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Copyright Protection of Musical Compositions in the U.S.A.

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July 1992

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Law.

Copy # 1

ISBN 0-315-87827-4

Canada

ACKNOWLEDGMENT

The author wishes to express his gratitude for the academical guidance and support given by Professor G. Blaine Baker of McGill University.

Amongst many people that encouraged and supported these studies, I especially thank my parents for their support that made my studies at McGill possible, and, last but not least, my wife for her patience and verstaendnis for my time- and energy-consuming academical ehrgeiz.

H. Buerskens

ABSTRACT

The author analyses the copyright protection of musical compositions in the U.S.A. with regard to the development of new reproduction methods. He argues that the existing copyright law has to be reinterpreted or amended in order to control new technologies in an appropriate way. The possibility to analyze music with computers and to store and reproduce it digitally ("sampling") has not only opened a broad variety of possibilities to use compositions already published for new productions, it also poses new questions for the application of copyright law.

The author interprets the existing legislation and adjudication with regard to the possibilities the new technologies offer and makes suggestions for an adaptation of the existing law to recent developments in technology. The author especially criticizes the so-called "audience test" to determine infringement and suggests, that in areas requiring a particular technical knowledge, the determination of copyright infringement should not be left up to the impression of a lay person, but rather depend on the testimony of an expert.

The author argues, that the recent developments in the music business require a new definition of the scope of protection of musical works. Parts of music such as rhythm, harmony or the arrangement of a song should itself be protected by copyright law.

For the area of digital sound sampling the author suggests the introduction of a statutory licensing scheme. The license fee should depend on the length of the part taken and the number of copies sold.

RÉSUMÉ

La thèse analyse la protection des compositions musicales par le droit d'auteur aux États-Unis. L'auteur montre que le courant droit d'auteur droit être réinterprété ou réformé par suite de la développement des nouvelles technologies. Il analyse la présente législation et jurisprudence et propose des nouvelles interprétations pour obtenir une meilleure protection des compositions musicales.

Particulièrement la thèse critique ce qu'on est convenu d'appeler "audience-test" pour la détermination d'une infraction des droits d'auteur et propose, que dans des ressorts concernant une expertise particulière le juge ne devait pas dépendre sur l'impression d'un profane, mais au lieu de cela consulter une spécialiste. De plus l'auteur propose une nouvelle définition de la protection des morceaux d'une composition musicale. A son avis la possibilité d'approvisionner et de réarranger musique avec un ordinateur ("sampling") démontre la nécessité de protéger pas seulement la composition comme entier mais aussi des morceaux comme la mëlodie, le rythme ou l'arrangement d'une composition.

Comme solution pour le problème de "digital sound sampling" la thèse propose l'introduction d'un système de licencement statuaire. La licence devrait dépendre de la langueur du morceau musicale qu'était pris et des nombres de copie vendus.

I INTRODUCTION

During the last decades technologies for multiplication have developed quickly, and technical improvements make those processes nearly perfect and increasingly simple. The consumer has become used to the photocopying of written publications, scanning of texts, or taping of audio and video publications for private purposes. While the provisions of the applicable law hardly changed during those decades, the courts have been burdened with applying that law to cases wholly beyond the scope of comprehension of the time the law was created and have been asked to redefine and adapt it to the developing technologies.

In the musical sector the sound quality of tapes and equipment has not only been improved, but new technologies also have been developed that allow even more perfect duplications or derivations of recordings that were not possible at the time of the creation of the law. The opportunity to analyze music with computers and to store and reproduce it digitally has opened a broad variety of possibilities to use already published music for the production of new compositions. Digital sampling gives musicians and sound engineers the possibility not only to recreate an existing sound by playing the same notes, but enables them to record and reproduce the real sound, since the transformation into digital codes ensures that the copy is identical to the original. In fact the terms 'copy' and 'original' are confusing, since the sample has the same quality as the original and therefore 'is' the original[1].

[1] see generally Garcia, "Play it Again, Sampler", Time Magazine, June 3, 1991, at 60.

However, 'sampling' is not just a method for creating perfect copies. Digitally transformed sounds can be reproduced and manipulated in multiple ways. A sound sampler can regenerate a one-note sample on any note of the scale[2], add echo or rhythm or simply combine it with other sounds[3]. That technology not only gives a musician the opportunity to maximize the efficiency of the own production by combining single parts of a song to produce the final product in the computer, it also enables him to 'borrow' preexisting foreign sounds for the own recording. Since the sampling technique makes it possible to divide a song into different components and just take certain themes, parts, or sounds to combine them in a different way, it enables a musician to combine his own creation with the drum of Phil Collins, the screams of James Brown, or the saxophone of John Coltrane. Recently this technique has led to productions that consist largely of preexisting productions and combine characteristic parts of successful songs as a kind of collage. The samples that are used in new productions can make out a basic part of the song (like a certain rhythm as a background for a whole song) or consist of single notes or sounds.

One important consequence of that development is the search for new definitions of the legal scope of protection of music. It has become important not only to know whether music in general is protected by existing copyright law, but also - if the answer to this question is yes - where the protection actually starts and which areas are covered by it.

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2 see generally Pareles, "Digital Technology Changing Music", New York Times, Oct. 16, 1986, at C23, col 4.

3 see generally Miller, "High-Tech Alteration of Sights and Sounds Divides the Arts World", Wall St. J., Sept. 1, 1987, at 1, col. 1.

The purpose of this paper is to give an overview of the current legal protection of musical compositions in the U.S.A., to interpret existing legislation and case law in the context of possibilities the new technologies offer to the user, and to make suggestions for an adaptation of the existing law to new technological developments. It will concentrate on the field of popular music. Rights of a performer or producer will be considered to show possible conflicts of interest. The additional protection of musical productions in the form of sound recordings will not be discussed. Copyright protection of words of songs as literary works will not be dealt with in detail. However, certain vocal performances will be discussed as parts of a musical work. Generally, the situation after the entry into force of the Copyright Act of 1976 ("the Act") will be considered. Where necessary for the interpretation of the new Act, the pre-1978 situation will also be considered.

A first part will give an overview over the applicable law, both national and international. The second part tries to define the subject matter of musical works and explores the requirements for protection of musical works. It will evaluate critically which parts of music are or should be protected by copyright law. It also gives an overview of those persons entitled to copyright protection with regard to musical compositions. A third part analyzes the different forms of use of preexisting works and discusses the legality of such uses of music, while the last part analyzes the legality of the sampling of music.

II APPLICABLE LAW

Whenever the scope of protection of intellectual property rights has to be defined, different levels of protection have to be considered. The first of the basic American touchstones is the U.S. federal law. Also to be considered are state law as well as international laws, which include international conventions or national laws of foreign states.

1. Federal Law

The U.S. Constitution authorizes, in Article I, Section 8, Clause 8, Congress to grant to authors and inventors for a limited time the exclusive right to their writings and discoveries. Under that grant of power Congress has enacted the United States Copyright and Patent Acts. The term 'writings' as used in the Constitution is not limited to the common meaning of words written on paper, but covers all kinds of creative expressions of ideas in tangible form[4].

In 1973 the U.S. Supreme Court made clear that the copyright clause of the Constitution did not necessarily grant exclusive legislative power to the federal government. In *Goldstein v. State of California* the Court held that this clause does not expressly or by inference give all power to grant copyright protection to the federal government and that a state could enact its own regulations, as long as they do not conflict with federal

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[4] see generally Kintner, Earl W., Jack Lahr, An intellectual Property Law Primer, 2nd ed. (New York: Clark Boardman Company Ltd., 1982) [hereinafter Kintner] at 339.

law or prejudice the interests of other states[5]. However, since the Copyright Reform Act of 1976 (reforming the Copyright Act of 1909) a single system of federal statutory regulations has been established for tangible works. Works not fixed in tangible form are protected by common law. Section 301 of the Copyright Act of 1976 states, that,

> "..all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyrights as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103,..., are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

Pre-1978 causes of action are still governed by the Copyright Act of 1909[6], as amended, and state law (common law)[7].

2. State Law

Prior to 1976, the Supreme Court has decided, besides the Copyright Act of 1909 state copyright law may be applicable[8]. Since 1978, the Copyright Act of 1976 seems to have established one system of federal provisions. However, there remain certain areas that are excluded from the

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5 Goldstein et al. v. State of California [1973] 412 U.S. 546.

6 Copyright Act of March 4, 1909, chap. 320, 35 Stat. 1075 [hereinafter the 1909 Copyright Act].

7 see generally Nimmer, Melville B., David Nimmer, Nimmer on Copyright, vol. 1, rev'd ed. (New York/Oakland: Matthew Bender & Co., Inc., 1991) [hereinafter Nimmer on Copyright] at 0V-1.

8 Goldstein et al. v. State of California, supra, note 2.

preemption of section 301 of the Act and thus may be subject to state legislation[9]. For the purpose of this paper these areas are of minor importance and will not be dealt with in detail.

3. International Conventions

Since intellectual property does not know any territorial boundaries or national borders, protection of ideas or writings only within the territory of one particular state cannot meet the needs of the copyright owners. To create an international system of copyright protection, a number of international conventions have been enacted. In addition to those conventions and bilateral agreements[10] reciprocity still operates in many jurisdictions[11].

a) Berne Convention

The Berne Convention of 1886 provides copyright protection for authors who are citizens of Convention countries and, if the author should not be citizen of a member state, of those works first published in a Convention country[12]. In its revised version (there have been five revisions: Paris 1896; Berlin 1908; Rome 1928; Brussels 1948; and, Paris 1971), the Berne Convention

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9 see generally Kintner, supra, note 4 at 242.

10 in 1971 had bilateral copyright agreements with 36 countries (among them Canada and the FRG), see Boguslavsky, M.M., Copyright in International Relations: International Protection of Literary and Scientific Works (Littleton, Co.: Fred B. Rothman & Co., 1975) [hereinafter Boguslavsky] at 21.

11 Among others: USA, Switzerland, Sweden, Spain, Italy, Hungary, Cuba, Poland, see Boguslavsky, supra, note 5 at 21.

12 see Articles 4 and 6 of the Berne Convention.

includes a broad protection of copyrights. Its basic goal is to protect copyright owners in foreign countries as if they were citizens of that country. By means of ratification the member states have adopted the Convention as national law or modified their own law to meet the requirements of the Convention. The U.S. ratified the treaty with the Berne Convention Implementation Act effective March 1, 1989[13]. Canada adhered to the revised Convention of Berne of November 13, 1908 and the Additional Protocol of March 20, 1914[14] and the amendments enacted by the Rome Convention[15].

b) Universal Copyright Convention

The Universal Copyright Convention (UCC) of 1952 grants citizens of member states of the UCC copyright protection in other contracting states as if they were nationals of those countries[16]. In comparison with the Berne Convention, the UCC does not have the same high standard. The UCC only obliges the member states to ensure a certain degree of protection for copyrights. The United States became bound by the Universal Copyright Convention on September 16, 1955. Canada ratified the UCC on May 10, 1962.

The UCC covers published as well as unpublished works. According to Art. I UCC, musical works fall within the scope of protection of the Treaty and the contracting states have to provide for the adequate and effective protection of the authors and other copyright proprietors

13 for details of the prior amendment of U.S. Law to make it compatible with the Berne Conventions see: Spurgeon, C. Paul, "The United States Adherence to the Berne Convention: A Canadian Perspective" (1990) 31 C.P.R. 417.

14 Copyright Act, RSC 1985, c. C-42 s 65, Sched II.

15 RSC 1985, c. C-42, s.71, Sched III.

16 Art. II of the UCC.

of such works. The member states not only have to protect musical and dramatic works, but also their combinations such as operas, operettas, and other dramatic-musical works[17].

The term of protection for works protected by the UCC shall be at least the life of the author and twnety-five years after his death[18]. However, if a contracting state has limited the duration of protection to a period calculated from the first publication of the work at the effective date of the Universal Copyright Convention, that state is entitled to keep this system. In such cases, the term of protection shall not be less than twenty-five years after the date of first publication[19].

c) Rome Convention

The 'Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations' of 1961 requires member states to provide with performers the power to prevent the fixation or broadcasting of their live performances, recordmakers with the power to prevent reproduction of their records, and broadcasting organizations with the power to control re-broadcasting and public performance for an entrance fee[20]. The U.S. has not ratified the Rome Convention, but is a member of the 'Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms' of April 18, 1973 as of March 10, 1974. Canada did not ratify these Conventions.

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17 see generally Bogsch, Arpad, The Law of Copyright under the Universal Convention, 3rd ed. (Leyden/NewYork: A.W. Sijthoff / R.R. Bowker Co., 1970) at 9.

18 Art. IV (2) UCC.

19 ibid.

20 see Arts. 7-14 of the Rome Convention.

d) Buenos Aires Convention

The Buenos Aires Convention has been ratified by the U.S. and a number of Latin American states. It gives the authors of contracting countries who have copyrights in a work in their home country the copyright protection of the respective country in each of the other countries.

III RIGHTS IN MUSIC

1. The Subject Matter of Copyrightability of Music

According to section 102 (a) of the Copyright Act of 1976

> "copyright protection subsists,... in original works of authorship fixed in any tangible medium of expression, ... from which they can be received, reproduced, or otherwise communicated.."[21]

Section 102 (a) explicitly includes musical works (no. (2)) and sound recordings (no. (7)) in its scope of application[22].

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21 Public Law 94-553, 94th Congress, 90 Stat. 2541

22 compare: Secretariats of Unesco and WIPO, "Principles Relating to the Protection of Copyright and the Rights of Performers in Respect of Dramatic, Choreographic and Musical Works", (1987) 21 Copyright Bulletin UNESCO No.3 at 44.

a) Originality

Copyright protection exists only for "original works". A definition of what is to be subsumed under this term can not be found in the Copyright Acts of 1909 or 1976. According to the House Report, the term "original works of authorship" remains purposely undefined by the Act, since the standard of originality established by the courts under the Copyright Act of 1909 was intended to remain valid[23].

The requirement of originality in copyright law is to be contrasted with the patent requirement of novelty, and has to be distinguished from that expression. Purpose of Copyright Law is to protect the independent creation of a work by an author[24] and thus secure "..the general benefits derived by the public from the labors of authors"[25].

There is no requirement for copyright protection that a work be substantially different from preexisting works, if its author did not copy such other works but created his own independently[26]. Therefore a work will have the necessary originality to obtain copyrightability if it is the product of independent efforts of an author. The work may even be identical to a preexisting work, because copyright law does not give a monopoly in ideas, but protects the method or way an idea is put into form[27]. An

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23 The House Report on the Copyright Act of 1976, Report No. 94-1476, 122 Cong. Rec. 1976 at 51 [hereinafter House Report].

24 see Mishan & Sons, Inc. v. Marycana, Inc., [1987] 662 F.Supp. 1339 (S.D.N.Y.) at 1340ff; Nimmer on Copyright, supra, note 7 at 2.01[A].

25 Fox Film Corp. v. Doyal, [1932] 286 U.S. 123 at 127.

26 see Alfred Bell & Co. v. Catalda Fine Arts, Inc., [1951] 191 F.2d. 99 (2nd Cir.); Leeds Music, Ltd. v. Robin, [1973] 358 F.Supp. 650 (S.D.Ohio); Sheldon v. Metro-Goldwyn Pictures Corp., [1936] 81 F.2d 49 (2d Cir.); Nimmer on Copyright, supra, note 7 at 2.01[A].

27 see Northern Music Corp. v. King Record Distributing Co., [1952] 105 F.Supp. 393 (S.D.N.Y.) at 393.

author is therefore entitled to a copyright if he did not copy the other work, but created the same work innocently and independently[28]. On the other hand, a work is not entitled to a copyright just because particular skills, training or knowledge are necessary to create it, if the creation consists of the copying of another work. Even if reproduction requires enormous physical skills and abilities, it is nothing but a copy of something already existing and therefore does not owe its origin to the author but to somebody else[29].

How can the originality necessary to make a work eligible for copyright protection be defined? Usually it is required that works have at least a minimum element of creativity[30], which will be taken for granted if there is a not merely trivial, distinguishable variation of a prior work[31]. In this context the concern of Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*[32] should be considered: judges as persons trained only to the law are not in a position to judge the worth of art outside the narrowest and most obvious limits and even on such level some works of genius would surely miss appreciation.[33] Therefore, a judge can make his decision only on a rather trivial level with the effect that every independent creation of an author representing at least a

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28 see Alfred Bell & Co, supra, note 26 at 102; Novelty Textile Mills, Inc. v. Joan Fabrics Corp., [1977] 558 F.2d 1090 (2d Cir.).

29 see Nimmer on Copyright, supra, note 7 at 2.01[A]; Batlin & Son, Inc. v. Snyder, [1976] 536 F.2d 486 (2d.Cir.).

30 see generally Johnston, Donald F., Copyright Handbook (New York/London: R.R. Bowker Company, 1978) at 14 [hereinafter Copyright Handbook].

31 see Alfred Bell & Co, supra, note 26 at 101; Nimmer on Copyright, supra, note 7 at 2.01[B].

32 see Bleistein v. Donaldson Lithographing Co., [1903] 188 U.S. 239 at 251.

33 ibid.

distinguishable variation of a prior work will be subject to copyright protection, provided that it is not too trivial[34].

The distinction between original works and those that have to be regarded as too basic and trivial to obtain copyright leaves enough room for interpretation and legal discussion. The judge should be careful not only to decide according to his taste but also following consideration of the view of experts in the respective field as well as that of the public.

As far as musical works are concerned, a number of cases have established guidelines to identify the minimum requirements of originality. In *Northern Music Corp. v. King Record Distributing Co.* the Court held that to acquire the necessary originality, a composition does not have to possess individuality that marks the work of extraordinary genius. The music may even have been expressed in part by others, if the composition leaves a certain impression of newness or novelty[35]. The originality of a composition is not affected by the fact that the author;

> "..has borrowed in general from the style of his predecessors. The collocation of notes, which constitutes the composition, becomes his own, even though strongly suggestive of what has been preceded, and it ceases to be an invention, and becomes an infringement, only when the similarity is substantially a copy, so that to the ear of the average person the two melodies sound to be the same."[36]

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34 compare: Smith v. Muehlebach Brewing Co., [1956] 140 F.Supp. 729 (S.D.Mo.); Toro Co. v. R & R Products Co., [1986] 787 F.2d 1208 (8th Cir.); Copyright Handbook, supra, note 30 at 15.

35 see Northern Music Corp., supra, note 27 at 400.

36 Hein v. Harris, [1910] 175 F. 875 (S.D.N.Y.) at 877.

In another decision the Court developed more precise guidelines: a musical composition must be a substantially new and original work[37]. A copy of a work already existing with additions and variations, which a writer of music with experience and skill might readily make, is not sufficient[38]. The Court denied the originality because the plaintiff had simply adapted a Russian composer's hymn to the English language with minor changes in the length of some notes. The tune remained the same.

Based on the assumption that neither harmony nor rhythm can in itself be subject to copyright, the Court in *Northern Music Corp. v. King Record Distributing Co.* compared the melody in issue with preexisting compositions and, in spite of numerous similarities to songs in the public domain, held that the composition still made the impression of newness and therefore had the necessary originality. In *McIntyre v. Double-A Music Corporation* the Court agreed that the originality necessary to obtain copyright protection is not so high a standard as the requirements of 'invention' and 'novelty' in patent law[39]. Nevertheless the Court denied the plaintiff's motion with regard to a missing element of creativity in the composition[40]. This element of creativity, though on a low level, seems to have been accepted in most of the decisions on the copyrightability of musical compositions[41]. Since copyright law protects creation and not mechanical skill, a

37 see Norden v. Oliver Ditson Co., [1936] 13 F.Supp. 415 (D.Mass.)

38 see Norden v. Oliver Ditson Co., ibid. at 417; Gerlach Barklow Company v. Morris & Bendien [1927] 23 F.2d 159 (C.C.A.).

39 see McIntyre v. Double-A Music Corporation [1959] 179 F.Supp. 160 (S.D.Cal.).

40 ibid. at 161.

41 compare Shapiro, Bernstein & Co., Inc. v. Miracle Record Co., Inc. [1950] 91 F.Supp. 473 (N.D.Ill.) at 474f; Consolidated Music Publishers, Inc. v. Ashley Publications, Inc. 197 F.Supp. 17 at 18.

composition that is too simple and only consists of a mechanical application of simple harmonious chords will lack of creativity and will consequently not fulfill the requirement of originality[42].

b) Fixation in Tangible Form

A work is only eligible for copyright protection if it is fixed in a tangible medium of expression from which it can be communicated, either directly or with the aid of a machine. A work is fixed, when;

> "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, ..., that are being transmitted, is "fixed" ... if a fixation of the work is being made simultaneously with its transmission."[43]

The requirement of a work fixed in tangible form to make it eligible for copyright protection is based on the 'Constitutional Provision Respecting Copyright', giving the Congress the power to secure authors the exclusive right to their writings[44]. The interpretation of the term "tangible form" therefore has to be seen in connection with the question of what requirements a work will have to fulfill in order to be considered as a "writing". Most works meet easily the standard of "some material form, capable of identification and having a more or less permanent

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42 see Shapiro, Bernstein & Co., Inc. v. Miracle Record Co., ibid.

43 17 U.S.C. 101

44 U.S.Const. Art. I, § 8.)

endurance"[45]. In connection with musical works it is accepted that the recording of a composition on record or tape represents a tangible form[46]. However doubt may exist whether performances on stage, T.V. or radio may be regarded as being fixed in such tangible form. Although these performances may be perceived or reproduced, there can be no doubt that they are ephemeral and therefore not "fixed".

However, according to section 101 of the Copyright Act of 1976, such works may be regarded as being fixed if a fixation of the work is made simultaneously with the transmission. Consequently, a simultaneous recording of performances and broadcasts will ensure the copyrightability of the performance. It has to be emphasized that the work eligible for copyright protection has to be divided from the material object necessary to fix it. As a book is only the medium to fix a literary work, the videocassette, tape, or other medium is just the material embodying the performance and thus satisfying the fixation requirement[47].

c) Works of Authorship

Copyright protection subsists only in original "works of authorship". Section 102 (a) of the Copyright Act of 1976 gives a non-exhaustive list of seven categories, that fall within the scope of the term "works of authorship".

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45 Canadian Admiral Corp. v. Rediffusion, Inc. [1954] Can.Exch. 382 at 383.

46 see generally Nimmer, Melville B., Copyright and other Aspects of Law Pertaining to Literary, Musical and Artistic Works (St Paul, Minn.: West Publishing Co., 1979) [hereinafter Nimmer in Casebook] at 28f.

47 see generally Nimmer on Copyright, supra, note 7 at 2.03[D]; diverse copies cannot change the fact that there is but one original work of authorship.

Musical works as well as sound recordings are included in these categories [section 102 (a)(2) and (7) Copyright Act 1976] and therefore will be regarded as such works of authorship. The Copyright Act of 1976 gives no further definition of the terms "works of authorship" or "musical works". According to the House Report, a flexible definition was intended to leave room for further development and interpretation[48].

d) Scope of Protection

What exactly is the nature and content of the rights protected by copyright law, and what precisely is protected by the term "musical works" in section 102(a)(2) of the Copyright Act? This question is of growing importance not only with regard to changes of the music itself, reflecting changes in the taste of the public, but especially with regard to new technical possibilities and the growing economic importance of the musical sector. Since musical copyrights have to be regarded as valuable economic assets, copyright infringements in this area are no longer violations of ideal interests, but often lead to considerable losses for copyright owners. While the economic importance of rights in music is growing, the exploitation and infringement of existing musical works has become easier and more widespread. The use of computer and sampling equipment gives musicians or sound-technicians the ability to produce perfect copies of existing recordings and even allows them, by using digitalised versions of these recordings, to take a certain part of the music or just certain sounds and fill them in a new song without even using one of the instruments necessary for the

48 see House Report, supra, note 23 at 51.

original recording[49]. Therefore it is necessary to develop a more precise definition of what falls within the scope of copyright protection of musical works and which parts of a musical composition will be protected by copyright law.

(1) Whole Song

A song as a whole is protected by copyright law. A song, usually described as the combination of melody, harmony and rhythm, is commonly understood as 'the' musical work referred to in section 102(a)(2) of the Copyright Act of 1976[50]. Therefore, there can be no doubt that a musical composition as a whole will be protected by copyright law if it fulfills the necessary requirements (like originality and fixation in tangible form). A song as a combination of word and text will often even contain copyrights in multiple form, such as the music itself and the text as a literary work[51]. For the purpose of this paper, the text as a possible literary work will not be considered in detail.

(2) Musical Idea

According to section 102(b) of the Copyright Act of 1976, copyright protection does not extend to any idea

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49 in fact the digitalization of existing sounds gives the musician the chance to not just copy an existing sound, but to reproduce the original in the same quality.

50 compare Jewel Music Pub. Co. v. Leo Feist, Inc. [1945] 62 F.Supp. 596 (S.D.N.Y.); 66 U.S.P.Q. 282; Kaplan, Benjamin, Brown, Ralph S., Copyright, Unfair Competition, and other Topics bearing on the Protection of Literary, Musical, and Artistic Works 3rd ed. (Mineola, New York: The Foundation Press, Inc., 1978) at 219ff; Drone, Eaton S. The Law of Property in Intellectual Productions (Boston: Little, Brown, and Company, 1879) at 176 (comments also on the English situation); Hughes, Roger T. Hughes on Copyright and Industrial Design rev'd ed. (Markham, Ont.: Butterworths, 1991) at § 14 (referring to the Canadian situation).

51 see generally Hughes on Copyright, ibid at § 14.

included in a work. Copyright law does not protect ideas, but only expressions of ideas[52]. The reason for this can be seen in the difficulty of protecting something that is not fixed in tangible, physical form. Therefore, a musical idea is not eligible for copyright protection[53].

(3) Melody

The melody is one of the basic elements of a musical composition. Usually such a composition is described as a combination of melody, harmony, and rhythm. Although everybody may have an idea of the meaning of the term "melody" (often referred to as 'the tune'), providing a precise definition of this element is not as easy as it might seem. Based on the assumption that the copyrightability of a work will depend on the impression of an average hearer, judges refer to their own personal impression rather than to definitions of musical science or expert testimonies[54]. Apart from the personal impression of the judges, the courts usually compare the notes and the structure of the composition. Of importance in this content are the notes itself, the key of the composition, the tact, measures and rests, and time values or repetitions[55].

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52 see Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., [1986] 797 F.2d 1222 (3rd Cir.) at 1234; Craft v. Kobler [1987] 667 F.Supp. 120 (S.D.N.Y.) at 123; compare Blanco White, T.A., & Jacob, Robin, Patents, Trade marks, Copyright and Industrial Designs, 3rd ed. (London: Sweet & Maxwell, 1986) at 139.

53 see generally Marks, Irving B. & Phillips, Robert M., "Music and Law: Copyrighting a Musical Idea" (1969) 18 Cleveland State Law Review 523 at 525; critical towards the differentiation between idea and expression: Keyt, Aaron, "An Improved Framework for Music Plagiarism Litigation" (1988) 76 California Law Review 421 at 443.

54 see Northern Music Corp., supra, note 27 at 397.

55 see generally Withol v. Wells [1956] 231 F.2d. 550 at 552.

Of course, these elements will also be of importance for the other parts of musical compositions that will have to be considered, such as harmony and rhythm. For the evaluation, different scores should be regarded separately, although the overall impression will be of importance.

Based on this definition of the melody of a song it has to be decided whether the melody itself can be subject to copyright. In *Northern Music Corp. v. King Record Distributing Co.*[56] the Court made clear, that it was in the melody of the composition - or the arrangement of notes or tones that originality had to be found[57]. Although the Court was trying to define measurements to evaluate the originality of a whole song, it seems logical that, if such originality in the melody of a song is sufficient to make the whole song subject to copyright protection, the melody itself must contain enough originality to be protected by copyright law as well. This interpretation is supported by the approach of Prof. Melville B. Nimmer, who described the melody as the usual source of originality in musical compositions[58] and by the interpretations developed by other courts that also regarded the melody as the prior source of originality of a song[59]. In spite of the different methods of evaluation developed by the courts, there can be little doubt that the melody of a musical composition will be eligible for copyright protection[60].

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56 Northern Music Corp., supra, note 27.

57 see Northern Music Corp., supra, note 27 at 397.

58 see Nimmer on Copyright, supra, note 7 at 2.05[D].

59 compare Berlin v. E.C. Publications, Inc. [1964] 329 F.2d 541; Life Music, Inc. v. Wonderland Music Company [1965] 241 F.Supp. 653 (S.D.N.Y.).

60 see generally Kintner, supra, note 4 at 353; Marks & Phillips, "Music and Law..", supra, note 53 at 525; compare Copeling, A.J.C., Copyright Law in South Africa (Durban: Butterworths, 1969) at 35; Keyt, supra, note 53 at 438.

If the melody itself is subject to copyright, it has to be determined which requirements will have to be fulfilled by a single melody to obtain the necessary amount of originality for copyright protection. Because of the variety of factors that, in combination, make out the melody, it is impossible to specify rules for the evaluation of the melody of a musical work. The decision will obviously not be based only on exact figures and the comparison of individual notes, since copyrightability or infringement cannot be determined alone by "lines or inches" as measurements[61]. The judge will have to rely on his own impression as well as on expert testimonies or polls. The courts have developed different approaches towards this problem with a different appraisal of the described elements.

An example of a court's consideration of the different melodic elements is *Withol v. Wells*[62]. In that case the Court held that the melodic element written by the plaintiff was an original work subject to copyright. The Court not only compared the soprano, alto, and bass scores separately, but also calculated exact percentages of identity (percentages of 80.95 %, 69.84 %, and 59.96 % of identity in the different scores were held to be sufficient to prove copying).

According to the general principles described above, a musical tune will be subject to copyright, if its overall impression is that of a new work, even if it has been influenced by prior works[63].

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61 Chicago Record-Herald Co. v. Tribune Association [1921] 275 F. 797 (7 Cir.) at 799.

62 Withol v. Wells, supra, note 55.

63 see generally Nimmer on Copyright, supra, note 7 at 2.05[D].

(4) Rhythm

Rhythm has been defined as the "tempo in which the composition is written. It is the background for the melody"[64]. Based on the argument that only a limited number of tempos exist that seem to have long been exhausted, one Court concluded that originality in rhythm was a rarity, if not an impossibility[65]. In *Life Music, Inc. v. Wonderland Music Company*[66] the Court followed that interpretation. To decide whether one song infringed the other composition the Court simply stated that similarities in tempo are "common to a great many songs, and that they do not, in any way, indicate copying"[67].

In *Norden v. Oliver Ditson Co.* the Court held a song not to be eligible for copyright protection because it differed from a prior composition only in some rhythmic changes, while the rest remained "the same old tune"[68]. However, that Court did not state whether it denied the possibility of originality in the rhythm. It held that the "occasional changes of certain notes" were not sufficient to create the originality necessary for copyright protection.

Some other courts have accepted the general possibility of copyrightability of rhythm. One Court recognized

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64 Northern Music, supra, note 27 at 400; more exactly, "rhythm refers to proportional time values, e.g. quarter notes and eigth notes, whereas tempo refers to actual time values, e.g. specifying that a quarter note is to last one half of one second", Keyt, supra, note 53 at 431 (note 47).

65 see ibid.; compare Berlin v. E.C. Publications, Inc., supra, note 59 at 545.

66 Life Music, Inc. v. Wonderland Music Company, supra, note 59.

67 ibid. at 656.

68 Norden, supra, note 37.

copyrightable originality in the fingering, dynamic marks, tempo indications, slurs and phrasing[69].

In *Desclee & Cie., S.A., v. Frederick E. Nemmers*[70] the Court went even further and held, that;

> "rhythmic annotations indicating the manner of performance of the Gregorian chants are an integral part of the musical composition which may be copyrightable under the statute"[71].

That holding leads to the conclusion that generally the courts accept the theoretical possibility of originality in rhythm. The fact that many courts regard this at least as a rarity shows their concern about possible consequences of the copyrightability of rhythm. Because of a "limited amount of tempos" that "appear to have been long since exhausted" courts are cautious about accepting such a copyright. To guarantee the free development of art, science, and industry they are willing to subordinate the composers interest in maximum financial return, if the rhythmic concept of a composition is not, like in *Desclee & Cie., S.A., v. Frederick E. Nemmers*, of particular significance[72].

In my opinion, an important aspect that has not been considered yet is the change in the character of the different areas of popular music itself. While decisions like *Norden v. Oliver Ditson Co.* date from 1936, popular music has been developed to an extent the judges of that

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69 see Consolidated Music Pub. Inc. v. Ashley Publications Inc. [1961] 197 F.Supp. 17 (S.D.N.Y.) at 18.

70 Desclee & Cie., S.A., v. Frederick E. Nemmers [1961] 190 F.Supp. 381 (E.D.Wis.).

71 ibid. at 388.

72 see Berlin, supra, note 59 at 543f.

time probably would not have considered to be possible[73]. The reason for this development lies not only in better technical abilities to perform or produce a composition or in the broad interest of the public in popular compositions, but also in social developments and a variety of new influences upon popular music. The influences of ethnic traditions and instruments, for example, have led to new structures that are strongly influenced by rhythm-orientated instruments like percussion ones. Rap-music or House music are based on rhythm to a high degree, and often the rhythm will be even more important than a melody or harmony. Modern dance music as well is usually arranged on a dominant rhythm to guarantee the 'danceability' of the composition.

These examples show that rhythm has become one of the dominant factors in popular music, not inferior to elements like melody or harmony. To reflect this development, courts will have to accept rhythm as a factor that can not only give compositions the necessary originality to obtain copyright protection but also is eligible for copyright protection itself[74]. Decisions about the extent to which rhythmic elements are eligible for copyright will have to be made with regard to the public interest in the development of art, science, and industry. Depending on the circumstances of each case the courts may have to

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73 the "youngest" decision, Berlin v. E.C. Publications dates from 1965.

74 compare Keyt, supra, note 53 at 433, who shows how the rhythmic possibilities have expanded in the last century: "The unique player-piano pieces of Conlon Nancarrow, composed by hand-punching piano rolls, are significant mid-century explorations of complex rhythms, as is much of the music of Stockhausen, Pierre Boulez and Krzysztof Penderecki. Another direction is the use of aleatoric rhythms by John Cage, and the use of echo as a rhythmic element in Stuart Dempster's record 'Stuart Dempster in the Great Abbey of Clement VI' (1750 Arch Records 1976). An example of what computers can do is Joel Gressel's 'Points in Time' (Odyssey Y 34139, 1976)."

subordinate the financial interest of the composer or holder of the rights in a composition to the interest in free future development of musical rhythms. Works with significant originality in this area should be eligible for copyright protection.

(5) Harmony

Harmony is one of the basic elements of musical compositions. To evaluate the originality of a song that makes this particular composition eligible for copyright protection, the courts tend to look at the melody, the harmony, and the rhythm[75]. If originality can be found in one of those three elements, the whole song is eligible for copyright. Harmony has been described as "the blending of tones" which is "achieved according to rules which have been known for many years"[76]. And in *Northern Music Corp. v. King Record Distributing Co.*, the Court concluded that being in the public domain for so long, a harmony itself could not be the subject of copyright[77].

In my opinion the point of view the Court took in *Northern Music Corp. v. King Record Distribution Co.* was not in complete accordance with copyright principles. The fact that the rules of harmony may have been known for many years (which may be doubted, since at least synthesizers and experimental music create uncountable new variations of harmonies) does not exclude the individual performance from copyright protection. Copyright law protects not the idea that may have been known for a long time, but the individual performance of the idea. Therefore I do not agree that knowledge of the general rules of harmony might

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75 see Northern Music Corp., supra, note 27 at 400; Jewel Music Pub., supra, note 50 at 598; see Kintner, supra, note 4 at 353.

76 see Northern Music Corp., supra, note 27 at 400.

77 see ibid.

exclude compositions based on such rules from copyrightability. Even if basic rules of harmony have entered the public domain, variations of known compositions will remain eligible for copyright.

In *Shapiro, Bernstein & Co. v. Miracle Record Co.* the Court held a bass to be too simple to be copyrightable because it was only a mechanical application of a simple harmonious chord[78]. However, that decision seems to have been based mostly on the argument that the bass had to be regarded as a product of mechanical skill rather than as the composer's creation and therefore it is not informative with regard to the question of the general copyrightability of harmonies.

In *Withol v. Wells*, the United States Court of Appeals held the writing of alto, tenor, and bass scores to be an original work of the author[79]. With that interpretation, the Court seems to have accepted copyrightable originality in harmony, especially since it referred to these parts of the composition not only as separate parts, but also to their relation amongst each other[80], which usually is a characteristic for the harmonic structure of the composition.

Courts therefore seem to have accepted the theoretical copyrightability of the harmony of a song. However, with regard to a supposed limitation of available harmonies and on the basis of the assumption that these harmonies have been known for a long time and entered into the public domain, the courts hesitate to grant copyright protection to the harmonic structure of a particular composition. But

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78 see Shapiro, Bernstein & Co. v. Miracle Record Co. [1950] 91 F.Supp. 473 (N.D.Ill.).

79 see Withol v. Wells, supra, note 55.

80 see Withol v. Wells, supra, note 55 at 552; compare Nimmer on Copyright, supra, note 7 at 2.05[D].

- like in the case of the rhythm of a composition - such possible practical restrictions should not influence the theoretical eligibility of harmonies for copyright. Of course it will depend on the single work and the creation of a single composer whether a specific harmony can be subject to copyright. In view of the large number of harmonies in the public domain, it may be difficult to think of new developments that can be protected by copyright. But that does not effect the general opportunity to obtain copyright protection for musical harmonies[81]. Especially with regard to new developments in music, the eligibility of harmonies for originality and copyrightability should not be rejected.

(6) Sound

The term "sound" has not yet been discussed as a possible element of copyright protection. To some extent, sound may be part of other categories that have been discussed above (especially harmony). Sound has achieved significant importance in popular music, since some artists have developed not only a certain way of composing or performing compositions, but have been able to create a typical atmosphere in their compositions that became characteristic of them. Examples for this are Glenn Miller, who developed a certain Big Band Sound that could easily be distinguished from other artists of the same time, Miles Davis with his typical trumpet performances, or Tears for Fears with a particular form of technopop. Often the consumer will be able to identify the artist only by listening to that sound, because he recognizes it as something typical of one particular artist. The

[81] see generally Brent,Debra Presti, "The Successful Musical Copyright Infringement Suit: The Impossible Dream" (1990) 7 Entertainment & Sports Law Review 229 at 249.

distinctiveness of harmonies can be seen in the fact that a sound may consist of different harmonies and may be developed not only during one composition, but over a variety of songs. In addition, the sound of an artist may exist independent from particular harmonies and can be developed by the combination of many different single elements.

In this context it should be emphasized that a judge, who is not an expert in musical theory, may have difficulties distinguishing among the various elements of musical compositions. Therefore it cannot be expected that his decision will always meet the current standard of musical theory, even if based on expert testimony. Consequently, the use of certain expressions should not be overestimated. One should rather follow the description of the judges' understanding of the problem and give the judge the freedom to describe his understanding of the case and, of course, of the area where he claims to see originality (or not).

One of the basic problems one would have to deal with if the copyrightability of a certain sound was accepted is a workable definition of 'the sound'. Since a particular sound may be the result of numerous factors (such as the use of certain instruments, voices, special production methods, or simply a special mode of performance) it will be difficult, if not impossible, to describe a sound and define it in a way that allows a precise comparison of two examples. Therefore, doubt may exist whether a protection for the sound as such, even if desirable, could be enforced in practice. To create protection that is workable and follows enforceable rules one should consider copyright for the single components (such as the harmony) that can make out a particular sound. As long as the sound itself cannot be subsumed under precise rules, copyright protection would

be likely to produce more confusion than clear guidelines. Consequently I believe that protection of a particular sound by means of copyright should be rejected.

In my opinion protection of single harmonies that can be analyzed and defined more precisely will create more certainty with regard to the originality of single parts of works. That indicates, of course, that characteristic notes or harmonies have to be protected by copyright law.

(7) Arrangement

An arrangement can be described as the particular way the composition is presented to the public. The arrangement of the recording of a song is the way it is put into form and includes sound effects, accompaniments or intonations to create a certain atmosphere or inspiration, as well as rhythm or harmonies[82]. The factors that make out an arrangement are the musical background, the quality of the voices of the artists and the sound quality, the harmonization of the responses, and the intonation and expression of the performance[83]. The arrangement of a musical works can be characterized as a revision or modification of a preexisting work[84].

The arrangement of a composition is a form of derivative work[85], and as such is eligible for copyright

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82 see generally Cornish, W.R., Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 2nd ed. (London: Sweet & Maxwell, 1989) at 10-009.

83 see Supreme Records, Inc. v. Decca Records, Inc. [1950] 90 F.Supp. 904 (S.D.Cal.) at 912.

84 compare Anheuser-Busch, Inc. v. Elsmere Music, Inc. [1986] 633 F.Supp. 487 (S.D.N.Y.) at 489.

85 see 17 U.S.C. Sec. 101 : "A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement,.."; for the common law of copyright, compare: McIntyre v. Double-A Music Corporation, [1958] 166 F.Supp. 681 (S.D.Cal.); Baron v. Leo Feist, Inc. [1949] 173 F.2d 288 at 290.

protection[86]. Usually, derivative works are described as abridgements, adaptations, arrangements, dramatizations, or translations. A work is a derivative work only if it includes a substantial part of a prior work. Nimmer has concluded that a work will be considered a derivative work only if:

> "it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work"[87].

Consequently, an arrangement will represent an infringement if it has been done without the consent of the copyright owner, provided that the prior work has not yet entered the public domain[88].

According to section 103 (b) of the Copyright Act of 1976,

> "The copyright in a ... derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."

Therefore, a copyright in an arrangement of a preexisting work will neither influence an existing copyright nor create a copyright for a work that has entered the public domain. The subject of the copyright is only the particular arrangement of the work.

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86 see 17 U.S.C. 103; compare: Harms, Inc. v. Tops Music Enterprises of Cal. [1958] 160 F.Supp. 77 (S.D.Cal.) at 83; McFarlane, Gavin, "Originality: A Question of Arrangement" (1980) 130 The New Law Journal 33 at 33f.

87 Nimmer on Copyright, supra, note 7 at 3.01.

88 see Knickerbocker Toy Co. v. Winterbrook Corp. [1982] 554 F.Supp. 1309 (D.N.H.); Filmvideo Releasing Corp. v. Hastings [1976] 426 F.Supp. 690 (S.D.N.Y.).

Consequently, the relation of the new arrangement of a preexisting song to its original will determine the copyrightability of the arrangement of the new version. The problem of the extent to which an arrangement may take over ideas of the preexisting song and what changes have to be made to achieve the originality that is necessary for copyright protection of the newly arranged work has been the subject of a number of decisions[89].

In *Plymouth Music Co. v. Magnus Organ Corp.* the Court had to evaluate whether an arrangement of songs in the public domain had sufficient originality to be eligible for copyright protection[90]. The Court emphasized, that no large measure of novelty was necessary. Referring to a prior decision, the Court stated that a copy of something in the public domain would support a copyright if it was a 'distinguishable variation' and that Originality meaned little more than a prohibition of actual copying[91].

However, a work will not be eligible for a separate copyright as a derivative work if it does not constitute more than a minimal contribution[92]. Technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers cannot qualify for copyright protection[93]. A new rhythm, changes in the accompaniment and a new title of a

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89 17 U.S.C. 103 (b) ; compare: Musto v. Meyer [1977] 434 F.Supp. 32 (S.D.N.Y.); Hayden v. Chalfant Press, Inc. [1959] 177 F.Supp. 303 (S.D.Cal.).

90 see Plymouth Music Co. v. Magnus Organ Corp. [1978] 456 F.Supp. 676.

91 see ibid. at 679, see: Alfred Bell, supra, note 26 at 102/3.

92 see generally Sherry Mfg. Co. v. Towel King of Florida, Inc. [1985] 753 F.2d 1565 (11th Cir.); Batlin & Son, Inc. v. Snyder [1976] 536 F.2d 486 (2d Cir.); Grove Press Inc. v. Collectors Publication, *Inc.* [1967] 264 F.Supp. 603 (S.D.Cal.).

93 see generally McIntyre v. Double-A Music Corporation, supra, note 85 at 683.

song have been held to be too minimal to create a separate copyright for a derivative work[94].

On the other hand, a translation of the words of a song has been held to be copyrightable[95]. In another case the translation of English words into Arabic was regarded as not being sufficient because the translation of a list of words was considered to be a mere mechanical process[96].

In *Nom Music, Inc. v. Kaslin* the arrangement of piano-music by the assignee of the defendant's copyright in the unpublished lyrics and melody line of a song was held to be copyrightable[97]. In another case the Court decided that several choral or piano-vocal arrangements of public domain songs that in one case included a translation of words also were copyrightable. In that case the Court concluded with regard to nine out of twelve songs that the songs had "at least a modicum of creative work"[98]. Another Court held the variations an Italian sailor added to an old folk song during a ship-passage to be a copyrightable arrangement[99].

In another case, a Court had to define the scope of application of the term "arrangement" in a negative way[100].

In that case an advertiser brought declaratory action against the holder of a copyright in a jingle used in advertisements. Both parties had concluded an agreement under which the copyright holder was entitled to payments for "arrangements" of his original jingle. The declaratory

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94 see Shapiro, Bernstein & Co., supra, note 78.

95 see Plymouth Music Co., supra, note 90.

96 see Signo Trading International Ltd. v. Gordon [1981] 535 F.Supp. 362 (N.D.Cal.).

97 see Nom Music, Inc. v. Kaslin [1965] 343 F.2d 198.

98 Plymouth Music Co., supra, note 90 at 680.

99 see Italian Book Co.v. Rossi [1928] 27 F.2d 1014 (S.D.N.Y.)

100 Anheuser-Busch, Inc. v. Elsmere Music, Inc., supra, note 84.

action was to determine whether a new jingle constituted such an "arrangement".

The plaintiff argued that the term "arrangement" had a clear and unambiguous, commonly understood meaning, "specifically, a derivation or adaptation of a copyrighted work which, but for the license, would constitute infringement of the copyright"[101]. With regard to the practice developed by both parties under their agreement, the plaintiff argued that the defendant was entitled to payments only when the plaintiff used "identifiable variations of substantive portions" of the original jingle.

Although the Court did not agree that under the concluded agreement the term "arrangement" had a clear meaning, it adopted the plaintiff's argument and looked at the parties' own interpretation as evidenced by their course of conduct. Since over a fifteen-year period numerous variations of the jingle had been produced and the parties developed the practice that the defendant and copyright holder received residuals for the use of not less than eight notes of his jingle, the Court concluded that a substantial or identifiable portion of the defendant's music consisted of at least eight notes of his composition[102]. That interpretation was based on the particularity that the defendant's composition had a characteristic introduction and end, each consisting of four notes, that usually was kept in new jingles to ensure continuation of the identification between product and commercial-jingle. Apart from that single case, the Court's decision can be interpreted to the effect that a composition may be considered to be a musical arrangement of another work if it is based upon a substantial or identifiable portion of that composition, reflecting

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101 ibid. at 491.

102 see Anheuser-Busch, supra, note 84 at 493.

certain characteristics of it. A length of eight notes may represent such a substantial or identifiable portion of a composition.

(8) Compilations

According to the House Report,

> "a compilation results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright."[103]

While a derivative work requires recasting or transformation, a compilation is made up of a selection and arrangement without any changes in the preexisting material[104]. Collections of preexisting musical compositions will therefore only be regarded as compilations if those works are combined without any internal changes. Of course, a further requirement for eligibility for copyright is that the combination of the material can be regarded as being of sufficient originality. If these requirements are fulfilled, a combination of preexisting musical works is subject to copyright, whether or not the single components are eligible for copyright protection[105]. Combinations of different songs (for example as a collection of performances of various artists) may therefore achieve a copyright just for the way those works have been put together, provided that there is a certain originality in

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103 House Report, supra, note 23 at 57.

104 see Nimmer in Casebook, supra, note 46 at 84.

105 see generally In case of an own copyrightability of the single works the compilation will also represent a collective work. As Sec. 101 of the Copyright Act of 1976 states, "the term "compilation" includes collective works".

this combination. If preexisting works are taken over without any changes, the permission of the copyright holder is necessary to avoid infringement. Since the use of a whole work in its original form is easy to prove, infringements are easily determinable and do not represent significant practical problems.

(9) Part of a Song/ Theme

Often a song contains one or more especially characteristic sequence or theme. Such parts may be decisive for the success of a song and are more likely to be covered by other musicians than whole songs. This may happen when another composer takes over a whole part of a song or at least uses a sequence of characteristic notes. He could also just be influenced by a theme and use it in a similar form in his own composition. This last alternative usually can be qualified as an arrangement[106].

The *Anheuser-Busch* case indicates that even a part of a song can be protected by copyright law. Although the Court referred to the contractual practice that had been developed between the parties in that case, it had at least to accept the general possibility of infringement by taking over just a short sequence of a composition[107]. According to that decision, the copyright of a composition is infringed by the use of an identifiable portion of the music. This interpretation is supported by the ruling in *Elsmere Music, Inc. v. National Broadcasting Co.*[108]. The

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106 see Anheuser-Busch, supra, note 84, where the Court decided that the use of 8 notes was an arrangement of the preexisting song.

107 during a 7-year period approximately 650 different commercials had been produced. In general (with only few exceptions the composer received residuals for the use of at least 8 notes of his composition; see Anheuser-Busch, supra, note 84 at 493.

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

Court decided that the use made by the defendant was capable of rising to the level of copyright infringement, although only four notes in sequence and the words "I love" were taken from the original composition.

The Court held that this short sequence was a significant portion of the composition ("the heart of the composition") and that the use was far more than a '*de minimis*' taking[109]. Correspondingly, the broadcasting of a short sequence of a song that had been performed during a parade has been regarded to be sufficient to infringe copyrights (although privileged under the fair-use rule)[110]. Other courts held that the taking of a six note chorus[111] or of as much as two or four bars of music[112] could support copyright infringement. In one case, even the copying of a single word (a tonguetwister consisting of thirty-three letters) was held to be the possible subject of an infringement[113].

The general rule that can be developed out of these decisions is that even the use of part of a preexisting composition has to be regarded as an infringement, if that part represents a significant and characteristic part of the composition. The measurement in this context will be

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109 see Elsmere Music, Inc., ibid. at 744.

110 Italian Book Corp. v. American Broadcasting Company [1978] 458 F.Supp. 65 (S.D.N.Y.).

111 see Boosey v. Empire Music Co. [1915] 224 F. 646.

112 see Northern Music Corp. v. King Record Distrib. Co., supra, note 27; Robertson v. Batten, Barton, Durstine & Osborn, Inc. [1956] 146 F.Supp. 701 (S.D.Cal.).

113 see Life Music, Inc. v. Wonderland Music Company [1965] 241 F.Supp. 653 (S.D.N.Y.) at 656; the word was "Supercalifragilisticexpialidocious" and the Court stated that the copying of this word would have been sufficient for an infringement. However, the Court denied the motion for a preliminary injunction, because the plaintiffs failed to make a prima facie showing that they would have been able to prevail on the issue of infringement (the word used by the defendants was:"Supercalifragilisticexpialidocious").

the point of view of an average observer. There can be no fixed rule to determine the minimum length of such a sequence. Depending on the circumstances of the case, even a short sequence may qualify as an object of infringement if the public recognizes it as being a characteristic part of a certain composition[114].

With regard to the current situation in the music business, this interpretation has to be regarded as being just and appropriate. Hitsongs often are characterized by a typical refrain that will allow the customer to identify the composition. Usually it is this short and easily remembered sequences of notes that determines the popularity of a song. If such sequences influence the value and success of the whole composition, they deserve special protection by copyright law.

(10) *Title of a Song*

The title is the part of the song that allows a quick identification of the song and will often be important to attract the attention of the public. However, it seems clear that the title of a song is not protected by copyright law. Although Nimmer argues that the flexibility built into section 102(a) could give courts the opportunity to recognize copyright in titles, there is little tendency to do so[115]. In Wihtol v. Wells the Court stated that the title itself was not protected by the copyright, but should be taken into account to determine infringement of the song as a whole[116]. The interpretation of the Court in *Harms,*

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114 An example for such a shorter arrangement might be the characteristic opening of Beethovens 5th symphony.

115 see generally Nimmer on Copyright, supra, note 7 at 2.16 (note 6).

116 see Withol v. Wells, supra, note 55 at 553; Shaw v. Lindheim [1990] 919 F.2d 1353 (9th Cir.) at 1362.

Inc. v. Tops Music Enterprises, Inc. was to the same effect.[117]

Although some courts have considered copyright protection for titles under common law, the general rule is that neither under statutory law nor common law aretitles eligible for copyright[118]. This interpretation is not a necessary result of the application of copyright principles, since titles may have literary value that could make them eligible for copyright protection. However, according to the current interpretation, titles are protected only by means of unfair competition law. Consequently, unpublished titles are not protected, and published titles are eligible for protection only if they have developed a secondary meaning in the public's mind so that their use by somebody else would most likely lead to confusion of the public[119].

(11) *Performance/Style*

Two different aspects of performance rights have to be considered: the live performance by an artist may be subject to copyright protection; and: the style of performance as the way he presents his performances (either live or in any other form) to the public may be protected by copyright law.

The Copyright Act of 1909 granted to the holder of a copyright the exclusive right to perform the copyrighted

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117 Harms, Inc. v. Tops Music Enterprises, Inc. of Cal., supra, note 86 at 81; compare Warner Bros. Pictures, Inc., v. Majestic Pictures Corp., [1934] 70 F.2d 310 (2d Cir.).

118 see Warner Bros.Pictures, Inc. v. Columbia Broadcasting Sys., Inc. [1951] 102 F.Supp. 141 (S.D.Cal.)

119 see Nimmer on Copyright, supra, note 7 at 2.16 (pages 2-189ff); Leeds Music Limited v. Robin [1973] 358 F.Supp. 650 (S.D.Ohio) at 660.

work publicly for profit (17 U.S.C. § 1 (e)). However, it did not make clear whether a performance could be subject to copyright or whether an artist could claim copyright protection for a certain style of performance.

Therefore, before the enactment of the Copyright Act of 1976 (effective January 1, 1978), copyrights in musical performances could not be based on statutory law. In consequence, such rights could only be protected by state common law. Under the new Copyright Act, live performances are copyrightable within the subject matter definition of section 102. Therefore live performances may be protected if they are fixed in tangible form. This requirement is satisfied if the performance is simultaneously recorded and transmitted over the airwaves[120]. Of course a further requirement is sufficient originality of the performance. Unrecorded live performances are not subject to protection under the Copyright Act of 1976[121]. They may, however, be protected by state law (while the Copyright Act of 1976 excludes common law copyrights from the scope of the Act, performances that are not fixed may be protected by common law rights). State law protection will require a property interest of the performer in his performance[122]. This property right depends - like protection under statutory copyright - on the originality of the creation and provides the performer with contractual control of his performance[123].

Central to the question, of whether a performance includes property rights necessary for state law protection

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120 see House Report, supra, note 23 at 52; see generally Meltzer, Amy R., "A New Approach to an Entertainer's Right of Performance" (1982) 59 Washington Law Quarterly 1269 at 1274.

121 see Meltzer, ibid. at 1274.

122 see Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp. [1950] 101 N.Y.S. 2d 483 (Sup.Ct.) at 497.

123 see Meltzer, supra, note 120 at 1279.

or whether it has originality sufficient to make it eligible for copyright protection under the Copyright Act is the expression of the performer's style[124]. Since a performance right is independent from possible rights in the performed work itself, it is in the performers style that the necessary originality has to be found. Therefore the discussion of the copyrightability of performances is likely to indicate an answer to the question, of whether the style of performance itself may be protected by means of copyright law.

Prior to the enactment of the new Copyright Act of 1976 the courts did not agree in their treatment of copyrights for performances. Several courts have denied artists' property rights in their performances.

In *Sinatra v. Goodyear Tire & Rubber Co.* the Court denied a property right to the performing artist in the performance[125]. The Court emphasized that the plaintiff did not own the copyrights in the song itself (lyrics, music, and arrangement) and therefore could only be protected by state unfair competition law. Applying the law of California, the Court denied unfair competition because no property rights had been infringed.[126]

The decision in *Boothe v.Colgate-Palmolive Company* followed the same principles[127]. The background of that case was the imitation of the way a well-known artist performed in a television comedy series. An imitation of

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124 see generally Lang, John Walton, "Performance and the Right of the Performing Artist" (1971) 21 ASCAP Cpyright Law Symposium 69 at 95; Welles v. CBS [1962] 308 F.2d 810 (9th Cir.) at 814.

125 Sinatra v. Goodyear Tire & Rubber Co. [1970] 435 F.2d 711 (9 Cir.) at 714ff.

126 compare Lahr v. Adell Chemical Co. [1962] 300 F.2d 256 (1st Cir.) at 259.

127 see generally Boothe v.Colgate-Palmolive Company [1973] 362 F.Supp. 343 (S.D.N.Y.).

her voice had been used in a commercial. The Court denied property rights to the artist in the performance, and therefore decided that the commercial did not represent unfair competition.

Although these cases were decided before the enactment of the new copyright law and did not expressis verbis consider the question of the copyrightability of the original performances, they did discuss possible property rights of the performers in order to determine whether the new use of the song infringed the existing performance under unfair competition law. Since in these decisions the courts did not recognize property rights in musical performances, it can be assumed that the courts would not have accepted performance copyrights in these cases as well.

On the other hand, several decisions have accepted the copyrightability of performances, or have at least treated performances as property rights that could be infringed under unfair competition law and therefore provided a common law foundation for a protection against imitation[128].

In *Capitol Records v. Mercury Records Corporation*[129] the Court held that the performance of a "musical composition" was a "writing" under article I, § 8 Cl.8 of the Constitution that had to be treated separately from the composition and could be treated as a common law property.

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128 see generally Gardella v. Log Cabin Products Co. Inc. [1937] 89 F.2d 891 (2d Cir.); Chaplin v. Amador [1928] 93 Cal. App. 358; Lennon v. Pulsebeat News, Inc. (1964) 143 U.S.P.Q. 309 (N.Y.Sup.Ct.); Columbia Broadcasting System, Inc. v. Spies [1970] 167 U.S.P.Q. 492 (Ill. Cir. Ct.); Capitol Records Inc. v. Erickson [1969] 2 Cal. app. 3d 526, 82 Cal. Rptr. 798; Lahr v. Adell Chem. Co. [1962] 300 F.2d 256 (1st Cir.) at 259; Lombardo v. Doyle Dane & Bernbach, Inc. [1977] 58 App. Div. 2d 620 at 622.

129 see Capitol Records, Inc. v. Mercury Records Corporation [1955] 221 F.2d 657 (2d Cir.).

The Court held that: "..the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a "composition" as an "arrangement" or "adaptation" of the score itself,.."[130]. The performer could make his performance a writing by interpreting a composition according to his or her own style.

Even the way of talking and presenting radio news has been held to be a form of art expression, and therefore was protected by common law rights[131].
Another case that discussed the question of whether an artist acquires rights in his artistic performance is *Gee v. CBS, Inc.*[132]. The subject of this decision was performances by the Blues-singer Bessie Smith between 1923 and 1933. The plaintiffs based their claim in part on the argument that Bessie Smith had obtained a copyright for her style of making the sound recordings.

The Court held that originally a singer's performance rights were excluded from protection, but that the new copyright law could have altered this situation. However, since federal law did not protect such rights of performance between 1923 and 1933, protection could only result from the application of state law. The Court concluded that the musical composition itself was an incomplete work that still had to be transformed into sound by the performer. In so doing the performer might well have contributed something of intellectual and artistic value. Therefore, the Court decided, that Pennsylvania law would

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130 Capitol Records, Inc. v. Mercury Records Corporation, ibid. at 664.

131 see Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc. [1964] 248 N.Y.S. 2d 809; compare King v. Mister Maestro, Inc. D.C. [1963] 224 F.Supp. 101.

132 Gee v. CBS, Inc. [1979] 471 F.Supp. 600.

recognize a property right in the unique style and manner of Bessie Smith's singing[133].

However, the Court also stated that the more restrictive New York law would not recognize such rights of the performer[134]. The granting of performance rights to artists under state common law should therefore be described as questionable[135].

The question of how a Court would have had to decide the case under the new statutory law has not been answered by those common law decisions. The performance or style of interpretation is not mentioned in section 102(a) of the Copyright Act of 1976. However, that silence does not mean that such a contribution of the performer could not be subsumed under the general expression of "works of authorship". On the contrary, the statement of the Committee on the Judiciary (though in the context of sound recordings) contemplates a copyrightability for such performances:

> "the copyrightable elements in a sound recording will usually, though not always, involve 'authorship'

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133 see Gee v. CBS, Inc., supra, note 132 at 658.

134 see Gee v. CBS, supra, note 132 at 660f.

135 The doctrine has argued in favor of such a copyright: see generally: Waxman, "Performance Rights in Sound Recordings" (1973) 52 Texas L.Rev. 42; Lang, supra, note 124 (including a detailed summary of the political developments prior to the 1976 Copyright Act); Kaplan, Benjamin, "Performer's Right and Copyright: The Capitol Records Case" (1956) 69 Harvard Law Review 409; Bass, Nathan, "Interpretive Rights of Performing Artists" (1938) 42 Dickinson Law Review 57 at 67f; Note: "Copyrights - Unfair Competition - Property Right of Performing Artist in Recorded Performance." (1936) 7 Air Law Review 122 at 124; critical: Liebig, Anthony, "Style and Performance" (1969) 17 Bulletin of the Copyright Society of the U.S.A. 40 at 46f (he, however critizises the protection of a mere style apart from the expression in the single performance).

both on the part of the performers whose performance is captured and on the part of the record producer."[136]

This indicates that the performance itself may include copyrightable elements and therefore the way or style of performance of an artist should be eligible for copyright protection, provided that the performance includes a certain amount of originality and - of course - that the performance is embodied in a physical form capable of being copied[137].

In this context it is necessary to distinguish between the performance and the style of an artist. The style is the general way one sings or acts and may also include identification with a certain dress, character, or mannerisms[138]. The style itself is just an idea and thus not eligible for copyright protection[139]. However, the style, like any idea, may be protected if it is included in a particular expression.
A performance can be characterized as a "particular rendition of a song or character that expresses the performer's style"[140]. Consequently, a style itself may only be protected if it is expressed in the particular performance[141]. Therefore, the style of performance (as

136 House Report, supra, note 23 at 56.

137 see generally Capitol Records, Inc. v. Mercury Records Corp. [1955] 211 F.2d 657 (2d Cir.) at 664; Waring v. Dunlea [1939] 26 F.Supp. 338 (E.D.N.C.); Nimmer on Copyright, supra, note 7 at 2.10[A].

138 see Chaplin v. Amador [1928] 93 Cal.App. 358 at 362; Estate of Presley v. Russen [1981] 513 F.Supp. 1339, 1364 (D.N.J.).

139 see Lang, supra, note 124 at 95 (he argues that otherwise Mondrian could have acquired a copyright in the neo-plasticism style and Picasso in the style of synthetic cubism); Meltzer, supra, note 120 at 1270; see Sinatra v. Goodyear Tire & Rubber Co. [1970] 435 F.2d 711 (9th Cir.) at 716.

140 Meltzer, supra, note 120 at 1270; Davis v. TWA [1969] 297 F.Supp. 1145 (C.D.Cal.).

141 see Meltzer, supra, note 120 at 1269.

expressed in the performance) is protected by copyright law if the usual requirements for copyright prctection are fulfilled. Besides the fixation requirement, it is necessary that the mode of interpretation and the style shown in the performance include a certain amount of originality. The fact that the style of performance may include such originality has been accepted.

As shown, the House Report implies a copyright protection for such performances that express the style of the performing artist. That interpretation is confirmed by the guidelines developed by courts before the enactment of the new Copyright Act of 1976 that realized that a single artist could influence the character of a composition through his technique of rendition.

Even clearer is the situation in new areas of music such as aleatory and indeterminate music. These are characterized by new, "open" forms of compositions that allow the performing artist to vary the individual performance and change the order of appearance of sounds in order to give the work an identity of its own at the moment of its realization[142]. Consequently, a number of factors are left to the discretion of the performer who thus influences the character of the whole composition and performs his personal interpretation of a vague or indeterminate composition. The situation is similar in the field of jazz music, where the improvisation of the

142 see generally Keziah, Dorothy Pennington, "Copyright Registration for Aleatory and Indeterminate Musical Compositions" (1970) 17 Bulletin of the Copyright Society of the U.S.A. 311 at 357; Goldstein, Paul, "Copyrighting the New Music" (1968) 16 ASCAP Copyright Law Symposium 1.

performing musician is a common standard[143]. The jazz musician "must literally compose music as he performs"[144].

There can therefore be little doubt about the fact that the style or technique of interpretation that certain artists have developed may include enough originality to regard their performances as separate copyrightable works. The development of one's own sound or style does not usually take a long period of time combined with personal and financial expenses. "A successful performer's musical signature or style is often as unique and recognizable as a face, a name, or a character, all of which are today afforded some degree of protection"[145].

"Yet, to assert that Dame Margot Fonteyn, Enrico Caruso, or Jascha Heifetz is less a creator or artist than Burt Bacharach, Norman Mailer, or Andy Warhol would be to engage in a futile and perfunctory exercise, as the measure of creativity is imponderable."[146]

In consequence, the style or mode of performance of an artist should be regarded as a work of authorship according to section 102(a) of the Copyright Act, and will be protected by statutory copyright law if the further requirements of statutory copyright protection are fulfilled (especially distinctiveness and fixation in

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143 see generally Nelson, Marshall J.,"Jazz and Copyright: A Study in Improvised Protection" (1974) 21 ASCAP Copyright Law Symposium 35 at 36: "improvisation is the one form of musical composition in which the composer has no guaranteed rights"

144 Nelson, Ibid. at 27.

145 Salvo, Joseph P., "Commercial Sound-Alikes: An Argument for a Performer's Cause of Action" (1988) 62 St. Johns Law Review 667 at 702; see generally Phillips, Jill A., "Performance Rights: Protecting a Performer's Style" (1991) 37 The Wayne Law Review 1683 at 1694; Benjamin, Linda, "Tuning Up the Copyright Act: Substantial Similarity and Sound Recording Protections" (1989) 73 Minnesota Law Review 1175 at 1201.

146 Lang, "Performance and the Right of the Performing Artist" supra, note 124 at 73.

tangible form)[147]. This seems to be an appropriate solution to the problem, especially when one considers the creative efforts and artistic talents many performers have developed.

However, not every new sound-alike performance will infringe existing copyrights in a certain style of performance. Performers borrow vocal styles from other artists all the time, and should be allowed to do so as long as there is no obvious intention to participate in the popularity and success of the other artist[148]. Such intention can be assumed if not only the style is copied, but this copying is also done during the performance of a composition that has been interpreted by the other artist in his typical style before. And - of course - infringement has to be considered when the imitation is done with the obvious intent to make the listener believe that the 'original' artist was performing, for example in a radio or television commercial[149]. Finally, it has to be emphasized that not every similarity in voice or sound will infringe a copyright in a performance[150], but only the intentional imitation of such a way of interpretation, provided that this performance is clearly distinct from an average

147 Important for the protection of live performances is the interpretation that such performances are considered to be fixed in tangible form, if it is simultaneously recorded and transmitted over the airwaves, House Report, supra, note 23 at 52.

148 see generally Pareles, John, Her Style is Imitable, but It's Her Own, New York Times, Nov. 12, 1989, § 2, at 30; Phillips, supra, note 145 at 1692ff.

149 see Midler v. Ford Motor Co. [1988] 849 F.2d 460 (9th Cir.).

150 see Meltzer, supra, note 120 at 1291.

performance and thus represents a copyrightable work of authorship[151].

(12) Lyrics/words

Section 102(a)(2) of the Copyright Act of 1976 expressly includes any accompanying words under the category of musical works of authorship. Consequently, any copying of music and words together will be regarded as an infringement. Furthermore, this provision also protects the words of a composition without the music. This may not be stipulated "expressis verbis" in section 102(a)(2), but there would have been no need for the legislator to mention the words of a composition if the intention was only to protect them in combination with the music. This interpretation is in accordance with section 3 of the Copyright Act of 1909, in which it was stipulated that the copyright "..shall protect all the copyrightable component parts of the work copyrighted,...".
The courts have accepted this interpretation[152]. Not only are not only the words of a song as a whole protected, but parts thereof are also protected, if they can be regarded as a significant and identifiable part. In Karll v. Curtis Pub. Co. an eight-line chorus was cited in a newspaper

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151 compare Chester-Taxin, Sharon, "Will the Real Bette Midler Please Stand Up? The Future of Celebrity Sound-Alike Recordings" (1992) 9 Entertainment & Sports Law Review 165 at 177, who refers to Pareles, supra, note 148 at 30, with the vision of "Bob Dylan ... filing suit against Bruce Springsteen, John Cougar Mellencamp, Lou Reed, Roger McGuinn, Elvis Costello, Graham Parker, Steve Forbert, and Elliott Murphy ... [and] winning a huge settlement - and then being forced to hand it over to the estates of Hank Williams, Blind Lemon Jefferson, Buddy Holly, Woody Guthrie, Elvis Presley and jalf a dozen obscure blues singers for imitating their vocal and musical sounds."

152 see generally Witmark & Sons v Standard Music Roll Co. [1914] 213 Fed. 532 (D.N.J.) at 534; Stratchborneo v. Arc Music Corp. 357 F.Supp. 1393 (S.D.N.Y.).

article[153]. The Court did not doubt the possibility of infringement by the citation of such a part of the original song, but regarded the use as justified as a "fair use"[154].

In addition, the words of a composition may be protected as 'literary works' [section 102(a)(1)]. Protection as a literary work offers the advantage that - other than in case of a musical work - the exclusive reproduction rights granted by section 106 (1) of the Copyright Act are not subject to compulsory licensing under section 115 of the Act.

Doubt may exist as to whether such immunity as a lyrical work is lost through combination with music. Nimmer has demonstrated that both alternatives are arguable: the section 115 compulsory license may be invoked only as to the music while the words remain protected as a literary work; or, the words may lose their immunity when combined with the music. The third solution offered by Nimmer is to treat the combination of words and music as a form of compilation with the consequence that copyright protection in the pre-existing material is not affected (section 103(b) Copyright Act of 1976)[155]. Although there are good arguments for all these interpretations, I believe that only the second one will lead to reasonable results. The words should not be treated separately from the music and have to be governed by the same rules as the music. Otherwise the compulsory license of section 115 of the Act would be applicable only to an instrumental version of the song. That would lead to the consequence that artists were not allowed to perform the vocal part of a musical work without the consent of the owner of the copyright. Since

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153 see Karll v. Curtis Pub. Co. [1941] 39 F.Supp. 836 (E.D.Wisc.).

154 see ibid. at 837; compare Broadway Music Corporation v. F-R Pub. Corporation [1940] 31 F.Supp. 817 (S.D.N.Y.) at 818.

155 see Nimmer on Copyright, supra, note 7 at 2.05[B].

section 115(a)(2) prohibits any changes in the fundamental character of the work and only grants the right to adapt a work to the style and interpretation of the performer, a performance with new words would also not be protected by a compulsory license. Therefore the right to a compulsory license would be reduced to the right to an instrumental performance of a work, which usually is of no interest to the artist.

Consequently I believe that section 115 of the Copyright Act of 1976 has to be interpreted in a way that a compulsory license under section 115 covers not only the music but also the words of a musical composition. Of course this does not mean that at the same time the exclusive right of the author in the words separate from the music is lost. A poem that has been combined with music as a musical work will still be protected as a poem and become subject to a compulsory license only when performed with the music, because in this combination it has changed its character and has to be regarded as a part of a song.

(13) Sound Recordings

Sound recordings of musical compositions are eligible for copyright protection[156]. That protection exists in addition to the protection of the copyright in a musical composition or a possible copyright of an artist in his performance. The possible infringement of an existing copyright in a sound recording has to be considered in addition to an infringement of the copyright of the owner of the rights in the composition itself if the possibly infringed song has been published as a sound recording. Since the purpose of this paper is the analysis of the

156 17 U.S.C. 102(7), see also Section 114 of the Act.

protection of musical compositions, additional protection as a sound recording will not be considered in detail[157].

2. Persons entitled to Copyright

a) Principle

According to section 201(a) of the Copyright Act, the copyright in a protected work vests initially in the author or authors of the work. The author usually is the person who creates the work[158]. If the creation occured during the term of employment as a work made for hire, the employer (or other person for whom the work was made) will own the copyright unless otherwise agreed between the parties[159]. The ownership of a copyright is transferable as a whole or in part[160].

b) Rights of the Composer

Usually the composer of a musical composition will be the creator and therefore the owner of all copyrights that may exist in the composition. While under the Act of 1909 a statutory copyright was activated only after registration or publication (provided that publication included the necessary copyright notice), the current 1976 Act requires

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157 For a description of the protection of sound recordings, see: Nimmer on Copyright, supra, note 7 at 2.10[A]; Wagner-Silva Tarouca, Beatrice, Der Urheberschutz der ausübenden Künstler und der Tonträgerproduzenten in den USA (München: Beck, 1983).

158 see Community for Creative Non-Violence v. Reid [1989] 109 S.Ct. 2166 at 2172.

159 17 U.S.C. 201(b).

160 17 U.S.C. 201(d).

only the act of creation and fixing. However, the date of publication may still be important under current copyright law, since it will help to fix the copyright term for anonymous and pseudonymous works if the name of the author is not mentioned in the records prior to the expiration of the term[161].

The importance of ownership of the copyrights in musical compositions becomes apparent in cases where music is made for hire. The general rule according to section 201(b) of the Act is that in such cases the employer will own all copyrights while the composer has no right to exploit his own work. This problem has been discussed extensively in connection with *Bernstein v.Universal Pictures, Inc.*[162]. That case was an antitrust class action brought by seventy-one composers and lyricists against sixteen television and film production companies. The primary goal of the action was renegotiations of existing contracts between the companies and the composers. According to those contracts (labour agreements between the Composers and Lyricists Guild of America - CLGA - and the entertainment industry) the composers of music or lyrics had no rights in their compositions written for the producers. They not only obtained no copyright in their work, but also had no right to use the composition even if the producer decided not to use it or even to destroy it[163]. Since the settlement of the case after the conclusion of a modified contract between composers and producers, the composers were given at least a limited right to exploit their compositions in the market. The case shows the general principles of composer's and producer's

161 see Kintner, supra, note 4 at 343.

162 Bernstein v. Universal Pictures, Inc. [1979] 72 Civ. 542-CLB.

163 see generally Havlicek, Franklin J., Kelso, J.Clark, "The Rights of Composers and Lyricists: Before and after Bernstein" (1984) 8 Art and the Law 439 at 440ff.

rights, as well as the economic reality for many composers. While the composer as the creator of compositions usually owns all rights in his works, he often will have to transfer them to third parties to earn his living. On the other hand, the producer is free to exploit the music in the way he considers to be best or even not to exploit it at all. The situation of composers prior to the Bernstein case had therefore not changed since the days of Mozart, who also depended on the commission of his patrons and in return gave away his compositions[164]. For *Le Nozze di Figaro*, for example, he received an estimated $ 200, and could not participate in the later success of the work[165].

The success of the composers in the Bernstein case was based mostly on the change of their work conditions. Since they worked in their own studios with their own equipment, they were considered to be independent contractors with the consequence that the producers did not profit from the labour exemption in the antitrust law. Their behavior was therefore regarded as an inadmissible monopolization under antitrust law[166]. Changing work conditions have led not only to new rights for the producers in the motion picture business but also to a tendency amongst producers to exploit copyrights more carefully and, if possible, even separately from movie or television programme. Of course this settlement is not binding for courts that have to decide in this area, but it surely has shown a tendency to grant exploitation rights to a composer even if he has transferred his copyrights to his employer or a third party.

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164 since there existed no copyright protection, he only could have negotiated a contractual protection.

165 see the example given by Havlicek and Kelso in "The Rights of Composers and...", supra, note 163 at 439.

166 see Havlicek, Kelso, "The Rights of Composers and Lyricists..", supra, note 119 at 121.

Besides the general rights in music protected by copyright law[167] the courts will protect a composer especially against the omission of his name[168] and against a false attribution of authorship[169].

c) Rights of the Producer

The rights in a musical composition belong to the person who created the work, the composer. Of course he is free to transfer his rights. Often he will transfer his copyrights in the composition to his record company or to the producer of the recording of his song.

Apart from rights in the musical composition (that may have been transferred to him by an artist) the producer of a record may claim authorship for his part of the production[170]. According to the House Report:

> "The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording."[171]

Therefore the producer of the sound recording of a musical composition will obtain a copyright for the compiling and

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167 see supra III 1. d)

168 see generally Harms, Inc. v. Tops Music Enterprises, supra, note 86 at 83.

169 see generally Harms, Inc. v. Tops Music Enterprises, supra, note 86 at 83; D`Altomonte v. New York Herald Co. [1913] 208 N.Y. 596.

170 see Nimmer on Copyright, supra, note 7 at 2.10[A][2][b].

171 House Report, supra, note 23 at 56.

editing of the recorded sounds[172]. He does not, however, acquire any rights in the original composition.

In this context it has to be discovered, who is the person responsible for the "capturing and electronically processing" and the "compiling and editing" of the sounds. Usually this will not be the person known as 'the producer' of a recording, but one or a number of sound technicians or sound engineers. If the production fulfills the requirements of eligibility for copyright, these persons will be the creators of the work that is represented in the production. However, in most cases the record producer will acquire these copyrights by virtue of an employment for hire relationship[173].

d) Rights of the Performer

The artist performing a musical work usually not only performs a given sequence of neutral sounds, but interprets the notes in his personal way by emphasizing or shading notes and timing or changing the tone of his voice. As shown above, this personal interpretation of a composition and the style of a performance is eligible for copyright protection[174]. The rights of the performer acquired through the performance are not to be confused with the right to perform a copyrighted composition. This will be discussed subsequently[175].

172 see Innovative Concepts in Entertainment, Inc. v. Entertainment Enterprises Ltd., [1983] 576 F.Supp. 457 (E.D.N.Y.).

173 see generally Nimmer on Copyright, supra, note 7 at 2.10[A][2][b].

174 see supra, III 1. d) 11).

175 see infra, IV 3.

IV FORMS OF USE

There is a variety of different forms of uses of preexisting musical material that are subject to copyright protection. Depending on the circumstances of the case, each of those uses may be an infringement of protected rights or may profit from an exemption. Several exemptions may justify the use of copyrighted material without the consent of the copyright owner (the most important exemption is the "fair use doctrine" of section 107 of the Act; others are included in additional statutory exemptions or have been developed by the courts, like the defense of unclean hands). This chapter will first discuss the acceptability of copying a preexisting work. The next part will look at the situation for parodies, satires, and burlesques that are based on other compositions. The third part discusses the problem of a performance of copyrighted music including a variety of statutory exemptions. Finally, forms of use such as the reproduction and distribution right are examined.

1. Copying

According to the 'Constitutional Provision Respecting Copyright' copyright law has to secure to authors and inventors the exclusive right to their respective writings and discoveries. If a copyrighted work is copied by another party ("plagiarism") this will usually effect these exclusive rights and therefore constitute an infringement of the existing copyright.

Since copyright law does not grant monopoly rights and an independent creation of a similar work does not

represent a violation of existing copyrights, "copying" has to be defined and the requirements to prove copying have to be specified. Furthermore, the use of a preexisting work may be allowed under the 'fair use' exemption.

In *Arnstein v. Porter*[176], probably the most influential musical copyright infringement case, the Second Circuit Court of Appeals developed a copyright infringement test that since then has been applied by most courts in music infringement cases. The rule developed by the Court provides that in addition to proving his ownership of the infringed work the copyright owner has to prove copying of his work. If he is able to establish such prove, the other party is held to have infringed the prior work unless he can show that the copying constitutes a "fair use"[177].

Since direct evidence of copying is rarely available[178], the courts have held a work to be a copy of a preexisting work if the plaintiff could show that the defendant had access to the original version of the work and that both versions were similar[179]. There can be no

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176 Arnstein v. Porter [1946] 154 F.2d 464, affirmed: 158 F.2d 795.

177 see Kintner, supra, note 4 at 416.

178 see generally Plymouth Music Co. v. Magnus Organ Corp. [1978] 456 F.Supp. 676 (S.D.N.Y.), were the Court found that exact identity of the compositions established copying by the defendants (page 679).

179 see generally Kintner, supra, note 4 at 416; Nimmer on Copyright, supra, note 7 at 13.01.(b); Fisher Inc. v. Dillingham [1924] 298 F.2d 145 (S.D.N.Y.); Stratchborneo v. Arc Music Corp. [1973] 357 F.Supp. 1393; Northern Music Corp. v. King Record Distributing Co., supra, note 27; Broadcast Music, Inc. v. Moor-Law, Inc. [1980] 484 F.Supp. 357; Twentieth Century-Fox Film Corp. v. Dieckhaus [1946] 153 F.2d 893 (8th Cir.); Baxter v. MCA [1987] 812 F.2d 421 (9th Cir.); Arnstein v. Porter [1946] 154 F.2d 464, affirmed: 158 F.2d 795; Osterberg, Robert C., "Striking Similarity and the Attempt to Prove Access and Copying in Music Plagiarism Cases" (1983) 2 Copyright, Entertainment and Sports Law 85; Giannini, Maura, "The Substantial Similarity Test and its Use in Determining Copyright Infringement through Digital Sampling" (1990) 16 Rutgers Computer & Technology Law Journal 509 at 516ff.

infringement without copying, and there cannot be copying without access[180].

Just as it is nearly impossible for a copyright owner to prove direct copying, it will be difficult to prove access in the sense of actual viewing and knowledge of the preexisting work[181]. Courts are therefore usually satisfied with the proof that the other party had a reasonable opportunity to take notice of the preexisting work[182]. Such a reasonable opportunity can be assumed if the party claiming an infringement can demonstrate a "channel of communication"[183] between its own and the other party's work. Such a "channel of communication" can be seen in personal relationships between author and infringer or any other connections that may have enabled the alleged infringer to notice the original work. In Northern Music Corp. v. King Record Distributing Co., the Court found the similarities between two songs were not mere coincidence in view of the personal relationship of author and infringer[184].

Because of the high probability that an interested artist will notice most publications in his area of

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180 see Twentieth Century-Fox Film Corp. v. Dieckhaus, supra, note 179.

181 However, some courts have used that definition as a standard to prove copying: see: Bradbury v. Columbia Broadcasting Sys., Inc. [1961] 287 F.2d 478 (9th Cir.); Cantor v. Mankiewicz [1960] 203 N.Y.S. 2d 626 (Sup. Ct.); Schwarz v. Universal Pictures Co. [1949] 85 F.Supp. 270 (S.D.Cal.).

182 see Ferguson v. National Broadcasting Co. [1978] 584 F.2d 111 (5th Cir.); Universal Athletics Sales Co. v. Salkeld [1972] 340 F.Supp. 416 (W.D.Pa.); see Nimmer on Copyright, supra, note 7 at 13.02 (A).

183 see Brent, Debra Presti, "The Successful Musical Copyright Infringement Suit: The Impossible Dream" (1990) 7 Entertainment & Sports Law Review 229 at 234f; Nimmer on Copyright, supra, note 7 at 13.02(A).

184 see Northern Music Corp. v. King Record Distributing Co., supra, note 27 at 398f.

interest, a connection between an original work and an infringing work may also be inferred if the preexisting work has been published extensively[185]. In Stratchborneo v. ARC Music Corp. the Court held the fact that the preexisting versions were sold widely in the field of music in which the other party was engaged and were broadcasted, was sufficient to show access[186].

In today's music market this interpretation will make it rather easy to establish proof of access. Most musical works are extensively published and broadcasted, and for the more successful artists national boundaries do not seem to exist anymore. It will therefore not be difficult to fulfill these requirements and prove a reasonable possibility of notice. Only if a composition received local recognition will the plaintiff have difficulty proving access. In *Selle v. Gibb* the plaintiff had to admit that his composition had been played publicly on only two or three occasions in a limited local area while none of the defendants (Bee Gees) or any of their staff member was in that area[187]. However, the little difficulties that courts usually have to assume access show that such cases will remain exceptional.

In view of the large amount of publications it should be considered whether the broad understanding of the term "access" should not be interpreted in a more narrow way. Maybe it would lead to more realistic results to base the interpretation not only on the fact of extensive publishing but to require an extensive publishing at least in the area of music in which the alleged infringer is working.

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185 see generally Kintner, supra, note 4 at 416; Stratchborneo v. Arc Music Corp., supra, note 179 at 1403; Marks Music Corp. v. Borst Music Publishing Co. [1953] 110 F.Supp. 913 (D.N.J.); Cholvin v. B. & F. Music Co. [1958] 253 F.2d 102 (7th Cir.).

186 see Stratchborneo v. Arc Music Corp., supra, note 179 at 1403.

187 see Selle v. Gibb [1984] 741 F.2d 896 (7th Cir.).

The next requirement is proof of similarity between both works. Usually the courts require proof of at least "substantial similarity" in connection with proof of access[188]. Recent developments favour the term "probative similarity"[189] instead. However, the practical importance of this discussion should not be overestimated, since the judge still has to decide the same problem: do both compositions appear to be that similar that he (as an average listener) has the impression that the second work has been created in this way only because of the influence of the preexisting one. The decision, whether two compositions have such a degree of similarity that an average listener will not have any reasonable doubts that the one version has been copied from the other, will also have to take account of additional factors such as the defendant's training and experience or his former conduct (including the possible existence of other cases of copying)[190].

Similarity and access should not be treated as separate terms, but rather as two factors that may influence each other's interpretation. Some courts have decided that similarity even in details of complicated works ("striking similarity") will be sufficient proof of copying even if

188 see Kintner, supra, note 4 at 417; Ferguson v. National Broadcasting Co., supra, note 182.; Schwarz v. Universal Pictures Co. [1945] 85 F.Supp. 270 (S.D.Cal.) at 272; Nichols v. Universal Pictures Corporation [1930] 45 F.2d 119; Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp. [1977] 562 F.2d 1157 (9th Cir.).

189 see generally Latman, Alan ""Probative Similarity" as Proof of Copying: Toward Dispelling some Myths in Copyright Infringement" (1990) 90 Colum. L. Rev. 1187.

190 see Nimmer on Copyright, supra, note 7 at 13.01(B); usually these factors will be part of the defendants claim of independent creation.

access is not obvious[191]. In such a case, striking similarity may suggest access and, in the result, these cases will be treated as if copying had been proven directly. Therefore obvious similarity may lower the degree of probability necessary to establish access. However, one has to be careful to turn this rule into its contrary, because even obvious access will not replace the requirement of at least a certain degree of similarity.

Similarity has to be established in parts of the music that are subject to copyright, and the party claiming the infringement has to be the owner of that copyright. If the defendant can show that the plaintiff himself has no valid copyright in his composition (maybe he even copied from the same original work from which the defendant copied), an infringement of the plaintiff's work is not possible.

Not every copying of parts of existing works will constitute an infringement. In general, more than simply a de minimis fragment has to be copied to establish the necessary substantial similarity between both works. If such a degree of similarity is not apparent and the defendant does not confess the fact of copying, the plaintiff would - in most cases - have difficulties proving copying anyway.[192]

The defense of "fair use" will be dealt with in detail subsequently during the discussion of cases of use of preexisting works.

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191 see Arnstein v. Porter, supra, note 176 at 468; Stratchborneo v. Arc Music Corp., supra, note 179 at 1403; Baxter v. MCA, Inc. [1987] 812 F.2d 421 (9th Cir.) at 423; Ferguson v. National Broadcasting Co., Inc., supra, note 182 at 113; see Nimmer on Copyright, supra, note 7 at 13.02(b) at note 19; Osterberg, supra, note 179 at 87ff; Giannini, supra, note 179 at 520ff.

192 see generally Giannini, supra, note 179 at 520f; for details on the scope of protection of musical works see supra III 1.d).

2. Parody, Satire & Burlesque

The treatment of parody and related uses such as satire or burlesque represents one of the most problematic areas in current copyright law. The character of parody usually requires a certain similarity with the work of the original author and therefore is likely to cause conflicts with the rights of the owner of the copyrights in the original composition.

A parody can be defined as:
"the exaggerated imitation of a work of art or the imitation of the substance and style of a particular work of an author transferred to a trivial or nonsensical subject"[193].
A satire "is a work which holds up the vices or shortcomings on an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly."[194]
And a burlesque has been described as "an imitation distorting or mocking the original work by comic extremes"[195].

To what extent may parody, satire or burlesque refer to existing works, and under what circumstances is the parodist in danger of infringing existing copyrights?[196]

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193 Braithwaite, William J., "From Revolution to Constitution: Copyright, Compulsory Licences and the Parodied Song" (1984) 18 University of British Columbia Law Review 35 at 62; compare MCA, Inc. v. Wilson, [1976] 425 F.Supp. 443 (S.D.N.Y.) at 453.

194 Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod., [1979] 479 F.Supp. 351 at 357.

195 ibid.

196 In spite of the differences between these forms of expression they shall be treated interchangeable unless otherwise required with regard to a particular interpretation.

According to the copyright clause of the Constitution, one of the aims of U.S. copyright law is to promote the progress of science and the useful arts[197]. Therefore a copyright gives the artist (or the owner of the copyright) the power to control the reproduction of his work in order to ensure him a sufficient financial return. However, it does not give him an absolute monopoly. His exclusive rights as the owner of a copyright are subject to certain restrictions. The Copyright Act does not privilege purposes such as parody, burlesque, or satire. However, parody is treated under the fair use exemption of section 107 of the Copyright Act.

The fair use doctrine gives other persons the right to use a copyrighted work without the authorization of the copyright owner for purposes such as criticism, comment, news reporting, teaching, scholarship, or research[198]. The fair use question has been called "the most troublesome of the whole law of copyright"[199] and has led to extensive discussions. A "fair use" does not have to be limited to the purposes listed in section 107 of the Act[200]. Therefore, the fair use clause may be applicable for parodistic uses[201]. With regard to the terminology used in the Copyright Act, these forms of use[202] can be seen as a

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197 U.S. Constitution art. I, § 8, cl. 8.

198 17 U.S.C. section 107.

199 Dellar v. Samuel Goldwin, Inc. [1939] 104 F.2d 661 (2d Cir.).

200 House Report No. 1476, supra, note 23 at 65

201 see Clemmons, Melanie A., "Author v. Parodist: Striking a Compromise" (1987) 33 ASCAP Copyright Law Symposium 85 at 86.

202 In spite of the theoretical differences of parody, satire and burlesque (compare Yankwich, Leon R., (1955) "Parody and Burlesque in the Law of Copyright" 33 Canadian Bar Review 1130 at 1130f) these terms can be used and are often used interchangeable with regard to copyright infringements: see. MCA, Inc. v. Wilson, supra, note 193 at 453; Benny v. Loew's, Inc., [1956] 239 F.2d 532 (9th Cir.) at 533, Light, "Parody, Burlesque and the Economic Rationale for Copyright" (1979) 11 Conn. L. Rev. 615 at 616.

"form of social and literary criticism"[203] and will therefore be protected by the fair use doctrine if the further requirements mentioned in section 107 and developed by the courts are fulfilled[204].

To avoid abuses of this exemption not every form of parody, burlesque, or satire will be privileged by the fair use doctrine. According to section 107 of the Copyright Act the applicability of the fair use exemption has to be decided in each case with reference to:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (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 potential market for or value of the copyrighted work."

The most important factor is the amount and substantiality of the portion used[205]. Before the enactment of the new copyright law, but under the influence of the same principles, the Court decided in MCA, Inc. v.

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203 Berlin v. E.C. Publications [1964] 329 F.2d 541 at 545 (this definition was used for parody and satire but seems to be applicable to the same extent to burlesques).

204 see generally Yankwich, Leon R., "What is fair Use" (1954) 22 University of Chicago Law Review 203 at 212; Tyler, Duane, "Fair use doctrine defense to copyright infringement claim available to parodists only if copyrighted material is, at least in part, an object of the parody" (1982) 55 Temple Law Quarterly 1100; Braithwaite, William J., "From Revolution to Constitution: ..", supra, note 193 at 62 (including a comparison to the situation in Canada); Yankwich, Leon R., (1955) "Parody and Burlesque in the Law of Copyright" 33 Canadian Bar Review 1130 at 1145f.

205 Section 107(3) of the Copyright Act of 1976.

Wilson[206] that the law permits a more extensive use of a copyrighted work in the creation of a burlesque than in the creation of another work[207]. However, not every use of a preexisting work will be exempted by the fair use clause. If a parody or burlesque simply copies the substance of another work with a few variations, the fair use clause will not be applicable.

> "A writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text; but even in such cases, it is generally held that if he appropriates the fruits of another's labors, without alteration, and without independent research, he violates the rights of the copyright owner."[208]

In *Benny v. Loew's*, Inc. the defendant had copied a dramatic work practically verbatim and then presented it with actors walking on their hands and other grotesqueries[209]. The Court held that wholesale copying and publication of copyrighted material could never be fair use. Otherwise everybody could simply take over an existing work in its entirety, add some comic features, and publish it. The Court made clear that only the copyright owner has the right to use his work in such way and that the fair use exemption could never protect the copying of the substance of another's work[210].

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206 MCA, Inc. v. Wilson, supra, note 193.

207 see ibid. at 452.; compare Columbia Pictures Corp. v. National Broadcasting Co. [1955] 137 F.Supp. 348 (S.D.Calif.) at 354.

208 Benny v. Loew's, Inc., supra, note 202 at 536.

209 see Benny v. Loew's, Inc., supra, note 202.

210 see Benny v. Loew's, Inc., supra, note 202; compare Leon v. Pacific Telephone & Telegraph Co. [1937] 91 F.2d 484 (9th Cir.).

In *Berlin v. E.C. Publications, Inc.* the Court decided that parodies of popular songs that were written in the same meter but with different lyrics than the original songs were not infringements[211]. However, although the Court referred to the fair use exemption, it seems questionable that the parodies represented copies at all, since the Court stated that "the disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater"[212].

In *Columbia Pictures Corporation v. National Boradcasting Co.*[213] the Court had to decide if the telecast of the burlesque "From Here to Obscurity" infringed the original picture "From Here to Eternity". The Court emphasized that subsequent authors had the right to use protected material under the fair use doctrine and that the amount of material which could be used without infringement would vary in each case. The Court also listed the different factors to be considered in applying the doctrine: the character of the two works; the nature and object of the selections made; the quantity and value of the materials used; and, the purpose for which the use was made[214]. In the particular case of a burlesque of a motion picture the Court held that:

> "the burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued" and that "the law permits more extensive use of the protectible portion of a

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211 see Berlin v. E.C. Publications, Inc., supra, note 203.

212 Berlin v. E.C. Publications, Inc., supra, note 203 at 545; compare Seltzer, Leon E. Exemptions and Fair Use in Copyright (Cambridge, Mass.& London: Harvard University Press, 1978) at 43f [hereinafter Seltzer "Exemptions and Fair Use.."].

213 Columbia Pictures Corporation v. National Boradcasting Co. [1955] 137 F.Supp. 348.

214 see Columbia Pictures Corporation v. National Broadcasting Co., supra, note 213 at 354.

> copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works"[215].

Although the Court emphasized that the burlesquer would not be allowed to take over the entire work, he was allowed to take over some major characteristics that would help the public to identify the source of the burlesque.

The guidelines given by section 107 may not be applied separately. The amount of taking admissible will be influenced by the purpose and character of the use and the nature of the copyrighted work[216]. In *Loew's Inc. v. Columbia Broadcasting System*[217] the Court referred to the purpose of the use of the preexisting work. It stated that a broader scope would be permitted where the field of learning was concerned and a much narrower scope where the taking was solely for commercial gain[218]. The Court found that in the field of business competition the fair use exemption might be narrowed but still existed. On the other hand, a critic was allowed to quote extensively for the purpose of illustrating and commenting on his criticism, if he did not act for profit[219].

In another case the Court had to apply these principles on a musical parody. The jingle "I love New York" had been transferred into "I love Sodom" in a television broadcast sketch[220]. This case is particularly interesting because the parodist took only a sequence of four notes and the

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215 ibid.

216 Section 107(2) and (3) of the Act.

217 Loew's Inc. v. Columbia Broadcasting System [1955] 131 F.Supp. 165.

218 see ibid. at 176.

219 see ibid. at 176f.

220 see Elsmere Music, Inc. v. National Broadcasting Co., supra, note 108.

words "I love" from the original composition (altogether a 45-word lyric and 100 measures). Still, the Court found this use capable of rising to the level of copyright infringement because the part taken represented the heart of the composition and was easily recognizable as such. However, the Court held this use to be exempted by the fair use doctrine because it helped to further the overall satirical effect and was not that substantial a taking as to preclude the use from being a fair use[221].

This leads to the main problem of satire, parody or burlesque under copyright principles. All these forms of criticism will have the intended effect only if the public realizes the relationship with the original work. Therefore it usually is necessary to take over the key parts of preexisting works. With regard to parodies of musical works, this leads to the consequence that the parodist usually will use at least a considerable part of the music to identify the aim of his parody and criticism. To what extent such use will be exempted depends on the circumstances of the case. According to the guidelines that have been developed by the courts, the character of the works has to be regarded as well as the nature and object of the selections made and the quantity and value of the materials used. In case of a musical composition, the reference to the work at which the parody is aimed will usually be made by means of the music or the text although in particular cases an imitation of other particularities (like a special accent of an interpreter) may be sufficient. Most cases of parody are based on the preexisting melody and often include a new text, although the text will usually remind the listener of the preexisting words (by means of phonetic similarities or a

221 see Elsmere Music, Inc. v. National Broadcasting Co., supra, note 108 at 747.

related content). In order to direct the attention of the listener towards the similarities between the songs to emphasize the parodistic effect and to make clear where the critic is aiming, it is the basic characteristics of a composition (basic melody, refrain) that tend to be used in parodies and similar works. While the use of such parts usually will be regarded in copyright infringement cases as an indication of substantial copying that in return indicates infringement, the use of such parts will have to be tolerated under the fair use doctrine to make such criticism possible. However, the use of parts of the preexisting should be restricted to the extent necessary to "conjure up" the original[222].

Some courts seem to have used the terms "fair use" and "not substantial taking" synonymously[223]. It has to be emphasized that although the problem of whether a use constitutes a "fair use" may be related to the question of whether a copying has to be regarded as substantial or not, both terms may not be used interchangeably. A use does not become a fair one because it is an unsubstantial taking and a use will not be excluded from the fair use doctrine because the part taken is substantial. Such an interpretation would render the fair use doctrine meaningless "by equating it with copying which is insubstantial"[224]. If copying is insubstantial, it will usually not be regarded as an infringement at all, with the consequence that the fair use doctrine will not apply. On

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222 see Acuff-Rose Music, Inc. v. Campbell [1991] 754 F.Supp. 1150 (M.D. Tenn.) at 1156.

223 see Nichols v. Universal Pictures Corp. [1930] 45 F.2d 119 (2d Cir.) at 121; Twentieth Century Fox Film Corp. v. Stonesifer [1944] 140 F.2d 579 (9th Cir.); compare Light, Sheldon N., "Parody, Burlesque, and the Economic Rationale for Copyright", (1979) 11 Connecticut Law Review 615 at 626ff.

224 Light, "Parody, Burlesque, and the Economic Rationale for Copyright", supra, note 202 at 626.

the other hand, the fair use doctrine will apply only if copying was substantial enough to be regarded as an infringement. Fair use is technically an infringement of copyright that is allowed on the ground that the appropriation is reasonable and customary[225]. Of course there remains a certain interrelationship of both terms and the degree of substantiality may well be considered to determine if a use is eligible for an exemption under section 107 of the Copyright Act[226].

Another aspect often considered by the courts to define the scope of application of the fair use doctrine in connection with the purpose and character of a use is the intention of the author of a parody. Does he mainly wish to express criticism and does he understand his work as a kind of social statement, or is his motivation primarily a commercial one and does he want to profit of the popularity of an existing composition by creating a new 'comical' version of it[227]? Such intention is hard to prove, and economic success itself does not make a criticism inadmissible. On the contrary, the aim of a parodist usually is to attract broad publicity which in return is generally connected to a certain commercial success. In consequence, the criteria of a commercial purpose becomes unworkable in many cases[228]. Courts have reflected this development by exempting uses with obvious commercial purposes under the fair use doctrine[229].

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225 see generally Clemmons, supra, note 201 at 86 (note 11).

226 compare Benny v. Loew's, Inc., supra, note 202 at 536.

227 see Loew's v. Columbia Broadcasting Sys. [1955] 131 F.Supp. 165 at 181ff.

228 see generally Faaland, Susan L., "Parody and Fair Use: The Critical Question" (1981) 57 Washington Law Review 163 at 169.

229 compare Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., [1980] 626 F.2d 1171 (5th Cir.); Rosemcunt Enterprises, Inc. v. Random House, Inc., [1966] 366 F.2d 303 (2d. Cir.).

Another aspect to be considered with regard to the purpose and character of a use is the relationship between copyrighted material and parody. Is it necessary that the copyrighted material is the object of the parody, or will the fair use rule apply whether the parodist comments on the copyrighted material or not? Of course this problem is related to the question of whether a work represents a parody at all. A parody, satire, or burlesque is not created by merely achieving comical effects[230]. There must at least be a critical comment or statement about "the original perspective of the parodist - thereby giving the parody social value beyond its entertainment function"[231]. However, doubt may exist whether such comments have to include the original work or may be made in a general context.

In *Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod.* the Court made clear that not every comic use of a preexisting work could be protected by the fair use rule. A distinction was drawn between the comical interpretation of a work "just for laughs" and use to comment critically on the original work as a whole or a part of it (like the character of a person)[232]. The Court concluded that usually the parody or satire should parody that part of the original work which it copies. In cases of close parallels to an entire work, at least a majority of these parallels should include parodistic elements[233]. Other courts have

230 see Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod., supra, note 194 at 357.

231 Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod., supra, note 194 at 357.

232 see Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod., supra, note 194 at 358.

233 see Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op. Prod., supra, note 194 at 360.

followed that interpretation. In *MCA, Inc. v. Wilson*[234] the Court held that:

> "..a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general. However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up."[235]

A different interpretation was acopted by the Court in *Elsmere Music v. NBC*[236]. It held the parodistic version "I Love Sodom" to be protected by the fair use exemption although it did not seem to parody the plaintiff's copyrighted advertising jingle itself. The Court argued that the issue to be resolved was whether the use in question was a valid satire or parody, and not whether it was a parody of the copied song itself. The parody was aimed rather towards the City of New York and an advertising campaign for the City than the original song "I Love New York". However, the Court admitted that because of the extensive use of the jingle in connection with advertisements relating exclusively to New York City the song had become an anthem of the City and of the state itself[237]. Therefore there still existed a connection between the aim of the parody and the original song, and the song was held to be an appropriate target of parody with regard to the City of New York. Although the Court emphasized that a valid parody did not require "an identity between the song copied and the subject of the parody"[238],

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234 MCA, Inc. v. Wilson [1981] 677 F.2d 180.

235 id. at 185; compare Walt Disney Productions v. Air Pirates [1978] 581 F.2d 751 (9th Cir.) at 758.

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

237 see Elsmere Music, Inc. v. National Broadcasting Co., supra, note 108 at 746.

238 Elsmere Music, Inc. v. National Broadcasting Co., supra, note 108 at 746.

it still asked for a certain degree of relationship between the parody and the original to make this an appropriate target of the satirizing sketch.

The elements that may be addressed by parodies will depend on the character of the single work. Just as a parodistic criticism of a film may be adressed towards a variety of factors like the character of a person in this film or the arrangement of the plot, the parody of a musical work may be directed towards the content of the lyrics itself, a special way of performance or arrangement, an unusual rhythm, or even the performing artist[239]. The parody need not be directed solely to the copyrighted song but may also reflect life in general, if the song itself is at least a part of the parody[240].

The fourth factor given in section 107 aims at the relationship between both works in the market. Although an economic success itself should not automatically exclude a parody from the fair use exemption, it should on the other hand be ensured that - according to the Constitutional Provision Respecting Copyright - the copyright owner still has the exclusive right to his work and therewith the sole right to exploit his work economically. Section 107 (4) of the Copyright Act advises the courts to consider "the effect of the use upon the potential market for or value of the copyrighted work" in deciding whether a work is a fair use or an actionable infringement. Light has argued that a parody will harm the author of an original work only if it makes him lose some economic benefit and has concluded that

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239 see Bloom & Hamlin v. Nixon [1919] 125 Fed. 977 (C.C.); Green v. Minzensheimer [1909] 177 Fed. 286 (S.D.N.Y.); Green et al. v. Luby [1909] 177 Fed. 287 (S.D.N.Y.).

240 see Elsmere Music, Inc. v. National Broadcasting Co., supra, note 108; see Walt Disney Productions v. Air Pirates [1978] 581 F.2d 751 (9th Cir.) at 758 n.15; MCA, Inc. v. Wilson [1981] 677 F.2d 180 (2d Cir.) at 185.

only a parody that functions as a replacement or substitute in the market would represent an infringement not exempted by the fair use doctrine[241]. Therefore, only if the parodistic version competed with the preexisting work in the same market would it infringe the legitimate interests of the copyright owner in having a financial return out of the work. Consequently, only a parody satisfying the same market demand as the original could not be protected by the fair use exemption[242]. This commercial approach is not to be confused with possible economic consequences of an admissible criticism in form of a parody that may of course lead to a devastation of sales. Only if for an average customer both works become interchangeable ("substitution effect"[243]) can it be assumed that the subsequent production includes a too substantive part of the original to be privileged by section 107 of the Copyright Act.

The approach of Seltzer goes even further. He tried to develop a better manageable definition of the fair use doctrine[244]. He based his interpretation on a "dual-risk approach". Based on the assumption that fair use primarily involves the question of costs he concluded that the acceptability of a use should be judged with regard to the question of whether "a particular cost-free use is one both foreseen by the author and contemplated by the Constitution"[245]. Seltzer is of the opinion that the author wants society to use his works at least to the extent of a 'taking notice'. And as a consequence of the copyright

241 see generally Light, supra, not 202 at 634f.

242 see Light, supra, note 202 at 634; compare also the functional approach of Nimmer (Nimmer on Copyright), supra, note 7 at 13.05 [B]), who comes to similar results by defining a fair use as a use whose function is different from that of the source.

243 Faaland, "Parody and Fair Use: The Critical Question", supra, note 228 at 171.

244 Seltzer, "Exemptions and Fair Use..", supra, note 212 at 28ff.

245 ibid. at 29.

system created by society, the author combines this interest with certain economic expectations with regard to his work. Seltzer has further argued that on the other hand society does not understand the copyright as an exclusive right, but expects an appropriate opportunity for use by other authors in the future. According to Seltzers interpretation, it is up to the courts to decide between these two interests of access and financial return. Therefore the interpretation of fair use will be based on a definition of the "normal expectations" the author of a copyrighted work may have:

> "The author expects that the copyright scheme itself will sometimes require use of his work necessary in the public interest for which he will not be paid, and society expects that the copyright scheme will either allow such use without reducing the author's incentive or impose no excessive burdens on the public when use is controlled."[246].

Seltzer simplifies this problem to two basic questions that could help a judge to apply the fair use doctrine: Is the particular use within the risk the author was taking that he would not be paid? Is this use within the risk society was taking that the author would assert control of access?

I believe that although this may be a rather simplified approach towards the copyright system, it reflects the main interests of both authors and society. Copyright is a right with a commercial background. The aim of copyright law is the promotion of progress of science and useful arts by economic means. Therefore it seems just and appropriate to define the fair use doctrine from an economic point of view. This approach also reflects reality, since copyright

246 ibid. at 30.

infringement cases have developed in the direction of mere negotiations about royalties and of course the financial expectations will be the primary interests of copyright holders. Of course performing artists will consider other factors as well. With regard to the personal contribution every artist makes to his work it seems understandable that he requires consideration of not only his financial situation, but also of his personal role as an artist in society. However, it has to be emphasized that copyright law does not protect the artist's pride, and that personality rights have to be enforced by other means.

Seltzer's "economic configuration of the copyright scheme"[247] is based - like Light's approach[248] - on the economic interests of society and authors, and both interpretations will lead to similar results. If any new work based on a prior publication satisfies the same market demand as the original, this will usually not fall within the risk the author took that he would not be paid and in such a case society has to accept the control of access by the author. Therefore both approaches may be helpful in developing new interpretations of the fair use doctrine. However, doubt may exist as to whether the approaches of Light and Seltzer represent more manageable definitions of a fair use. In most cases it will not be possible for a judge to analyze the expectations of an author and society, or to look for an interchangeability of two products. It can be assumed that in those cases the judges will come back to the 'old-fashioned' way of evaluation and in addition look at the purpose and character of the use, nature of the works, amount and substantiality of the portion used and at the effect of the use upon the potential market while the interpretations of Light and

247 ibid. at 32.

248 compare Light, supra, note 202.

Seltzer may look more precise than the existing law, in the end they are only simplifications that will not exempt the judges from a precise analyzis of individual cases. Furthermore, both interpretations will not be able to solve all possible problems. It is doubtful whether concentration on the subjective expectations of the authors of copyrightable works or market replacement of existing works is sufficient to come to just solutions in each case. It will be difficult to determine which expectations an author could have with regard to further profits from his work[249]. On the other hand it seems clear that a parody may deprive the original author of potential economic reward without being regarded as a substitute in the market[250].

However, the economic approaches will (hopefully) help judges to focus on the essential demand of copyright law: the commercial interests of the parties.

In summary a parody, satire, or burlesque will be exempted by the fair use doctrine if it uses the preexisting work only to the extent necessary to recall or conjure up the original[251]. Since the purpose of a parody is to demonstrate a relation with another work, even a copying has to be accepted up to a certain degree. However, extensive copying will usually not be covered by the fair use doctrine. The parody of a musical work will usually be exempted if no more than the basic melody or one

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249 see generally Clemmons, supra, note 201 at 93.

250 ibid., however, Clemmons' suggestion (page 107f) to establish two new fair use criteria ("good faith" and "reasonable royalties") has to be rejected. It seems unrealistic and not practicable to oblige parodists to show a reasonable attempt to get the authors consent for the use of his work including a "commercially reasonable offer" and especially to assume a fair use only if the payment (or offer of payment) of a reasonable royalty can be shown. Such solution even is likely to conflict with the First Amendment.

251 see Berlin v. E.C. Publications, supra, note 203 at 545.

particularly typical part is used, if necessary even combined with a use of certain keywords of the lyrics to refer to the original.

If the parody has the intent or effect of fulfilling the demand for the original and the purpose of the parody is the use of the popularity of the original composition to participate in the financial return out of another artist's work rather than criticism in satirical form, the fair use rule should not be applicable at all. On the other hand, the commercial interest of the author of the parody does not automatically exclude the applicability of the fair use doctrine, but the courts will consider the question of whether a use was primarily for public benefit or for private gain[252]. Furthermore, a parody will have to include critical comments to be eligible for fair use protection. This criticism may be in a general context but has to have some connection with the original work that has been chosen to express the criticism.

The judge will have to consider carefully, in each case, whether according to the guidelines described above a parodistic criticism has to be tolerated under the fair use doctrine. Occasionally courts tend to protect interpretes or authors against any form of criticism or even make their decisions under the influence of the judges personal opinion with regard to the literary or moral quality of the parody[253]. Based on the assumption that satire, parody, or burlesque are forms of art as well that deserve protection under copyright principles in order to promote the progress of the art, the fair use doctrine should be interpreted

252 see generally MCA, Inc. v. Wilson, supra, note 193 at 182.

253 see generally Light, "Parody, Burlesque, and the Economic Rationale for Copyright", supra, note 202 at 635.

extensively. The "Critical Effect Test"[254] proposed by Susan L. Faaland may be a step toward a better future for parodists, although doubt may exist whether in the majority of cases an actual differentiation between satiric and merely comic effects will be possible. On the other hand, it seems reasonable to give authors a certain degree of protection and to keep in mind that most parodists are capitalizing on the already established public recognition of the work of another author[255]. It cannot be expected that courts will change their reasoning in the near future. This may also be seen as an indication that the solution provided under section 107 of the Copyright Act, though far from being perfect, has proven to be at least a compromise that enables courts to apply vague rules to a large variety of individual cases. However, the search for a new definition of the fair use exemption may hopefully help to develop the awareness that copyright protection is not a question of the personal literary taste of a judge or even of the pride of parodied authors, but rather of economic values[256].

3. Performance

The conditions under which the performance of a musical work itself may be eligible for copyright protection were reviewed above. This chapter deals with the question of

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254 Faaland, "Parody and Fair Use: The Critical Question", supra, note 228 at 188f.

255 see generally Casey Del Casino, F., "The Potential Harm of Musical Parody: Toward an Enlightened Fair Use Calculus" (1989) 6 University of Miami Entertainment and Sports Law Review 35 at 59.

256 see Faaland, "Parody and Fair Use: The Critical Question", supra, note 228 at 191; Light, "Parody, Burlesque, and the Economic Rationale for Copyright", supra, note 202 at 635; see MCA, Inc. v. Wilson [1981] 677 F.2d 180 (2d Cir.) at 186. (Mansfield, J., dissenting).

whether and to what extent a protected work may be performed publicly without infringement of existing copyrights. According to section 106(4) of the Copyright Act, the copyright owner has the exclusive right to perform the protected work publicly. There is no such right for sound recordings [section 114(a) of the Act]. Unlike the 1909 Act[257], the Copyright Act of 1976 provides a definition of the term "perform". To perform a work means; "..to recite, render, play, dance, or act it, either directly or by means of any device or process"[258]. The medium or equipment used to 'play' the work is not of importance. The broadcasting of a song, for example, will represent a performance of that work[259] and has to be distinguished from the live performance of a musician at the radio station[260]. A radio signal that is picked up by a restaurant owner to entertain his public remains a performance of the broadcaster, the 'turning on' by the restaurant owner does not represent a performance[261]. A live performance of a musician in a club is treated like the performance of a mechanical reproduction by a "juke box"[262].

Section 106(4) of the Copyright Act limits the exclusive performance right of the copyright owner to

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257 for an overview over the definition of "performances" in public broadcasting under the old Act see Cardwell, Suzan Kay, "Music and the Courts: Copyrights" (1975) 27 Baylor Law Review 331.

258 Section 101 of the Copyright Act "perform".

259 see Schumann v. Albuquerque Corp. [1987] 664 F.Supp. 473 (D.N.M.).

260 see ibid.; see Nimmer on Copyright, supra, note 7 at 8.14 [B] (note 27).

261 see Jerome H. Remick & Co. v. General Electric Co. [1926] 5 F.2d 411 (6th Cir.); Buck v. Debaum [1929] 40 F.2d 734 (S.D.Cal.); Twentieth Century v. Aiken [1973] 356 F.Supp. 271 (W.D.Penn.); Cardwell, Suzan Kay, "Music and the Courts: Copyrights" (1975) 27 Baylor Law Review 331 at 338.

262 see Big Sky Music v. Todd / Cayman Music, Ltd. v. Todd [1974] 388 F.Supp. 498.

'public' performances. To perform 'publicly' means:

> "(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of a device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[263]

The definition given by the Copyright Act of 1976 makes clear that even performances not open to the general public but only to a specific group of people are 'public'. Therefore performances in clubs, schools, factories and similar places are public performances under the Copyright Act[264].

Even if an insubstantial number of people attend a performance it will still be considered a 'public' performance if a substantial number of people could have attended the performance[265]. According to the Copyright Act this can be assumed if a work is performed "at a place open to the public"[266].

In connection with the calculation of copyright remuneration it is of importance, if several infringing

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263 17 U.S.C. 101.

264 see generally House Report, supra, note 23 at 64, compare Fermata Intern. Melodies, Inc. v. Champions Golf Club, Inc. [1989] 712 F.Supp. 1257 (S.D.Tex.) at 1260; for the situation prior to the new Act, see Twentieth Century Music Corp. v. Aiken [1974] 500 F.2d 127 (3rd Cir.).

265 see Nimmer in Casebook, supra, note 46 at 207.

266 17 U.S.C. 101 "publicly".

actions that have infringed the same work have to be treated as different infringements or if these different acts are to be treated as one infringing act. An example is the performance of one work during several concerts of one tour. With regard to the rule, that the minimum amount of statutory damages has to be given for every infringing act, the definition of that infringing act is of significant importance for the total amount of remuneration.

Under the 1909 Act the courts held repeated infringements of the same work to be different infringements if the intervals between the succeeding publications were substantial[267]. If, however, these intervals were merely a matter of days or shorter periods the courts tended to hold such publications as parts of one infringement requiring one single damage award[268]. Under the Copyright Act of 1976 such infringements are regarded as one infringing act, and the copyright owner may recover one minimum sum "for all infringements involved in the action, with respect to any one work"[269].

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267 see generally L.A.Westermann Co. v. Dispatch Printing Co. [1919] 249 U.S. 100; Cory v. Physical Culture Hotel, Inc. [1944] 14 F.Supp. 977 (W.D.N.Y.); Baccaro v. Pisa [1966] 252 F.Supp. 900 (S.D.N.Y.); Blackman v. Hustler Magazine, Inc. [1985] 620 F.Supp. 792 (D.D.C.); see Christiansen, Jay D., "Copyright - Damages - The owner of the performance Rights in a Dramatico-Musical Must Receive At Least the Minimum "In Lieu" Damages for Each Song Included in Each Performance of the Entire Work" (1976) 29 Vanderbilt Law Review 859.

268 see Zuckerman v. Dickson [1940] 35 F.Supp. 903 (W.D.P.A.); MCA, Inc. v. Wilson [1981] 677 F.2d. 180 (2d. Cir.); Doll v. Libin [1936] 17 F.Supp. 546 (D.Mont.).

269 17 U.S.C. 504(c)(1).

The exclusive performance right granted to the copyright owner is subject to certain restrictions[270]. To ensure appropriate access to copyrighted works for the public, the Copyright Act provides compulsory licences for which payment is required[271]. Furthermore, the Act makes the performance right subject to several statutory exemptions[272].

a) Statutory Exemptions

The Act excludes several mostly noncommercial or economically less important performances. These exemptions include the performance by a nonprofit educational organization done in the course of teaching activities by instructors or pupils in a classroom[273] and the performance of a nondramatic musical work by or in the course of a transmission by a nonprofit educational institution or governmental body if it is "a regular part of ... systematic instructional activities". The performance has to be directly related and of material assistance to the teaching content if the primary reason for the transmission is the reception in an instructional place by people who may because of particular circumstances (e.g. disabilities) not attend classrooms or by government officers or employees during their employment[274]. Section 110(3) of the Act exempts the performance of a nondramatical work or a

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270 for an overview, compare Korman, Bernard, "Performance Rights in Music under Sections 110 and 118 of the 1976 Copyright Act" (1977) in: The Complete Guide to the New Copyright Law by the New York Law School Law Review (New York: Lorenz Press, Inc., 1977) 229ff; Seltzer, supra, note 212 at 49ff; Nimmer on Copyright, supra, note 7 at 8.14 - 8.18.

271 see 17 U.S.C. 116, 118.

272 see 17 U.S.C. 110, 111, 112.

273 17 U.S.C. 110(1).

274 17 U.S.C. 110(2).

dramatico-musical work of religious nature in the course of services or worship or other religious assembly[275]. Furthermore, the exclusive rights of copyright owners are not infringed by the noncommercial performance of a nondramatical musical work if this is not further transmitted to the public. Condition is, however, that there is no payment of any compensation to performers, promoters, or organizers and no admission charge[276] or the fees after the deduction of the production costs are used for educational, religious, or charitable purposes unless the copyright owner has served a notice of objection to the performance under certain conditions[277]. Another important statutory exemption concerns the performance of works in a retail record store, provided the sound is not transmitted beyond the area where the sale is occurring[278].

Further exemptions include nonprofit broadcast performances for the blind and deaf[279], performances at annual agricultural or horticultural fairs[280] and performances of dramatic works published at least ten years earlier for blind audiences[281]. The performance of a work by public reception of a transmission on a single radio or television apparatus commonly used in private homes is excluded if no direct charge is paid for the transmission and the transmission is not further transmitted to the public[282].

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275 17 U.S.C. 110(3).
276 17 U.S.C. 110(4)(A).
277 17 U.S.C. 110(4)(B).
278 17 U.S.C. 110(7).
279 17 U.S.C. 110(8).
280 17 U.S.C. 110(6).
281 17 U.S.C. 110(9).
282 17 U.S.C. 110(5).

In connection with so called "secondary transmissions"[283] the Act provides a number of additional exemptions mostly concerning cable systems that are described in section 111 of the Copyright Act[284]. "Ephemeral recordings" made by transmitting organizations for own purposes are exempted by section 112 of the Copyright Act[285]. Section 112 also allows governmental bodies or other nonprofit organizations to make small numbers of copies for purposes such as limited transmissions or archival purposes[286]. These uses are subject to close restrictions and of no practical importance for this paper. Therefore they will not be considered in detail.

b) Compulsory Performance Licenses

The Copyright Act includes several regulations granting compulsory performance licenses with statutory fees. Certain cable systems may obtain a compulsory license to retransmit television or radio "performances" of a copyrighted work in their cable network[287]. The operator of a coin-operated phonorecord player may obtain a compulsory license to perform the respective works publicly, provided no admission fee is charged[288] . A compulsory license is

283 a `primary transmission' is defined as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted".`Secondary transmissions' are defined as "the further transmitting of a primary transmission simultaneously with the primary transmission..", see 17 U.S.C. Section 111(f).

284 For a detailed discussion of these exemptions see Seltzer, supra, note 212 at 57ff.

285 17 U.S.C. 112(a).

286 17 U.S.C.112(b)-(e).

287 17 U.S.C. 111(c),(d).

288 17 U.S.C. 116.

also granted to a "public broadcasting entity"[289] to broadcast any published nondramatic musical work[290]. Section 119 of the Copyright Act grants a statutory license to superstations[291] for transmissions of primary transmissions embodying a performance or display of a work, provided the "secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for each retransmission service to each household"[292]. Furthermore, a statutory license is given to Network stations for "secondary transmissions of programming contained in a primary transmission made by a network station and embodying a performance or display of a work", provided the "secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for such retransmission service to each subscriber receiving the secondary transmission."[293] This statutory license is limited to transmissions to unserved households[294]. "Unserved households" means households that cannot receive, with regard to a particular television network, an over-the-air signal of a primary network station affiliated with that network with a certain intensity and, during the previous 90 days, have not subscribed to a cable system that provides such a signal[295]. The validity of that license depends on a variety of additional factors such as

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289 these are only noncommercial broadcast stations and nonprofit institutions or organizations, 17 U.S.C.118(g).

290 17 U.S.C. 118.

291 The term "superstation" means a television broadcast station, other than a network station, licensed by the Federal communications Commission that is secondarily transmitted by a satellite carrier, 17 U.S.C.(d)(9).

292 17 U.S.C. 119(a)(1).

293 17 U.S.C. 119(a)(2)(A).

294 17 U.S.C. 119(a)(2)(B).

295 17 U.S.C. 119(d)(10).

reporting or payment requirements that shall ensure an appropriate income for the copyright owner and prevent abuses of the licenses.

c) Defense of "unclean hands"

In *Tempo Music, Inc. v. Myers*[296] the Court denied recovery for copyright infringement because the plaintiffs had come into court with "unclean hands". The defendant had allowed the performanc of copyrighted musical compositions in his nightclub without paying license fees. Prior to that he had been contacted by ASCAP, but refused to obtain a blanket license. Instead he asked for a complete list of the ASCAP repertoire to avoid the performance of any compositions included therein. ASCAP failed to provide him with such a list and argued that because of constant changes such a list could never be complete. The Court held that the defendant had shown his intention not to infringe copyrights and that in return ASCAP had a duty to provide some alternative aid. Otherwise the nightclub owner had only a choice between paying the fees or not playing music at all. Because of the direct effect on the defendant's rights by ASCAP's inaction, the Court found the "unclean hands doctrine" applicable[297]. This is a consequence of the principle that the owner of a copyright may not regard such right as absolute. He has a duty to take reasonable steps to help the defendant avoid an infringement or will be denied the right to sue for infringement[298].

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296 Tempo Music, Inc. v. Myers [1969] 407 F.2d 503 (4th Cir.).

297 see ibid.

298 see generally Paslay, James B., Note on Tempo Music, Inc. v. Myers, (1970) 22 South Carolina Law Review 132 at 136.

4. Reproduction

According to section 106(1), the reproduction right is an exclusive right of the owner of a copyright. The term "reproduction" is not to be confused with the term "copying". Although a reproduction will also represent a copy[299], both terms may not be used synonymously. Under the former copyright law courts had difficulties giving a precise definition for the term "reproduction"[300]. Under the current Act, a work is considered a reproduction when it is fixed in copies or phonorecords.

Copies are material objects

> "in which a work is fixed by any method..and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object...in which the work is first fixed."[301]
> ""Phonorecords" are material objects in which sounds ... are fixed by any method...and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed"[302].

Therefore the reproduction right consists of the right to fix a work on material objects such as phonorecords or other copies.

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299 "copying" can be seen as the general term describing the five exclusive rights of the copyright owner described in section 106, compare S.O.S., Inc. v. Payday, Inc. [1989] 886 F.2d 1081 (9th Cir.) at 1085.

300 compare White-Smith Music Co. v. Apollo Co. [1908] 209 U.S. 1.

301 17 U.S.C. 101 ("copies").

302 17 U.S.C. 101 ("ponorecords").

The 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. A work consisting of sounds ... that are being transmitted, is "fixed" ... if a fixation of the work is being made simultaneously with its transmission."[303]

A musical work is therefore fixed in a tangible medium of expression if it is taped or recorded in some other form of phonorecord. For live performances it is sufficient to record the work simultaneously.

The 1976 Act also makes clear that it is necessary (and sufficient) that the fixed work can be communicated either directly or with the aid of a machine or device. With this definition the 1976 Copyright Act made it possible to include not only phonograph records, sound recordings, or fixations in computer storage media but also the piano rolls the Court had not accepted as a copy in *White-Smith Music Co. v. Apollo Co.*[304].

Like the performance right, the 'exclusive' reproduction right is subject to several limitations. Under the conditions of section 115 of the Copyright Act the owner of a copyright has to grant a license for the making and distribution of phonorecords of nondramatic musical works. While the copyright owner's exclusive right includes the right of reproduction "in copies or phonorecords", the right of the licensee is limited to the making and distribution of phonorecords. Other copies like sheet music

303 17 U.S.C. 101 ("fixed").

304 White-Smith Music Co. v. Apollo Co., ibid.

or the soundtrack of a motion picture are not covered by this compulsory license[305].

The exemption section 112 of the Act creates for ephemeral recordings by transmitting organizations does not only limit the exclusive performance right[306] but also the reproduction right of the owner of a copyright. The organization is not only entitled to transmit the performance but also may make no more than one copy or phonorecord of the particular transmission program embodying the performance or display. However, the exemption is limited to restricted purposes and if not used exclusively for archival purposes the copy has to be destroyed six months after the transmission of the program[307]. Similar exemptions apply for limited numbers of copies made by governmental bodies or other nonprofit organizations for instructional activities[308].

Noncommercial educational broadcast stations may reproduce copies or phonorecords of transmission programs of published nondramatical musical works[309]. Other exemptions include the right of governmental bodies or nonprofit organizations (such as churches) to reproduce transmission programs of works of religious nature[310] and to make copies or phonorecords of transmissions specifically designed for and primarily directed to blind or other handicapped persons[311].

Most of these exemptions are subject to additional restrictions depending on the particular use in order to

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305 see Nimmer on Copyright, supra, note 7 at 8.04 [B].
306 see supra IV 4. a).
307 17 U.S.C. 112(a).
308 17 U.S.C. 112(b) - (e), 17 U.S.C. 118(d)(3).
309 17 U.S.C. 118(d)(2).
310 17 U.S.C. 112(c).
311 17 U.S.C. 112(d).

guarantee a minimum prejudice of the exclusive rights of the copyright owner. Consequently, the practical importance of these exemptions is minor.

5. Distribution

The third exclusive right given to the owner of a copyright by section 106 of the Act is the right to distribute copies or phonorecords of the copyrighted work to the public by sale, rental, lease, lending, or other transfer of ownership[312]. Therefore, any unauthorized public distribution of copyrighted works will represent an infringement. The term "distribute to the public" is not defined in the Copyright Act. A systematic interpretation should be based on the definition of public performances[313] and leads to the result that a distribution can be regarded as a "public" distribution if it is directed towards a substantial number of people outside of a normal circle of a family and its social acquaintances[314]. However, certain exemptions allow the limited distribution of copyrighted works in special cases without infringement of existing copyrights. The most important are included in sections 109, 115 and 118.

Sections 115 and 118(d)(2) grant compulsory licenses for the distribution of nondramatical works in form of phonorecords [section 115] and copies or phonorecords of transmission programs of public broadcasting entities [section 118(d)(2)] in restricted cases. According to section 109(a) of the Act "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the

312 17 U.S.C. 106(3).

313 17 U.S.C. 101 ("publicly").

314 see generally Nimmer on Copyright, supra, note 7 at 8.11 [A].

authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord". However, section 109(b)(1) restricts the use of phonorecords with regard to rental, lease or lending. Such use shall only be possible with the consent of the owner of copyrights in the soundrecording and the copyrights in the musical work embodied therein. The rule under section 109(a) is subject to some further restrictions of minor importance included in section 109(b)(2) - (e). Further exemptions are included in sections 108 (library distribution), 115 and 118.

6. Adaptation

Section 106(2) of the Copyright Act gives the copyright owner the exclusive right to prepare derivative works of the original work. This right is of minor practical importance, since an infringement of the right to prepare derivative works will usually represent an infringement of the more important reproduction or performance rights[315].

Section 101 of the Copyright Act gives as an example for the adaptation of a musical work the "musical arrangement". Therefore any transformation of the musical arrangement by changing the words or music of the original composition[316] infringes the adaptation right of the copyright owner unless a respective license has been obtained. It should be noted that the compulsory license under section 115 of the Act entitles the owner of such license to make a musical arrangement of the respective

315 see Nimmer on Copyright, supra, note 7 at 8.09[A].

316 compare Mills Music, Inc. v. Arizona [1975] 187 U.S.P.Q. 22 (D.D.C. Ariz.).

work to the extent necessary to conform it to the performance involved[317].

7. The 'Fair Use' Exemption

The fair use of a copyrighted work can be described as

> "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright. Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary."[318]

Section 107 of the Copyright Act 1976 allows the fair use of copyrighted works for uses such as criticism, comment, news reporting, teaching, scholarship or research and gives guidelines to determine if a use may be characterized as a fair use. The most relevant uses in the area of musical infringement cases are criticism and comment. These forms of use have been discussed in the context of musical parodies[319]. The guidelines described above apply correspondingly to the less relevant uses such as news reporting, scholarship or research[320].

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317 17 U.S.C. 115(a)(2).

318 Loew's, Inc. v. Columbia Broadcasting System, Inc., supra, note 227 at 174.

319 supra IV 3.; the question, if private home taping is protected by the fair use doctrine has been widely discussed (see Nimmer, supra, note 7 at 13.05[F][5][b][ii]). Although this may lead to considerable consequences for the respective artist the private home taping is not of importance in this context, since it is not a multiplication process for commercial purposes.

320 see generally Nimmer on Copyright, supra, note 7 at 13.05.

V 'SAMPLING' AND COPYRIGHT LAW

1. Introduction

Digital sampling has to be regarded as a new challenge for musical copyright law. Depending on the circumstances of a case, a variety of legal problems has to be solved. The first concerns the applicable law. Besides copyright law, other rules may be applied to sampling cases and may influence the rights of copyright owner and sampler[321]. Another aspect is the possible involvement of more than one copyright owner. In consequence, the legality of musical sampling has to be judged not only with regard to copyrights existing in the original composition, but also with respect to possible performance rights in the particular version to be sampled or copyrights in a sound recording as a source for sounds to be sampled. The sampling problem has often been discussed in connection with the copyright protection of sound recordings. However, just as a copyright in a sound recording may be infringed if sounds are taken from the work enregistered in the recording, the underlying musical composition may be implicated in such practices as well.

For the user, the legal risks involved in the process of digital sampling are compensated by the advantages this

321 Besides copyright law especially an application of unfair competition law may be considered, see Arn, Thomas D., "Digital Sampling and Signature Sound: Protection under Copyright and Non-Copyright Law" [1989] 6 Entertainment & Sports Law Review 61 at 80ff; Allen Jr., James P., "Look What They've Done to my Song Ma' - Digital Sampling in the 90's: A Legal Challenge for the Music Industry" [1992] 9 University of Miami Entertainment & Sports Law Review 179 at 193.

technique offers. Voices, instruments, or other sounds may be stored on computer discs and played back on a keyboard during a recording session or live performance. Sound libraries enable musicians and producers to store different sounds to fill in a sample whenever suitable. This has already led to significant consequences for studio musicians, since it is not only cheaper and faster to use sounds stored in a sound library, success seems to be guaranteed since the material stored has been selected before. In fact, sampling allows use of a particular tune played by a particular musician on a particular instrument and therefore offers unique musical expressions[322], often by famous musicians[323]. On the other hand no (expensive) studio musician can guarantee a performance in accordance with the expectations of his producer or co-musicians. Consequently, sound sampling has already caused lay-offs among musicians[324].

The sources for such sound-collections are indefinite: samples may be taken either from phonorecords[325] or may be registered during live performances. It has even become a

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322 see generally Johnson, E.Scott, Note: "Protecting Distinctive Sounds: The Challenge of Digital Sampling" [1987] 2 The Journal of Law & Technology 273 at 275.

323 Best known example is probably the percussion sounds of David Earl Johnson, recorded during a session with Jan Hammer. Johnson's distinctive sounds, played on rare instruments were afterwards used in the popular Miami Vice Theme. Johnson had allowed to sample his work during the recording session but had not allowed any use of these samples. However, he receive no credit or royalties for his contributions. See Wells, Ronald Mark, "You Can't Always Get What You Want But Digital Sampling Can Get What You Need" [1989] 22 Akron Law Review 691 at 691; other artists that have been sampled recently are: James Brown (by M.C.Hammer), Phil Collins, Jeff Porcaro; compare Johnson, supra,note 322 at 275; Allen, supra, note 321 at 182f.

324 compare Johnson, supra, note 322 at 275.

325 In this case an infringement of a copyright in the sound recording has to be considered in addition, However, this problem goes beyond the scope of this paper and shall not be considered in detail.

common practice to hire studio musicians solely for the production of musical samples to be used in later productions. When used, these samples may be adapted to the individual composition by technical alteration to make them suitable for the respective production. The consequence is that a studio musician will be paid for only one recording session while his enregistered performance may be used in numerous subsequent productions.

In the prior chapters the guidelines for protection of musical compositions have been examined. What consequences have these principles when applied to the problem of digital sampling? What aspects do the respective parties - the owner of the copyrights in a composition that has been sampled or the musician who wants to use a preexisting work - have to consider?

A first part of this chapter describes the technical background of digital sampling. The second part analyzes the legal problems related to this use of musical compositions including the storage of samples in data bases (sound libraries).

2. Technical Background

Digital sampling "sounds like a dream come true for record companies and producers"[326]. It allows them to record, recreate and manipulate any sound with a computer[327]. The basic principle that made this process possible is the development of a technique that transfers the sound waves into computer bits intelligible to a digital computer. While analog recording, the traditional

326 Wells, supra, note 323.

327 see Pareles, supra, note 148.

method to record sounds with an analog storage system, could only give a close approximation of the original sound, the digital method enables the musician to reproduce any perceptible sound "in all its acoustic intricacy"[328].

An analog recording system transforms air pressure fluctuations into signals varying the voltage of an electrical current. When this current is applied to an electromagnet and a storage media (such as a magnetic tape) is passed over the magnet, the current encodes the tape with patterns formed by ferrous oxide particles included in the tape. The retransformation again is done by passing the tape over an electromagnet which is connected to an amplifier[329].

For a digital recording, the analog signal formed by the sound waves hitting the transducer of a microphone has to be converted into a binary signal by an analog-to-digital converter transforming the voltage of the analog signal into bits to be recorded in the storage media of a computer[330]. To re-perform a sound this binary numerical code has to be retransformed into sound waves. If a musician (in this context a soundtechnician) changes the numerical code in the computer, the resulting sound will change correspondingly. This offers the opportunity not only to store and reproduce any sound in perfect quality but to also alter any stored sound in an indefinite variety of ways by changing single bits[331]. Computer disks preserve the sounds for future use and the storage capacity of modern computers makes it possible to create whole

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328 Mathews & Pierce, "The Computer as a Musical Instrument" Sci.AM., Feb. 1987, at 126.

329 see generally Newton, Jeffrey S., "Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance" [1989] 11 Hastings Comm/Ent Law Journal 671 at 672.

330 see Wells, supra, note 323 at 695f.

331 see ibid.

libraries of sounds in data bases. Not only have musicians or sound studios created their own libraries of such samples, manufacturers offer sounds suitable to their sampling equipment and commercial databases can provide the user with numerous sound samples[332].

3. Legal Situation

Different rights may be infringed during the process of digital sampling. Usually the taking of sounds collides with the rights of the owner in the underlying musical composition, the rights in the sound recording the sampled sounds are fixed in, or rights of the performing artist who is sampled[333]. In addition to a possible infringement of copyright, claims may be based on unfair competition principles. Other legal theories that my be invoked are defamation, false light, and right of publicity[334].

The question of whether digital sampling represents an infringement of existing copyrights in a sound recording (provided that it is done from a sound recording rather

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332 see Johnson, supra, note 322 at 275; several companies offer a variety of sounds for the "sampling-amateur" as shareware.

333 see generally Wells, supra, note 323 at 693; Newton, supra, note 329 at 685; Johnson, supra, note 322 at 289; Note: "A New Spin on Music Sampling: A Case For Fair Pay" [1992] 105 Harvard Law Review 726, at 732ff.

334 see generally Johnson, supra, note 322 at 296; These theories go beyond the scope of this paper, for a more detailed discussion see Johnson at 296 - 304.

than a live performance) has been widely discussed[335]. The majority of authors agree that sampling of sound recordings may represent an infringement of existing copyrights in this sound recording[336]. Less attention has been paid to the possible infringement of copyrights that exist in a musical composition or its performance.

a) Copyright-Infringement in Musical Compositions

The copyrights that exist or should be acknowledged in a musical composition have been described above[337]. The traditional test to determine if digital sound sampling infringes these copyrights involves the following steps[338]: First, the plaintiff must own a valid copyright in the sound material alleged to have been infringed. Second, he has to prove that the defendant copied from the copyrighted work. The plaintiff furthermore has to show that such

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335 see generally Newton, supra,note 329 ; Johnson, supra, note 322 at 287ff; Wells, supra, note 323; Arn, supra, note 321; Note: "A New Spin..", supra, note 333 at 734ff; Bently, Lionel, "Sampling and Copyright: is the Law on the Right Track?" [1989] Journal of Business Law 113 at 119 (commenting on the similar situation under the English Copyright, Designs and Patents Act 1988); Giannini, Maura, "The Substantial Similarity Test and its Use in Determining Copyright Infringement Through Digital Sampling" [1990] 16 Rutgers Computer & Technology Law Journal 509 at 513ff.

336 see generally Newton, supra, note 329 ; Johnson, supra, note 322 at 287f; Wells, supra, note 323; Note: "A New Spin..", supra, note 333 at 736; Arn, supra, note 321 at 80ff rejects a protection of sounds by means of copyright law but argues that such sounds are protected by the doctrine of unfair competition;

337 see supra III 1. d).

338 see supra IV 1.

copying constitutes an unlawful infringement of his copyrights[339].

The plaintiff may establish his own valid copyright by demonstrating the necessary originality and fixation in a tangible medium of expression. According to the principles developed during the discussion of the originality requirement and in connection with the scope of protection of musical works[340] an author may claim a valid copyright not only in a song as a whole but should be given a copyright also in parts of a musical composition. Since it is a characteristic of sound sampling that only small quantities of sound are copied[341], a broader definition of the scope of protection of copyright in musical works is of particular importance in this context[342].

The requirement of fixation in tangible form is satisfied when the composition is recorded, transcribed into sheet music or performed live while being simultaneously recorded[343].

The owner of a valid copyright is granted several exclusive rights, one of which is the right to reproduce the work in copies or phonorecords[344]. This right may be infringed if it can be proven that another party copied from the protected work. Copying may be established by

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339 see Note: "A New Spin..", supra, note 333 at 732; Allen, supra, note 321 at 185f; Wells, supra, note 323 at 694f; McGiverin, Bruce J., "Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds" [1987] 87 Columbia Law Review 1723 at 1728.

340 see supra III 1. d).

341 see Allen, supra, note 321 at 190.

342 compare Newton, supra, note 329 at 676ff; Fleischmann, Eric, "The Impact of Digital Technology on Copyright Law" (1988) 23 New England Law Review 45 at 55f; Allen, supra, note 321 at 191f; Johnson, supra, note 8 at 282.

343 see supra III 1. d) (11); Allen, supra, note 321 at 187.

344 17 U.S.C. 105(1).

showing that the other party had access to the work and that there is "substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work"[345]. The proof of substantial similarity in cases involving sound sampling requires as a first step the proper identification of the passages to be compared[346]. Modern technology not only allows sampling, but is also helpful in determining copying. Filters help to remove extraneous frequencies. By means of a sophisticated digital sampler, the relative amounts of each frequency in the sounds may be graphed and compared like musical fingerprints. However, this method requires an effective isolation of the parts to be compared from any other sounds included in the recording[347]. If this should not be possible, the proof of actual copying becomes more difficult and will depend on expert analysis and dissection[348].

However, not every copying constitutes an infringement. The plaintiff in an infringement case has to prove not only the fact of copying but also that the defendant's copying constitutes an improper appropriation and an unlawful infringement of his copyright. This requirement is satisfied if it can be shown that there is "substantial

345 Sid & Marty Krofft Television v. McDonald's Corp. [1977] 562 F.2d 1157 (9th Cir.) at 1162; compare supra IV 1..

346 see Giannini, supra, note 335 at 518.

347 see Giannini, supra, note 335 at 518f.

348 see generally Nimmer on Copyright, supra, note 7 at 13.03[E][3]; Arnstein v. Porter, supra, note 176. This interpretation can be described as the "modified audience test". In its original application this test had been developed to determine if substantial similarity existed between two works. The standard of this test was the effect of the alleged infringing play upon the spontaneous and immediate reaction of the average reasonable man. Harold Lloyd Corp. v. Witwer [1933] 65 F.2d 1 (9th Cir.) at 18. At least since the Supreme Court decision of Feist Publications, Inc. v. Rural Telephone Service Co., 111 S. Ct. 1282 (1991) this interpretation has been criticised and transformed, see Nimmer on Copyright, supra,note 7 at 13.03[E][1][b] & [2].

similarity in the expressions of the ideas so as to constitute infringement"[349] in the eyes of the ordinary reasonable person (the so called "audience test"). If a lay listener has the impression that the defendant wrongfully appropriated the plaintiff's work and finds the resemblance between both musical works noticeable the defendant will be held to have infringed this work[350]. As shown above to constitute an infringement it may be sufficient if a short fragment is taken from a preexisting work, depending on the quality of the passage taken[351]. In the case of the "heart of a composition" even the taking of a few notes may constitute an infringement[352]. The Court should determine whether the defendant "appropriated any one of the following: 1) "the meritorious part of the song"; or 2) "material of substance and value in plaintiff's work"; or 3) "the very part that makes ... [the complaining work] popular and valuable"; or 4) "that portion of [the complaining work] upon which its popular appeal and hence, its commercial success depends," or 5) "what is pleasing to the ears of lay listeners..."[353].

If samples have been filled into new productions without alteration, plaintiffs usually will have no difficulty meeting the requirements of the "audience test". The intention of the sampling artist will often be to make

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349 Shaw v. Lindheim, [1990] 919 F.2d 1353 (9th Cir.) at 1358.

350 see Nimmer on Copyright, supra, note 7 at 13.03[E]; compare Hirsch v. Paramount Pictures, Inc., [1937] 17 F.Supp. 816 (S.D. Cal) at 818.

351 see supra III 1. d) (9).

352 see supra III 1. d) (9); compare Boosey v. Empire Music Co., [1915] 224 F. 646 (S.D.N.Y.); Robertson v. Batten, Barton, Durstine & Osborn, Inc., [1956] 146 F.Supp. 795 (S.D. Cal.); Giannini, supra, note 335 at 520f.

353 Sherman, Jeffrey G., "Musical Copyright Infringement: The Requirement of Substantial Similarity" (1977) 22 ASCAP Copyright Law Symposium 81 at 104 (citing Arnstein v. Porter, supra,note 176).

his "citation" recognizable to increase the attractivity of his own production. If, however, the fragments taken from another work have been changed, a plaintiff may have difficulty satisfying this "audience test". Because of the possibility to change the character of a sample[354], the use of a musical fragment may not seem to be infringing to the lay listener even if direct evidence of copying is available and a technical analysis proves identical patterns in the key parts of the compositions.

In the similar case of computer programs some courts have allowed expert testimony to analyze the similarity between two programs, practically abandoning the "audience test"[355]. It seems obvious that the ordinary reasonable person is not able to compare two computer programmes, or similar technical works. Consequently, the evolution of technical possibilities justifies an adaptation of the audience test to an expert test, where the judgement of lay persons would merely lead to coincidental results. However, it is doubtful whether these principles should be applied to the field of musical sampling. This leads to the question of whether copying may be allowed, if the copied fragment afterwards is transformed in a way that no taking is obvious. In my opinion the answer to this question has to be "no", at least in the particular field of digital sampling. Otherwise the problem of musical sampling would be reduced to the question of whether the sampler was able to alter a sample technically in order to "hide" it from the ears of the listener. Of course sampling represents a

354 The recording speed for example may be increased or decreased, reverberation or echo introduced, portions of the sound may be eliminated, reduced or increased in volume and additional sounds may be filled in. Compare: United States v. Taxe [1976] 540 F.2d. 961 at 964.

355 see Q-Co Industries, Inc. v. Joffman [1985] 625 F.Supp. 608 (S.D.N.Y.) at 613; Whelan Associated, Inc. v. Jaslow Dental Laboratory, Inc. [1986] 797 F.2d 1222 (3d Cir.) at 1232.

form of art that deserves to be promoted and protected. On the other hand, the goal of promotion of artistic creativity requires protection of the creativity of those artists who still create works on their own. The sampling technology makes it increasingly easy to take from other works and use other compositions. A sample taken from a sound recording, altered and used in another production may not only infringe the copyright in the sound recording, but can be regarded as a derivative work of the original composition. According to section 106[2] of the Copyright Act, the right to produce such a derivative work belongs exclusively to the copyright owner. If such a right may not be protected properly under the "audience test" it seems just to refer to the testimony of expert witnesses familiar with the possibilities digital sampling offers.

With regard to compulsory licenses under section 115 of the Copyright Act, such interpretation will not lead to unbearable disadvantages for sampling artists. It will rather insure an adequate income to the original composer and compensate him for the fact that somebody else usurped his labour and unjustly benefited from his creativity.

b) Fair Use and Digital Sampling

According to the general rules described above[356] four nonexclusive factors have to be considered to analyze if digital sampling of musical works may be protected by the fair use doctrine: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, the effect on the potential market for or value of the work[357].

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356 see supra IV 2.

357 17 U.S.C. 107.

Consideration of the purpose and character of the use includes the question of whether the use is of a commercial nature. While noncommercial hobbyists may sample without any commercial interest most cases that come to the attention of the public can be classified as commercial uses[358]. Every commercial use can be regarded as being presumptively an unfair exploitation[359], although it is not necessarily fatal to a fair use defense[360]. With regard to the nature of the copyrighted work, the scope of application for the fair use doctrine in the field of musical works becomes increasingly small. A fair use will be accepted with regard to informational works such as catalogs or similar compilations of facts or data[361]. Musical compositions, however, are principally creative in nature and do "not suggest any implicit fairness in incorporating portions of such works in other compositions without payment."[362]

Another important factor to be considered is the amount and substantiality of the portion that has been used. As shown above, the taking of a small amount of a preexisting work can represent an infringement of copyrights in the underlying composition. The fair use doctrine includes a more flexible evaluation of the amount taken. However, even use of a short phrase or single notes can go beyond a fair use, if this represents "the" characteristic part of a composition such as the refrain or a characteristic introduction[363].

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358 see generally Newton, supra, note 329 at 710 (note 203).

359 see generally Sony Corp. of America v. Universal City Studios, Inc., [1984] 464 U.S. 417 at 451; Johnson, supra, note 322 at 293.

360 see Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., [1980] 626 F.2d 1171.

361 see Nimmer on Copyright, supra, note 7 at 13.05[A][2].

362 Note: "A New Spin..", supra, note 333 at 737.

363 see Note: "A New Spin..", supra, note 333 at 737.

The effect on a potential market of the original work may not be of the same importance for the market of musical compositions as it is for the market of a sound recording. Of course a use of a preexisting composition may enhance it by renewing interest in the previous hit. On the other hand, every use of a composition may reduce the attractiveness of that composition as a new work in the market or simply detract from the market for other derivative uses of a song and therefore represent an additional reason to reject an application of the fair use doctrine[364]. It can therefore be assumed that at least the use of recognizable samples will be likely to influence the value of the original composition in the market.

In cases of parody, the amount of a composition may be bigger to conjure up the original. In this area the general rules developed above remain valid[365]. One has to be aware of the fact that sampling is not only a simple way to copy part of a performance of the original composition in order to refer to the original, but in fact may induce a parodist to take over an even bigger part of the original, since technology makes such uses increasingly simple. Therefore courts will have to consider carefully if the amount taken by a parodist exceeds the amount necessary to conjure up the original.

The use of recognizable[366] samples for commercial purposes will not be exempted by the fair use doctrine[367]. If non-recognizable samples are chosen, the use may still amount to copyright infringement depending on the purpose of the use and substance and amount of the parts taken. A final decision will still require an evaluation on a case-

364 Note: "A New Spin..", supra, note 333 at 738.

365 see supra IV 2.

366 in this context: for the lay listener.

367 see Note: "A New Spin..", supra, note 333 at 738.

by-case basis and has to depend on the understanding of the respective judge and his interpretation of "the most troublesome doctrine in the whole law of copyright"[368].

c) Use of Samples in Data Bases

The use of a computer during the sampling process allows not only the digital arrangement of a musical work, it also enables the 'sampler' to store the results of his work by means of computer-technology. He does not have to record sounds, harmonies, or other parts of music on tapes or similar storage material, but may use the computer as a storage media to have the samples available for later use. Such sound-databases make work on new productions more efficient since the musician or sound-sampler does not have to look for an appropriate sound in existing compositions every time he creates a 'new' work, but may choose among the presampled available sounds. It is selfexplanatory that a collection of such sounds will be more useful (and more valuable) the bigger a variety it offers. Such sound databases may be created by a musician for his private use or may be operated on a commercial basis. Their high quality and large variety make sound-samples a valuable asset for sound studios and musicians. Instead of hiring expensive studio musicians without guarantee of a positive result, the producer may buy a preexisting sound from a sound-database and thereby reduce production time and costs. In consequence, the trade in sounds can be a lucrative business.

The use of copyright works in electronic databases includes different steps, each of which may represent an infringement of existing copyrights. In this context it is

368 Dellar v. Samuel Goldwyn, Inc. [1939] 104 F.2d 661 (2d Cir.).

not of importance which part of a song is used in a sound database, provided that the part is eligible for copyright protection[369].

Basically it has to be differed between the input of material into the storage media of a computer and the output to the user. The input of a copyrighted musical work into a database might constitute an infringement of the reproduction right. As shown above, the copyright owner has the exclusive right "to reproduce the copyrighted work in copies or phonorecords"[370]. The Copyright Act of 1978 defines copies as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"[371].

While under the previous Act a copy was understood as something that could be visually perceived or read with the naked eye[372], the new definition makes clear that even the 'invisible' fixation by means of new methods may represent a copy[373]. The musical work stored in the storage media of a computer can be perceived and reproduced with the aid of the computer and the necessary equipment and therefore represents a 'copy' as defined by the Copyright Act. This interpretation is confirmed by section 117 of the Act. It would not have been necessary explicitly to allow the owner of a computer program to create a duplication of that

369 The capacity of modern computers allows the storage of whole songs.

370 17 U.S.C. 106(1);

371 17 U.S.C. 101 "Copies";

372 see White-Smith Music Publishing Co. v. Apollo Co. [1908] 209 U.S. 1; Corcoran v. Montgomery Ward & Co. [1941] 121 F.2d 572 (9th Cir.);

373 see Williams Electronics, Inc. v. Arctic Intern., Inc. [1982] 685 F.2d 870 (3rd Cir.) at 876f; Tandy Corp. v. Personal Micro Computers, Inc. [1981] 524 F.Supp. 171 (N.D.Cal.).

program, if such duplication was not regarded as a copy under the Copyright Act. Therefore, the input of a copyrightable work in an electronic database constitutes a reproduction of that work[374].

Doubt may exist as to whether such use of music is an infringement even if it is done solely for private purposes. Just as section 117 allows the user of a computer program the preparation of copies, a musician might have the right to collect sounds in his computer for personal use. However, such interpretation does not reflect basic differences between those cases. Section 117 does not constitute a different scope of protection for copyrighted works if they are stored in a computer, it simply reflects certain particularities of the use of a computer programme[375]. Subject to fair use and other exemptions, the motivation of the infringer cannot be of importance in this context. Consequently, the private copier infringes existing copyrights just like the commercial operator of a database.

The output is the retrieval of a work from the computer. This can be a printout or, in case of musical works, an audible reproduction of the original that may again be stored digitally or in other storage media. The

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374 see Williams Electronics, Inc. v. Arctic Intern., Inc., ibid. at 876f; Tandy Corp. v. Personal Micro Computers, Inc., ibid.; Lenny, David, "Copyright Infringement Problems of a Network/Home Cable Record Selection and Playing System" (1975) 5 Rutgers Journal of Computers and the Law 51 at 74.; Allan, Steven; Green, Sharon; Friedman, Jerald, Harrington, Bruce E.; Johnson, Lawrence R., "New Technology and the law of Copyright: Reprography and Computers" (1968) 15 U.C.L.A. Law Review 939 at 995ff (though under the previous Act the authors argue in favour of such an interpretation); Beard, Joseph J., "Cybera: The Age of Information" (1969) 19 ASCAP Copyright Law Symposium 117 at 137.

375 The use of a computer program usually provides that the program or a part of it is copied during the utilization. In addition Section 117 simply gives the owner of the program the possibility to protect himself against damages to the program.

output of a work stored in electronic storage media such as a data base again represents a copy and thus may infringe existing copyrights in the original work[376].

VI CONCLUSION

At a first glance, the protection of musical works does not seem to pose particular problems. According to section 102 of the Copyright Act of 1976 copyright protection subsists for works of authorship including the category of musical works. However, a closer analysis shows that the situation is far from being clear. Along with the development of new production and reproduction methods new types and styles of music have appeared that do not fit the traditional definition of musical works. Production methods like digital sound sampling make it necessary to redefine the scope of protection of music and to adapt copyright interpretation to technical and economic reality. It does not seem to be sufficient anymore to regard the musical composition as one single work with regard to copyright protection.

Although courts in the past have protected musical works against infringement that occurred in single parts like the melody, it does not reflect reality to consider a composition that is made up of a variety of different factors as just one musical work. Copyright protection should reflect the change not only in production and composition methods but also in the taste and style of the

376 see generally Lenny, supra, note 374 at 74; see Nimmer on Copyright, supra, note 7 at 8.08 (page 8-110); Cornish, supra,note 82 at 438 (on the situation in England).

public and consider single parts of compositions or musical performances as being separately eligible for copyright protection. Rhythm, harmony, or the arrangement of a song are no longer subordinated parts of minor importance to the composition as a whole. Often individual musicians compose separately from each other the melody, the rhythm, harmonies or the arrangement of a composition and each should be given credit for his contribution to the work as a whole if it fulfills the basic copyright requirements. Similarly, a copyright in the performance of a particular style should be protected. Not only should the single components that make up the composition be eligible for copyright protection, a short part of a composition should also be protected, if it includes a certain degree of originality.

No precise rule can be given with regard to the minimum length of such parts. As shown, sequences of a few notes may fulfill the requirement of originality if they represent a characteristic part of the composition. This interpretation has been accepted in the music business and the major labels and publishers try to obtain licenses for all samples used before the release of a record[377]. The strategies that have emerged with respect to the underlying musical compositions vary and include solutions like the payment per sold record or an agreement upon a co-publishing, in which the 'original' copyright owner shares in the copyright of the new work. However, the most common system is the flat fee buyout, in which the copyright owner of the original composition receives one payment for the use of a part of his work. This payment may vary between $ 250 and $ 10,000. An "average" license ranges between $ 1,500 and $ 3,000[378].

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377 see Sugarman, Robert G. & Salvo, Joseph P., "Sampling Gives Law a New Mix" The National Law Journal November 11, 1991, at 21.

378 see Sugarman & Salvo, ibid. at 22.

A new definition of the scope of protection of musical works will not only influence the protection of copyrights in musical compositions but will also effect the treatment of sound recordings based on such compositions. This once again poses the question of whether a different treatment of compositions and sound recordings under copyright law is still in conformity with the current technical and economic situation in the music business[379].

To establish copyright infringement by means of copying, the so-called "audience test", based on the impression of an average lay listener may represent an appropriate solution, as long as the case does not pose questions that involve a complicated technical background. However, with regard to the development of technologies like the digital sound sampling doubt may exist whether the impression of a lay person is an appropriate measurement to develop a just differentiation between the economic interest of the composer on the one side and the right to use such compositions in order to ensure a development of art in the interest of society on the other side. Instead I suggest that in areas that require a particular knowledge, the determination of copyright infringement should not be left to the impression of a layman. The judge should rather rely on the testimony of an expert who may provide him with the necessary background information.

A technology like digital sound sampling offers an indefinite number of possibilities to alter a sound electronically. As long as a part of a performance is taken over without major changes it will usually not be difficult to prove an infringement of the underlying composition, and even the average listener will be able to locate such

379 The law does not accept a performance right for sound recordings, there is different regulations for licensing. However, this question goes beyond the scope of this analysis and may not be discussed in detail.

infringement. If, however, the part taken over has been electronically changed, a lay listener will often not be able to recognize a possible copying or infringement. Often it may even require an exact technical analysis of the work that is held to have infringed in order to prove that the author simply benefitted from another persons creativity. It may be argued that such an altered version of an original does not even represent an infringement. With regard to the existing interpretation of copyright protection in sound recordings such doubts seem to be reasonable. But, as far as the underlying musical composition is concerned, even the taking of an electronically altered part has to be rejected under copyright principles. This would not unjustly prejudice a sound sampler, since he could not rely on a right to use someone else's creativity for free, especially since section 115 of the Copyright Act, giving him the right to a compulsory license in nondramatic musical works, ensures that he may use the works he chooses for his own production[380].

Therefore, to ensure better protection of composers, copyright infringement should be deemed possible even if the average listener should not be able to identify the similarity between both works. With regard to the growing importance of sound sampling and the practical problems proof of infringement imposes on copyright owners, the development of an alternative system of regulation for digital sampling should be considered[381].

Such a system should not only include guidelines that are as precise as possible but at the same time establish a

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380 As pointed out, the situation may be different with regard to a copyright protection of sound recordings.

381 compare: Note: "A New Spin..", supra, note 333 at 742; Johnson, supra, note 322 at 294.

procedure that allows an evaluation of a large number of single cases with a minimum of administrative effort. It seems that a statutory licensing scheme for sampling could meet these requirements. In the current system musicians either take chances when they use preexisting compositions without approval or they enter the "private bargaining system" that cannot guarantee any results. A statutory licensing scheme should go beyond the solution offered in section 115 of the Copyright Act and establish rules for the taking of a part of a composition to be used in sound recordings or live performances. The license fee to be paid could depend on the length of the part taken and the number of copies sold of the new production or, respectively, the number of people attending the performance. Of course factors like the success or popularity of the original song or the importance of the sample both to the old and the new production could be considered as well but are likely to make the system as a whole too complicated[382]. I believe that one should rather rely on the (though general) rule that a sample of a more successful song or more important part of a song would increase the success of the new production in a similar relation and herewith ensure the original composer an adequate return. Such a single licensing system would even offer the advantage to establish regulations not only with respect to the use of musical compositions but also of sound recordings. Every artist planning to use preexisting works in a new recording or performance could easily calculate the amount of license rates to be paid to the owner of the copyright in the sound recording to be sampled (provided he samples a sound recording rather than a live performance) and to the copyright-owner of the underlying musical composition.

382 see: Note: "A New Spin..", supra, note 333 at 740f.

The amount to be paid for each "lick" could be stipulated by looking at the rates that have been developed in the music business so far. The current cover licensing fee of 6.25 cents per record distributed[383] should be the maximum fee depending on how much of a composition is used. The minimum fee could be equivalent to the minimum amount to be paid for a one-minute cover version, which is 1.2 cents per phonorecord distributed[384]. Though typical samples[385] are shorter than such cover versions, a similar treatment is appropriate, since it is usually the most significant parts of a composition that are sampled.

In addition a statutory regulation should include a payment standard for sampling sessions and for the use of sampled performances of artists (to cover not only the area of original compositions and sound recordings but also the sampling of performances)[386].

The introduction of such a system could probably help to accomplish the major goals of copyright law: to ensure the owner of a copyright an appropriate return while giving other musicians the chance to create new works under exploitation of existing forms of art. It should be kept in mind that one aspect of promoting arts development is the encouragement of artists to produce new songs with original elements rather than just variations of preexisting tunes. At least such a new system on copyright payments for sampling will help to make a notice like the one published by Frank Zappa on his "Jazz From Hell" album obsolete,

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383 see: Cost of Living Adjustment of the mechanical Royalty Rate, 56 Fed. Reg. 56, 157 (1991), cited in: Note: "A New Spin...", supra, note 333 at no. 26.

384 compare supra, note 383.

385 In so-called "Mastermixes" the average takings have a length of 10 - 15 seconds, see Prevost, Jean-Victor A., "Copyright Problems in Mastermixes" (1987) Communications and the Law 3 at 5; however, samples usually are shorter (up to 5 seconds).

386 compare Wells, supra, note 323 at 695.

warning that: "Unauthorized reproduction/ sampling is a violation of applicable laws and subject to criminal prosecution."[387] And maybe a new approach to the sampling issue will render the underlying sense of the Picasso - word: "Good artists copy; great artists steal"[388] invalid.

387 This is the first such warning on a record album.

388 cited from: McGraw, Molly, "Sound Sampling Protection and Infringement in Today's Music Industry" (1989) 4 High Technology Law Journal 147 at 169 citing Torchia, "Sampling Realities: Frank Zappa's Experience with His Recent `Jazz From Hell' Album", Recording Engineer/Producer, Apr. 1987 at 64.

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