ahee v. Select Records, 11 Ent. L. Rep. 17 (N.Y. County Sept. 29, 1989).
145. Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981); *see supra* note 77.
146. Lamothe v. Atlantic Recording Corp., 847 F.2d 1403 (9th Cir. 1988).

fail to negotiate openly and fairly with copyright owners, they will not be able to avoid expensive lawsuits, and this exciting new musical genre will be prevented from growing to maturity.

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