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FACING THE MUSIC: THE MARKET PRINCIPLE AND ARTISTIC DEVELOPMENT - A TEST FOR MUSIC COPYRIGHT INFRINGEMENT

LLM RESEARCH PAPER
INTELLECTUAL PROPERTY LAW (LAWS 546)

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ABSTRACT

Musical "borrowing" from another's work is common in modern music. This is illustrated by the sampling phenomenon - the process of using digital technology to "lift" excerpts from a sound recording of a musical work and then reincorporating the excerpt into a new recording. Modern music, by its nature, is disposed to such pastiche forms of composition. The author suggests that copyright law permits the limited commercial use of another's work. The goal of providing an economic incentive to create must be balanced with the need to permit artistic growth through improvement and criticism. By protecting only the market for a work, copyright law permits artistic development. Where the musical excerpt used is not a substantial part of the original work, or has been used creatively in the new work, copyright law may not be infringed. This conflicts with some of the music industry's interests, such as protecting marketing investments made in the artist. The tort of passing off may provide additional assistance to the industry.

Word Length

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 13,990 words.

I INTRODUCTION

He takes other men's pebbles and polishes them into diamonds.[1]

Musical plagiarism is as old as music itself. It involves using excerpts from a musical composition in a new work and, if the new work is "substantially similar" to the original work, copyright may be infringed.[2] In the last decade the legality of musical "borrowing" has been brought to the fore by a second, and more transparent, form of musical copying called digital sampling.[3] Sampling is the procedure of using digital technology to "lift" an excerpt from another's recorded musical work and then incorporating that excerpt into a new recording.[4] The sampled excerpt can be as short as a single sound or as long as a verse of a song. The excerpt may be "transformed" (by altering the parameters of the sound or placing the excerpt in a new context) or used simply as a quotation. In the course of sampling a sound recording, plagiarism of the underlying musical work will also occur. Plagiarism, by contrast, can occur without sampling.

Much of the public debate about sampling is driven by a belief that the new work is of less artistic merit than the original,[5] hence the emotive term "rip-off". The music industry

[1]Attributed to William Boyce when discussing Handel's musical borrowings. C Hogwood *Handel* (Thames & Hudson, London, 1984), 266.

[2]The substantial similarity is embodies in s 3(1) of the Copyright Act 1962 and is discussed in Part VI of the text.

[3]The term "borrowing" is used here to refer to plagiarism and sampling collectively.

[4]Strictly speaking sampling is wider than this definition. Any recording of a sound is a 'sample'. While the term is used in this paper to describe the process of sampling from the recordings of others, sampling techniques are used legitimately in most modern recordings. One's own instrument or voice may be sampled, or one may sample from a variety of purpose made recordings (often created for advertising applications).

[5]Consumer choice may suggest otherwise.

argues that sampling without permission is "groove robbing"[6] and is blatant copyright abuse. The samplers argue that sampling is a valid form of artistic expression and is of social and musical significance.

Musical borrowing occurs in New Zealand,[7] and is likely to continue as our music industry undergoes something of a renaissance,[8] but as yet no cases have been litigated here.[9] Commentators are currently suggesting that specific legislative reform is needed to deal with digital sampling.[10] This paper argues that, despite the dearth of specific precedent, the current law is robust enough to cope with *all forms* of musical borrowing. Copyright law protects the market for a work as an economic incentive for creative activity that benefits the whole community. This paper purports that creative borrowing has a role to play in musical development and is permissible provided that it does not impinge on the market for the original work. Such artistic development is an implicit objective of the copyright scheme.[11] Defining non-infringing use in a musical setting necessitates an

[6]J H Brown "'They Don't Make Music The Way They Used To': The Legal Implications of 'Sampling' in Contemporary Music" 1992 Wisconsin Law Review 1941, 1944.

[7]Borrowing frequently occurs in advertising. See n 24, n 140, n 149, and n 323; See A R Shopland "Moana - Rhythm & Reo" Vol 4, No 3 New Zealand Musician, 2 for an example of "cultural" borrowing. Moana has incorporated traditional Maori music into modern dance tracks.

[8]See Recording Industry Association of New Zealand *1993 Yearbook* (RIANZ, Wellington, 1993) 33, for New Zealand popular music chart statistics for the last 12 years. The 90s have seen an increase in the quantity and quality of New Zealand music. See the *Yearbook* generally.

[9]New Zealand group Headless Chickens sampled an excerpt from Shona Laing's *1905*. The case was settled out of court, reputedly for a one-off payment.

[10]Brown, above n 6, 1988, argues for the enactment of a statutory licensing scheme akin to the compulsory license existing for making recordings of musical works. See n 165 for a description of the present compulsory license; A Keyt "An Improved Framework for Music Plagiarism Litigation" 76 California Law Review 421, 458. Keyt suggests that judicially imposed compulsory licenses fro sampling may be an alternative to injunctive relief; J H Marcus "Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music" in J D Viera (ed) *1992-93 Entertainment, Publishing and the Arts Handbook* (Clark Boardman Callaghan, Deerfield Il, 1992-93) 247, 259. Marcus suggests a voluntary licensing scheme with negotiation guidelines.

[11]See Part IV of the text.

understanding of the nature of modern composition. The legality of sampling, and musical plagiarism, the paper argues, may be resolved by applying an incentive analysis of copyright law. Copyright law does not directly protect the marketing investments made in an artist, which is an interest of central importance to the music industry, as is later illustrated. The tort of passing off may protect marketing investments. In the United States the right of publicity tort is also available. The constituent elements of this action may be found in some variations of passing off.

Courts may not always apply an the incentive rationale to copyright law. In *Grand Upright Music* v *Warner Brothers* Biz Markie, a rapper, sampled a large excerpt from Gilbert O'Sullivan's "Alone Again, Naturally" to form the basis of a new composition.[12] Armed only with the (duly cited) seventh commandment, "Thou shalt not steal",[13] and without reference to the Copyright Act 1976 (US) ("the US Act"), Duffy J issued a preliminary injunction against Biz Markie for his album *I need a Haircut*,[14] and recommended prosecution.[15]

While the outcome of the case was not in doubt, the lack of analysis is disturbing. The United States Supreme Court better addressed musical borrowing issues (in a plagiarism context) in the recent decision of the *Campbell* v *Acuff-Rose Music*.[16] The Court found

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[12]*Grand Upright Music Ltd.* v *Warner Brothers Records, Inc.* 780 F. Supp. 182 (S.D.N.Y. 1991) (US District Court).

[13]Exodus, Chapter 20: Verse 15.

[14]Biz Markie's latest album is titled "All Samples Cleared". The cover depicts Biz Markie as a judge hearing a sampling case.

[15]*Grand Upright Music*, above n 12, 183 and 185. "The defendants in this action for copyright infringement would have us believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. ...Their only aim was to sell thousands upon thousands of records. This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures".

that 2 Live Crew's use of distinctive phrases from Roy Orbison's *Oh Pretty Woman* was permissible as "fair use" under the Copyright Act 1976 (US). The use of the excerpts was "transformative". The Court addressed relevant copyright policy considerations to conclude that a legitimate parody had been created.

"Wholesale" appropriation of works as occurred in *Grand Upright Music* is not addressed in this paper.[17] The use of an entire melody without permission would certainly amount to copyright infringement and would be inconceivable in today's legal climate. Rather, this paper focuses upon the legality of transformative and creative uses of sampling and plagiarism that do not affect the market for the original work.

In suggesting that borrowing has a role to play in musical development, Part II of the paper places sampling and plagiarism in their musical context. The nature of musical composition is examined and the characteristics of contemporary music that lead to borrowing are analysed. Part III considers ramifications of the music industry's interests on musical borrowing. The criteria for negotiating "clearance" of excerpts is summarised. These criteria are different from those required for copyright infringement. Part IV deals with copyright policy. The principles of copyright law are distilled, and the courts' general approach to these principles is examined. The author suggests that copyright operates to encourage learning and the progress of the arts, and that limited musical borrowing is consistent with these objects. Part V separates the protectable elements of musical compositions from the unprotectable. This is determined by the test for originality and the idea-expression dichotomy. In Part VI the requirements for proving reproduction are analysed. This includes the important "substantial similarity" test, and the attendant difficulties in applying this test to contemporary music. Additionally, evidential hurdles

[16]*Campbell* v *Acuff-Rose Music* 510 US _, 127 L Ed 2d 500, 114 S Ct _.

[17]*Grand Upright Music*, above n 12.

must be overcome to prove that copying actually occurred. The implications of expert testimony are also considered. Part VII briefly examines the potential for a fair dealing defence for musical parody. Part VIII addresses the implications of the moral rights regime proposed in the Copyright Bill 1994 ("the Bill").[18] It is suggested that the right of integrity should not be allowed to inhibit musical development or criticism. Finally Part IX considers alternative legal remedies for musical borrowing. The tort of passing off may restrain attempts to profit from another artist's reputation.

II CONTEMPORARY MUSIC

A *Compositional Process*

Sampling is most predominant in rap music. Rap originated as a live medium where DJs would play well known dance tracks and "rap" over them.[19] Many rap recordings use sampling in this way. A large portion of a song will be sampled to form the basis of a rap. The sampled song need not be from a dance genre.[20] As there is little transformative use, but extensive quotation, this type of use is almost certain to infringe copyright.

In *Grand Upright Music* the defendants had argued that sampling was common-place within rap music and should be excused. Duffy J disagreed. "The argument suggested by the defendants that they should be excused because others in the 'rap music' business are

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[18]The Copyright Act 1962 ("the Act") is currently under review. The implications of the Copyright Bill 1994 (in its first draft) are considered in this paper.

[19]Rapping is the performance of rhythmic, but unmelodic, rhyming chants. For a description of the history of rap see Marcus, above n 10, 248 and Brown, above n 6, 1948.

[20]The well known TV theme from *I Dream of Genie* form the basis of Dimples D's *Sucker DJ*. Other TV themes such as *The Brady Bunch*, *The Addams Family*, and *F-Troop* have also been sampled. See Marcus, above n 10, 248.

also engaged in illegal activity is totally specious. The mere statement of the argument is its own refutation".[21] Perhaps the judge missed the point. The use of other people's musical material is common in composition and may occur for a variety of reasons.[22]

First, borrowing could be "ancestor worship". "Through [sampling], many artists pay homage to the strong roots of black American music. 'There is a shared black pop classicism in rappers, many of whom look to the late 1960s and early 1970s, particularly to Jimi Hendrix, Parliament-Funkadelic, Sly Stone, Marvin Gaye, James Brown, and Bob Marley for both musical and spiritual inspiration'".[23] Many groups of New Zealanders similarly identify with these artists.[24] If this is the borrower's genuine goal, the excerpt used may be small or concealed in the new work, reflecting the personal factors motivating such use.

Secondly, the borrower may wish to "recontextualise" existing music for purely artistic reasons. Previously recorded music can be taken from one format to another, and the parameters of the sound altered.[25] Recontextualisation of standardised consumer products is a general trend in modern art. The pastiche art of Andy Warhol is a good example.

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[21]*Grand Upright*, above n 12, 185 n 2.

[22]Note "A New Spin on Music Sampling: A Case For Fair Pay" 105 Harvard Law Review 726, 727.

[23]Marcus, above n 10, 250 quoting *A new Bag For Hip-Hop* New York Newsday, April 19, 1990, Part II, 11; B Milkowski "The Second Coming of Bootsy" July/August 1991 *Bass Player* 25, 26. Parliament-Funkadelic, the quintessential 1970s funk outfit have been sampled by Public Enemy and X-Clan, Young MC, Queen Latifah, Digital Underground, Jungle Brothers, M.C. Hammer, Ice Cube, et al.

[24]Two recent TV commercials, both for chocolate bars, have alluded to Sly and the Family Stone's 60s hit *I Want To Take You Higher*. The "Mars Bar" commercial uses the song's incantation "Boom chuka luka luka" repeated twice as in the original song. The "Cadbury Chunky" advertisement clearly includes the phrase "gonna take you higher", reminiscent of Sly Stone's performance at Woodstock, released on "Music from the Original Soundtrack and More - Woodstock" Atlantic, 1970, SAL 933861/3 (SD - 3-500).

[25]D Sanjek "'Don't Have to DJ No More': Sampling and the 'Autonomous' Creator" 10 Cardozo Arts & Entertainment 607 (1992), 608.

Thirdly, the borrower may quote for criticism or comparison. This reason is particularly important as much rap music addresses social and political issues.[26] Of 2 Live Crew's *Oh Pretty Woman* parody the United States Supreme Court noted:[27]

> 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.

Fourthly, a sampler may want access to sounds that can no longer be re-created, or are too expensive[28] and difficult to re-create. The sampler appropriates "the products of capital and the recording industry to serve their own devices".[29] Much of the music industry is devoted to finding interesting and exotic sounds to use in a recording. Such sampling may typically be of short extracts like drum beats which are unlikely to infringe copyright (or in fact be detectable).

Fifthly, the borrower may want to make an association with another successful song or artist. This may be to capitalise on the marketing investments made by the record company

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[26]Consider the recent public debate over police accountability encouraged by visiting rapper Ice T, and his song *Cop Killer*. Rap has also been used to fight against drug abuse and violence.

[27]*Acuff-Rose*, above n 16, 518.

[28]Indeed the way that music industry royalties are structured may contribute to the popularity of sampling in this respect. Recording costs are initially paid by the record company but are later deducted from a performer's sound recording royalties. See D S Passman *All You Need To Know About The Music Business* (Simon & Schuster, New York, 1991) 74; S Shemel & M W Krasilovsky *This Business of Music* (6 ed, Billboard Books, New York, 1990) 11. Hence there is some incentive for the artist to minimise recording costs, and sampling particular sounds, rather than recreating them, may be one means of cost saving.

[29]Sanjek, above n 25, 610.

or to give legitimacy or pedigree to the new work. Whether this was the borrower's object seems dependent upon perceptions of the new work's artistic merit.

Evidentially, copyright infringement will be harder to establish against a plagiarist than a sampler.[30] As "samplers" can achieve many of their objects by copying only the musical work,[31] they may be wise to plagiarise where possible and not sample. A further disadvantage of sampling is that it potentially infringes two copyrights; the copyright in the sound recording, and the copyright in the underlying musical work.

"In truth, in literature, in science and in art, there are and can be few, if any things which, in an abstract sense, are strictly new and original throughout",[32] and music is no exception. It is standard musical practice for musicians to re-work the material of others: from parody masses of the 15th century[33] to modern jazz composition. Creators will often be inspired by what has been done before them.[34] This is especially true in popular music as

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[30]Sampling is by definition "copying". Copying may be harder to prove where a work is plagiarised. See Part VI C of the text. Furthermore, plagiarism is more likely to alter the notes in the excerpt, producing less similarity. See Part VI B of the text.

[31]Only the first reason for sampling, appropriating novel or signature sounds, can not be accomplished by plagiarism.

[32]*Emerson* v *Davies* 3 Story's US Rep 768 (1845); 8 F. Cas. (No. 4,436) 615 (C.C.D. Mass. 1845).

[33]D J Grout & C V Palisca *A History of Western Music* (4 ed, J M Dent & Sons, London, 1988) 227.

[34]That few things are "strictly new and original throughout" was recognised in *Thornton Hall Manufacturing* v *Shanton Apparel Ltd (No 2)* [1989] 1 NZLR 239. The plaintiffs had created a dress that drew on contemporary trends and features from overseas. The defendants had copied the whole dress, and contested whether copyright subsisted in the "original". The plaintiffs were not "copying the dresses that they see. They are absorbing new ideas, observing trends, and they apply those to designs of dresses produced for the plaintiff company". See *Thornton Hall*, 241. This is analogous to how much modern music is written. While Hillyer J carefully couched the inspiration derived in terms of "ideas" and "trends", which are not protected by copyright, it is clear that certain specific features of other dresses would be incorporated into the new design. Whether the plaintiff's use of portions of other dresses amounted to copyright infringement was not discussed.

the very process of learning a popular music instrument involves copying the notes and styles of others.[35]

While popular music may appear to be a "free" art form, the conventions are restrictive. The range of harmonic language, rhythms, tonalities, and musical forms are limited. The "blues scale" is heavily used and is comparatively restrictive.[36] Popular music harmony is often limited to the three primary chords, or a variation of this pattern. Many "licks" are intimately connected with instrumental technique.[37] Therefore the opportunities for novelty are small and popular music draws on itself. Material is often recycled.[38]

Composition is a technical, and not always emotive, process.[39] "Rarely does a masterpiece tumble out of the brain of its creator in an instant".[40] General methods of composition -

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[35]Consider the process of "getting down" a song. This is where an aspiring musician will copy an instrument's, or vocalist's, "part" from a recording of the work. Through this process the characteristic "licks" and techniques of favourite musicians are learnt and some of these features are incorporated in one's own style. "[I]t is the event which is the key link in the transmission of musical ideas from the mass product to the individual mind,...". See H S Bennett *On Becoming a Rock Musician* (University of Massachusetts Press, Amherst, 1980) 132. Although a large amount of sheet music is available, it generally is too expensive for regular use, but more importantly the inadequacies of musical notation in accurately representing the sound mean it is seldom used. See Bennett, 141. The "chord chart" is the only form of notation regularly used by pop musicians. This summarises the harmonic content of a composition and thus serves as a basis for improvisation or construction of the part. See Bennett 143.

[36]The blues scale is a pentatonic scale comprised of whole tones and minor thirds. These intervals are the easiest to sing. The blues scale is usually superimposed on a major or minor scale, or perhaps a more exotic mode. The predominance of the pentatonic scale may also be related to instrumental technique. Whole tones and minor thirds are the easiest intervals to use on instruments such as the guitar and bass guitar where the strings are tuned in perfect fourths.

[37]A lick is a short phrase comprising of a few notes that is often used as part of a larger melody. Muddy Water's *Mannish Boy* lick (from "Hard Again" 1977 CBS) is a starting point for all harmonica players. See n 140 below about the use of this phrase.

[38]This is particularly true with record company "session musicians" who draw repeatedly upon a stock supply of licks and ideas. Consider also the amount of "covers" on the charts. Sometimes covers are simple re-recordings, and other times the material is more substantially reworked.

[39]Keyt, above n 10, 425.

[40]G Martin (ed) *Making Music* (Pan Books, London & Sydney, 1983) 266.

the tricks, techniques, tools, and imagery - are still employed, but modern composition does not require a strict mastery of the materials of music (such as the rules of counterpoint) as in previous times. Instead composers must now deal with the technological armoury at their disposal. Yet part of the ethical objection to sampling is that, while musical plagiarism is seen as an "intuitive" process where influences are absorbed and re-created, sampling is viewed as a conscious and deliberate process. Plagiarism however can be equally deliberate, but is not usually as *visible*.

For this reason samplers are often looked down upon as parasites, despite the fact that sampling has contributed to vibrant and dynamic new forms of music. In the eyes of the public, technology in music is shunned although in reality technology has always been intimately connected with popular music. Sanjek argues that "sampling proceeds from a belief in the innovative potentialities of technology and the use of a recording itself as a musical instrument".[41] Samplers do not observe rock music's traditional distinction between technology and art that "any overindulgent use of technology diminishes not only individual 'feel' or 'touch', but also the very idea of self-expression...".[42] Much of the music industry is founded upon such romantic notions, but as many recording artists do not write their own material[43] this issue is a diversion.

Sampling has its origins in tape manipulation techniques developed by "classical" composers.[44] The process involved "cutting and pasting" sections of reel-to-reel magnetic

[41]Sanjek, above n 25, 610.

[42]Sanjek, above n 25, 610.

[43]A casual inspection of the writer's credits on many CDs will verify this fact.

[44]T Fryer *A Practical Approach to Digital Sampling* (Hal Leonard Publishing Corporation, Milwaukee, 1989) 1. Fryer notes that Pierre Schaeffer developed *musique concrete* in 1948 by using a tape recorder to record various sounds in the countryside. The tapes were then spliced to create a musical pastiche. "Many of the techniques developed [by Schaeffer] are implemented in today's sampling instruments. Cross fades,

tape to achieve the desired result. The process found its way into popular music during the 1960s.[45] Sampling however remained the exception rather than the rule. Tape manipulation was a clumsy, time consuming and expensive process. The advent of digital technology has changed this.[46] Digital samplers are now widely available, and are extremely effective. Sampling in music is now firmly entrenched in the modern music industry.[47]

There are many myths surrounding sampling. Commentators have suggested that an entire work can be created by sampling one note, and that sampling is as simple as pressing the "record" button on a tape deck.[48] This is inaccurate as a variety of technical difficulties arise through the use of digital technology, notably the problems of sampling rate and resolution.[49] Difficulties with transposition, equalisation, and sampling multi-register instruments also occur. Also the sampler must first find an accessible "chunk" of sound.[50]

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layering of sounds, multi-tracking, splicing, looping, and playing sounds forward and backward at various speeds all have their roots in tape manipulation and can now be done in a fraction of the time (and of course without splicing tape)".

[45]See Martin, above n 40, 270, for a description of this process on the song *Being for the benefit of Mr Kite* on the Beatles' ground-breaking *Sergeant Pepper* album. A background steam organ "wash" was needed. "... I transferred one or two of [the Souza recordings] to tape and then got the engineer to chop up the tape into little pieces about 15 inches long. When he'd done that I told him to throw them all up in the air and mix them up... I eventually ended up with a tape that bore no resemblance to any tune at all but was unmistakably a steam organ".

[46]A digital sampler converts a real world sound into a numerical code, that when played back sounds like the original event. A numerical code is easily stored in a computer, and unlike analogue sound recordings, will not deteriorate. The problem with digital sound technology is to get a good enough recording in the first place.

[47]For an account of the origins of sampling in the modern music industry see Brown, above n 6, 1946.

[48]Sanjek, above n 25, 612 "The process of recording a sample requires only that one set a level and press a record button"; Brown, above n 6, 1942 "With innovations in computer and recording technology, and particularly the advent of the digital sampler, the impossible has become a reality. A duet with Nat 'King' Cole or the signature sound of Rick James can be created at the touch of a button".

[49]Briefly put, sound is a continuous medium. Digital sound recording operates by taking intermittent 'snap-shots' (hence the name "sampling") of the sound wave to produce discreet units of data that may be stored in a computer. If the gap between steps is too great the sound wave will be "jagged". If the gaps are too small the process becomes unworkable for lack of computer processing power and storage capacity.

Digital samplers cannot adequately reproduce the acoustic anomalies that characterise each instrument, nor can they act as a substitute for the nuances and expression contributed by the performer. A composition constructed from a single sampled note will sound like a door-bell tune. Suffice it to say that the process is technical and requires a considerable degree of expertise in its execution.

The "threat" from digital technology is not the ease of appropriation, but the ease of *manipulation.* As mentioned, sounds may be sampled with a tape recorder, but the potential for manipulation is limited. Once sound is digitally encoded however, altering the parameters of the sound is more feasible. A sampler may change the timbre, pitch, and speed of a sample. The digital encoding also permits sequencing to be accomplished with ease. Sequencing takes a sound, or phrase, and will "loop" it indefinitely. The sound recording is now regarded as an art form in itself. The significance of digital technology is evident when the nature of modern composition is analysed.

See Fryer generally and G Albright "Digital Sound Sampling and the Copyright Act of 1976: Are Isolated Sounds Protected" 38 ASCAP Copyright Law Symposium 47 (1991) 52.

[50]To sample, the desired excerpt must be able to be separated from the other simultaneous sounds. For example, if a bass line is required, this must be sampled from a part of the piece where only the bass plays. It would be difficult to edit out other sounds, unless occurring in a different register, or divided in stereo. Thus where a sound does not occur in isolation it cannot be sampled from the recording. The alternatives are to re-record the sounds in the studio, or seek permission from the record company to sample from the original master tapes. On master tapes each instrument is recorded on an individual track to facilitate re-mixing in the studio at a later date. James Brown's *Funky Drummer* (Original 45 issue in Parts 1 & 2, King 45-6290, March 1970, re-issued on "James Brown: In The Jungle Groove" 1986 Polygram Records) is one of the most frequently sampled compositions. The drum reprise, played by Clive Stubblefield, is easy to sample as the drummer is given a solo break, but told to "keep what you got, cos it's a mother", leaving the basic beat exposed. Even though the drum reprise is played for only one bar without other interjections, this is enough for a sampler: The sample can then be looped to give a repeating phrase and serve as the foundation for an entire work. A dozen major acts have sampled the drum reprise, including Sinead O'Connor and Grace Jones. See Sanjek, above n 25, 613. Other commentators have estimated that Clive Stubblefield's beat has been sampled on up to 3000 records! See Brown, above n 6, 1986 n 286. Interestingly *Funky Drummer*'s peak Billboard rating was No. 20 on the R&B charts and No. 51 on the Pop charts. The sampling of the work by other artists may have revived its popularity. The album on which it was re-released was issued in response to the sampling craze.

B *Characteristics of Contemporary Musical Styles*

Someone once said that "talking about music is like dancing about architecture". With that caveat in mind there is still much that can be described in words. The significance of borrowing in contemporary music is illustrated by a analysis of how that music is constructed, in particular with what may be called "groove" music.

First consider popular music in general. Compared with classical music, pop music is repetitive, and must be so to be accessible. Music cannot be "pop" if specialist knowledge or education is required for appreciation. Consequently most popular songs are composed of alternating verses, choruses, and bridge passages - a type of "rondo" form. In substance the repetitions will be exact, although texture or orchestration may be altered for variety. The only part of the song not repeated is the "development" section, often consisting of an instrumental solo.[51] Thus the structure of a typical contemporary song would be AABCABCDCABC, where A is the verse, B is the bridge, C is the chorus, and D is the development. Such compositions can easily be analysed in terms of structure, melody and harmony as any accompaniment to the "tune" is not usually the essence of the work.[52]

Groove music is a particular type of popular music where borrowing frequently occurs. This includes such genres as rap, acid-house, hip-hop, funk and other varieties of "techno" dance music. Essentially what distinguishes groove music from traditional composition is its lack of melody, harmony, and structure, and its consequent *extreme* repetitiveness.[53]

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[51]The development section allows for a brief excursion into more exotic tonalities and harmonies.

[52]Indeed often popular music is notated in "chord charts" consisting of melody (pitch and rhythm) and the accompanying chords (harmony).

[53]James Brown's *Sex Machine* is probably the most enduring exposition of this genre. *Get Up, I Feel Like Being a Sex Machine* Original 45 issue in Parts 1 & 2, King 45-6318, July 1970, re-issued on *James Brown: The CD of JB - Sex Machine & Other Soul Classics* 1985 Polygram Records.

The same "riff" or "groove" may be repeated throughout the duration of the composition.[54] This is not just a repetition of verses and choruses, but a repetition of the *building blocks* of a song. It is motivic[55] composition carried to the extreme.[56] This minimalist approach is possible because of the brevity of popular compositions (the "three-minute art form"), the dance-orientated nature of the music, and fact that in popular songs only one "mood" is established.

The structure of a "groove" is also peculiar to this type of music. Basically a groove is a short musical phrase constructed by *layering* complementing sounds. There is no single melody that may be reduced to notation for analysis, but rather a "sound picture" composed of many different simultaneous events. As with all music, style consists of force of assertion, and hence grooves may sometimes be simplistic. However a groove must be have sufficient depth, and be interesting enough, to retain the listener's attention.

A typical groove may consist of a particular drum pattern, a bass riff, a complementary guitar riff, horn "stabs and punches"[57] that contrast both melodically and rhythmically, and a "bubbling" keyboard part for fullness. An analysis of groove music will require analysis of all the building blocks that make up the groove, not just the melody and harmony, if indeed either can be found. The basic groove thus created will recur throughout the piece.

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[54]A riff is a single musical phrase, played by one instrument or several instruments in unison, that serves as a foundation for the composition. A groove is a particular combination of simultaneous riffs and licks.

[55]Motivic composition "bonds" a work by the use of a central motif throughout the work.

[56]B Wentz "Crime Pays - US3" Vol 61 No 8 Down Beat 34 (August 1994) 34. Wentz describes rap single *Cantaloop (Flip Fantasia)* from "Hand On The Torch" (1993 Capitol Records Inc) as an "aural concoction with layers of partying grunts and groans over infectious, rhythmic beats; no standard song forms can be heard, just a groove with rap lyrics, "lifted" background lick, and "live" horn melodies noodling in and out".

[57]"Horn" is the generic name in popular music for brass and woodwind instruments, and commonly includes trumpets, saxophones, and trombones. The horns usually play together as a section.

Often missing is any form of harmonic progression. The composition may only use one chord, or perhaps change chords only infrequently, although in some compositions standard harmonic formulas may be used.[58]

Various non-essential occasional sounds may be added to the groove for variety,[59] or the groove itself may be deconstructed and re-arranged during the course of the song. This will also help vary the atmosphere even though the "same" groove is still used. The importance of this technique is indicated by the various "mixes" of a release that will be available.[60]

The nature of groove music has three copyright implications. First, if a groove, or part of a groove, is borrowed from another's composition then even a small excerpt can take on great significance. Most grooves, despite their simplicity, are highly distinctive. The same is sometimes true for the constituent parts of a groove such a drum-beats.[61] It is the repetitiveness of groove music that creates vulnerability to "rip-offs". Secondly, an analysis of groove music requires analysis of musical context. In traditional infringement cases, the "tune" will be copied and re-used *as a tune*. Groove music does not use tunes, and may change the context of the excerpts. From this perspective, traditional musical

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[58]Such a formula may be a musical "idea" and thus not protectable by copyright. See Part V B of the text.

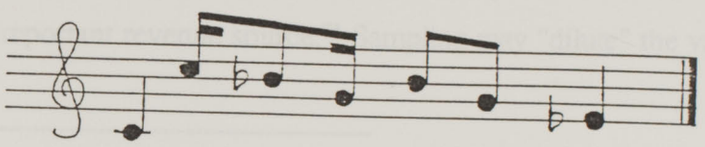
[59]Various crowd noises such as whooping, clapping, and screaming, may be added as "musical polyfiller" for ambience. Often part of a songs texture and fullness will be created in this way. The B-52's *Love Shack* (on "Cosmic Thing" 1989 Reprise Records) with its otherwise simple instrumentation and transparency of texture uses this technique as does Parliament's *Up for the Down Stroke* (on "Parliament's Greatest Hits" 1974, Casablanca Record and Filmworks, 1984 Polygram Records). The re-recorded 1970 LP version of *Sex Machine*, above n 53, had an over-dubbed audience "reaction".

[60]Dance tracks especially are likely to be available in more than one mix. A standard "single" mix is released for radio and TV, while specialised mixes may be available for dancing. Alternative mixes of a single are often supplied on an album release. See below at n 225 for a discussion of Betty Boo's *Where Are You Baby?* which was released in a second mix that did not contain a potentially infringing excerpt.

[61]James Brown's *Funky Drummer*, above n 50, is probably the best example.

analysis in terms of melody, harmony, and "horizontal" structure is "Eurocentric". The emphasis in Afro-American music is rhythmic.[62] The texture and harmony may be too simple or amorphous to serve as an analytical tool. There may be no verses or choruses. Thirdly, the layered construction of groove music lends itself to pastiche techniques. Rather than "absorbing" influences, "chunks" may be taken from other compositions and re-worked as building blocks in the new composition. Often the excerpt may be "looped" on a sequencer, making the excerpt disproportionately important relative to the original work.

Consider the following musical phrase:[63]



The phrase originally appeared in James Brown's signature tune *I Got You*,[64] but was later used in Betty Boo's recent dance floor hit *Where are you Baby?*[65]. In *I Got You* the phrase is repeated twice to form a bridge passage between verse and chorus. The bridge passage occurs twice in the song. In *Where Are You Baby?* the phrase is sped up and looped to form a background "wash" in a thick musical texture at various points in the song. On its own the original phrase is highly distinctive, but may or may not be a substantial part of *I*

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[62]Sanjek, above n 25, 617.

[63]The phrase has been transposed to the key of C Major for convenience of analysis.

[64]*I Got You (I Feel Good)* re-issued on "James Brown: the CD of JB - Sex Machine & Other Soul Classics" 1985 Polygram Records. Originally released on Smash LP 6/27058. *I Feel Good* is the song's more familiar title.

[65]*Where Are You Baby?* on "Boomania" 1990 Rhythm King.

Got You. An analysis of melody and harmony will not help to determine whether there is a substantial degree of similarity between the two works. A more detailed study of context must be undertaken. This is discussed below.[66]

III THE MUSIC INDUSTRY

Musical plagiarism creates special difficulties for the modern music industry. Copyright only protects rights in the work itself.[67] The industry's interests extend beyond the musical work to the *marketing of the artist as a commodity*. Record companies make substantial investments in their artists[68] reflected in the restraint of trade contracts artists must agree to.[69] Videos and tours are typical marketing tools.[70] Artist merchandising is also an important revenue source.[71] Sampling may "dilute" the value of the artist's reputation to the

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[66]See Part VI A & B of the test.

[67]"Moral rights" do offer protection for the artist's reputation, but not the artist's goodwill (ie the marketing investment in an artist). Moral rights are discussed in Part VIII of the text.

[68]When borrowing occurs, the sound recording copyright holder will probably be one of the "Majors". These are the half-dozen dominant record companies in the world. Smaller record companies usually work in concert with a major to access marketing and distributional capabilities. Therefore the commercial interests of a major will always be relevant.

[69]A new recording artist may be signed for a 6-10 record deal or at least for a specified time period. This is not a promise to make this many records, but rather an option on the artist's future recordings. See Shemel, above n 28, 8; Passman, above n 28, 119.

[70]Music videos and tours almost often *lose* money. Indeed record companies sometimes must *pay* TV stations to broadcast their videos, although Shemel, above n 28, 76, notes that MTV now pays for videos. Artists will only tour when they have an album to promote. The same is true for videos. See Passman, above n 28, 123 and 271.

[71]For a New Zealand case illustrating the economic importance of merchandising and image marketing, and the correspondingly strong protection afforded by the courts, see *Tony Blain Ltd* v *Splain* Unreported, 25 March 1993, High Court, Auckland Registry, CP 167/93 Anderson J. "The past decade or so has seen a burgeoning of the commercial exploitation of the goodwill associated with the name and activities of... 'personalities'... The... personalities [ie their agents] licence others in respect of copyright designs and authorise the exploitation of their commercial goodwill. This is probably a multi billion dollar industry in the western world", 2.

record company,[72] and may unjustly enrich the borrower who benefits from the popularity of the original artist and work.[73]

A further problem is that sampling has made musical composition available to everyone. Expensive studios and top musicians are no longer necessary for creating a "hit". Sampling "has undeniably enlarged, if not 'democratized', the ranks of potential creators. Instrumental dexterity is no longer a pre-requisite for creation".[74] This reduces industry monopoly of talent and resources as well as undermining the popular perception of the musician.[75] It is suggested that the copyright scheme may conflict with the music industry's interests in these respects.

Artists and the music industry are now very much more aware of their copyright interests in the "borrowing" sense. The industry distributes accessible public information[76] and

[72]The converse may also be true. See text at n 172 below.

[73]Note that sampling will involve both the musical work copyright and the sound recording copyright. The record company has no interest in the musical work copyright, so where plagiarism has occurred, and the artist themselves is not the author of the musical work, copyright actions will not be a means to protect marketing investments.

[74]Sanjek, above n 25, 609.

[75]Sanjek, above n 25, 609, asks that "[i]f anyone with an available library of recordings, a grasp of recorded musical history, and a talent for ingenious collage can call themselves a creator of music, is it then the case that the process and the product no longer possess the meanings once assigned to them?".

[76]AMCOS in its role as a collection agency provides information brochures for prospective copyright users. The brochures are not a summary of legal rights as such, but are aimed at encouraging users to seek clearance. See text at n 80. *AMCOS - Importing Audio Recordings into New Zealand of Songs & Other Musical Works: Audio Only Formats*, 1, and also *AMCOS - Making Audio Recordings of Songs & Other Musical Works: Audio Only Formats - New Zealand Manufacture*, 1. "Sampling a small section of another recording is subject to the approval of the publisher that owns the song *and* the record company that owns the rights in the sound recording that has been copied"; *AMCOS - A Guide to Music Reproduction Rights and the Concept of Copyright*, 4. "The unauthorised copying of a 'substantial part' of a musical work infringes copyright. A 'substantial part' can be a brief as a few seconds if the idea of the original work can be conveyed in that time"; *The Use of Music in Film*, 3-4. "The use of music in films and videos almost always involves obtaining permission... Permissions are needed because it is an infringement of copyright to reproduce the whole or a 'substantial part' of copyright material on a film or a video soundtrack without the permission, or licence, of the owner of copyright. As a few bars of music are

promotes its own views on copyright (and other legal rights) through government lobbying.[77] Some record companies contain in-house enforcement departments whose sole function is to detect unauthorised use of their works.[78] Other companies have departments which "clear" samples for commercial use, and encourage such use.[79]

A *Music Industry Attitudes*

In New Zealand the Australasian Mechanical Copyright Owners' Society (AMCOS)[80] is the collection agency responsible for licensing musical works for use on recordings ("mechanical" reproduction). AMCOS will refer clearance applications to the publisher concerned. AMCOS does not decide whether an excerpt will infringe copyright but leaves this decision to the publisher. This explains AMCOS's attitude to musical borrowing: all *potential* infringements will be referred. This is safest for the borrower as later legal entanglements may be avoided. If permission is granted then there is likely to be a claim

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likely to be 'substantial', the use of even short excerpts will require permission"; The Copyright Council of New Zealand and the Record Industry Association of New Zealand publish more substantial material on music copyright

[77]Submissions in response to the Justice Department's *Reform of the Copyright Act 1962 - A Discussion Paper* (Department of Justice, Wellington, 1985) from entertainment industry related groups included Actor's Equity, Australasian Performing Right Association, Australian Music Publishers Association, Composers Association of New Zealand, Copyright Council of New Zealand, Motion Picture Association of America/New Zealand Film and Video Security Office, and Phonographic Performances Ltd. The music industry submissions were by far the most comprehensive of those received.

[78]See Brown, above n 6, 1953 n 60.

[79]EMI has an 11 member inter-departmental sample clearance committee. The committee meets twice a month and assesses the fees due for use of their works. EMI encourages sampling, as long as clearance is sought, and has printed a guide of EMI's most sampled artists and songs to familiarise samplers with EMI's catalogue. See J McAdams "Clearing House: EMI Music Uses Sampling Committee", January 30, 1993 Billboard, 1 and 85.

[80]AMCOS also functions as an enforcement agency, alert to possible infringements. There is no collection agency responsible for licensing *sound recordings* for mechanical reproduction. Permission for sampling, in respect of the sound recording, must be obtained from the record company. The considerations for use of sound recordings and musical works are similar.

for percentage of ownership in the composition. Such a claim is based on the following reasoning:[81]

> [I]f the sample contributes to the success (commercial or otherwise) of the new composition, then it is appropriate to expect payment for the use. If it does not so contribute, then why use it? It would be unethical to use the talent of another (or the reputation, familiarity or evocative nature of their work to the listener) for gain without including that other in the rewards.

Such a statement reveals two important attitudes. First, that the law should not permit unauthorised gain from the commercial use of a work. Such attitudes represent a desire to protect the composer's financial well-being (consistent with the "incentive" rationale of copyright), but in part derive from "free-rider" arguments of economic efficiency.[82] Secondly, the statement reveals that the industry is concerned with protecting the worth of the artist as a commodity, or at least is unwilling to let another profit from an artist's goodwill.

In addition to the financial aspects, "moral" issues are important. Some compositions are deeply personal works, and musicians may object to them being tampered with or used in unsuitable contexts. Sampling or plagiarism may diminish the integrity of the original work and performance, in addition to affecting the reputation of the artist.[83] This is especially true if the artist has well known political or social leanings.[84] The implications of "moral rights" are discussed below.[85]

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[81]Correspondence with Janice Giles, General Manager AMCOS NZ, 18 January 1994. Australasian Mechanical Copyright Owners Society Ltd, P.O. Box 37 695, Parnell, Auckland, (09) 309 4258.

[82]Harvard Law Review Note, above n 22, 739. "A requirement that sampling artists pay for the use of samples is fair and promotes efficiency because such a requirement ensures both that new artists are not 'stealing' and that artists will not be discouraged from producing new songs". The argument assumes that a borrower cannot benefit from the use of a work without causing harm to the original creator.

[83]Interview with Janice Giles, General Manager AMCOS NZ, 26 August 1994.

Artistic merit is not a consideration in copyright law, but will be a consideration if "clearance" is sought. Other factors relevant to clearance issues in respect of plagiarism and sampling are the length of the excerpt,[86] the importance of the excerpt to the new work,[87] the general context of the use,[88] the probability of the new work being successful,[89] the nature of the use,[90] the stature of the original and new artist, the popularity of the original work, and whether prior permission was sought.[91] Attribution

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[84]Some publishers do approach clearance on a purely commercial level. No value judgments are made about the original works, or the use of the sample in the new work. Crude or scatological lyrics will not lead to outright rejection, but may be referred to the writer. See McAdams, above n 79, 85.

[85]See Part VIII of the text.

[86]Most publishers use three tests to determine how much to charge for a clearance. If less than 50% of the composition has been used, and that portion is insignificant, then a fee will be requested. If less than 50% of a composition is used, but the portion is very distinctive, then a percentage of the musical work copyright royalties will be requested. If more than 50% of a composition has been used, then up to 100% of the royalties may be requested. As most of a rap record (or a similar work) is original lyrics or original rhythm tracks, claims for 100% of the royalites are rare, or at least confined to situations where the entire melody is sampled. About 10-15% of the royalties is normal. See McAdams, above n 79, 85.

[87]Generally the publisher will receive a percentage of the royalties, sometimes expressed as a percentage of the statutory rate for the compulsory license depending on the importance of the sample to the new work. See Brown, above n 6, 1956. (At 1 January 1992 the full statutory license fee was 5.3% of the ordinary retail selling price of the record. See sections 22(2) and 23(1) of the Copyright Act 1962) Note that this is not a consideration under s 3(1) of the Copyright Act 1962 for determining infringement. See Part VI A 5 of the text.

[88]Artists may object to uses of their work they consider to be offensive. A "demo" tape or piano reduction of the new work will be requested so the extent and context of the use can be assessed. Once effort has been expended in bringing the composition to this staged of development, the copyright holder gains bargaining power.

[89]If success is likely a percentage of royalties will be more lucrative than a "flat fee".

[90]Exclusively commercial uses such as advertising will attract the highest fees. Also advertising is hardest to gain clearance for. Giles interview, above n 83.

[91]Permission may be granted for free, or at least on more favourable terms is prior permission is sought. See Marcus, above n 10, 260; Vanilla Ice reputably lost all of the profits on his hit *Ice Ice Baby* which without clearance sampled the Queen-David Bowie collaboration *Under Pressure*. See Harvard Law Review Note, above n 22, 728 n 10.

will *always* be required.[92] The infringement test in the Copyright Act 1962 ignores most of these criteria and addresses only the excerpt's importance in the original work.

B *Negotiation*

Most plagiarism and sampling claims have been settled out of court.[93] Given the uncertainties in an infringement action of proving reproduction, "infringers" prefer to negotiate. Paying compensation may be preferable to incurring litigation costs and still bearing the risk of losing the action. As well as the uncertain odds of litigation, the stakes are very high. The distributor of the infringing work will not react kindly to an injunction (even an interim one) on the work.[94] An injunction will totally disrupt any marketing plans, and a permanent injunction will cause considerable loss to the record company as the CDs will already have been recorded, manufactured and distributed.[95] One factor that may

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[92]Many musicians feel aggrieved when their work is copied without attribution, irrespective of payment issues. "Bootsy" Collins, space bass player from Parliament comments: "We're the ones that got the real stuff... Can't nobody else funk like that. Everything else is just an imitation... In order for us to jump back on an start doing it for ourselves we have to realise that the real force is with *us*, the real force comes with being the family that we were". Milkowski, above n 23, 26; Attribution of excerpts may be required under the Fair Trading Act 1986. See Appendix A.

[93]The only commercially significant sampling claim in New Zealand related to the use of Shona Laing's *1905* by the Headless Chickens. The parties reached a settlement to permit the use; Marcus, above n 10, 256, notes the threat of legal action is enough to bring most parties to the negotiating table. Some samplers take a chance on avoiding detection. Once detection occurs though they do not contest liability.

[94]Publishing contracts usually require the composer to contract that the work is the composer's "sole, exclusive, and original" work and that it is not subject to any copyright claims. See cl 3 of the Songwriter Contract Form of The Songwriters Guild of America, reproduced in Shemel, above n 28, 612, Form 1, and cl 3 of the Publisher Popular Song Contract reproduced in Shemel, above n 28, 625, Form 2.

[95]Section 24(1) of the Act. An injunction is the best copyright remedy and will always be sought. The use of the excerpt can be restrained if desired, or a settlement can then be "negotiated" by the parties; I James Address to Music New Zealand Convention 1992 on "Recording and Publishing - Making a Deal" from *Music New Zealand Convention '92* (Music New Zealand, Wellington, 1992) (Un-paginated). James, of Mushroom Music publishers in Australia notes "... [the injunction] is an enormous penalty and it's made the record companies realise that they can no longer take a laissez-faire attitude to sampling"; See also Passman, above n 28, 255; Shemel, above n 28, 285; An injunction was sought in *Grand Upright Music*, above n 12. See above n 15.

deter borrowers from seeking prior permission, is that a refused clearance application may point towards "flagrant" infringement[96] and potential criminal liability[97] if the sample is nonetheless used.[98]

Copyright holders also prefer negotiation.[99] Record companies and publishers may be reluctant to initiate legal actions, as their own artists may also engage in sampling.[100] Furthermore copyright litigation in the music industry may establish unfavourable precedents.[101] This would limit the leverage of record companies and publishers to obtain negotiated settlements in the future. *Acuff-Rose Music* is a case in point. The music industry in the United States is now saddled with Supreme Court authority sympathetic to musical borrowing in some circumstances.

Given the industry adage, "where there's a hit, there's a writ",[102] music litigation will still occur. The following Parts assess liability for borrowing under copyright law and the tort of passing off.

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[96]Under s 24(3)(a) of the Act the court may award punitive damages for flagrant infringement.

[97]"Knowing" infringement can lead to criminal liability under s 28(1) of the Act.

[98]In *Grand Upright Music*, above n 12, 184, the defendant's had sought prior permission to sample *Alone Again, Naturally*, but were denied. Because permission had been sought, Duffy J was able to exclaim "[w]hat more persuasive evidence can there be!" when deciding whether a valid copyright subsisted in the original work.

[99]James, above n 95. "...[A]s a publisher we do not have a problem with sampling, we think that it's a fine and wonderful thing because it's the exploitation of copyrights. What we have a problem with is anyone who doesn't understand that you've got to negotiate and talk about it before you put out the record... Anyone who doesn't do this has no bargaining position whatsoever... [N]o matter what you feel about [sampling] morally you're not going to win the argument, so try and win the discussion instead".

[100]Brown, above n 6, 1953; Marcus, above n 10, 256.

[101]Marcus, above n 10, 256.

[102]James, above n 95. "... [T]he fact is that decent plagiarism cases only occur when there is a lot of money. George Harrison got done for My Sweet Lord, but it tends to happen to The Beatles rather than to anyone I know or have ever represented...".

IV COPYRIGHT POLICY

Patterson & Lindberg observe that a unified theory of copyright is not often perceived. "[A]n ambivalent theoretical foundation provides leeway for interpretation and therefore leads to a malleable concept subject to opportunistic modification".[103] However, analysis of the statutory scheme does reveal a unified theory. Copyright law exists to promote learning and the arts,[104] and achieves this end by carefully balancing the competing interests of authors, publishers, and users.[105] Copyright provides creators of artistic works with clearly defined exclusive rights permitting commercial exploitation, and gives protection only for new works.[106] This is an incentive to encourage the creation of works for the public benefit.[107] Copyright is a statutory scheme,[108] and the protection afforded is

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[103]L R Patterson & S W Lindberg *The Nature of Copyright - A Law of Users' Rights* (University of Georgia Press, Athens Georgia, 1991) 135.

[104]Copyright policy is illustrated in the Long Title to the first copyright act, the Statute of Anne 1709 (GB): "An Act for the *Encouragement of Learning* by vesting the "copies" of printed books in the Authors or Purchasers of such Copies during the Times herein mentioned..." (emphasis added). The Preamble continues "Whereas Printers ... have of late frequently taken the Liberty of printing, reprinting and republishing Books without the Consent of the Authors or Proprietors of such Books ... for preventing such Practice and for the Encouragement of Learned Men to compose and write useful Books, be it enacted that ..."; The utility of copyright as a device to facilitate social improvement was also recognised by the framers of the U.S. Constitution. Article 1, § 8, cl 8 states that "The Congress shall have the power ... to *Promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (emphasis added).

[105]"The main function of copyright law is to strike a fair balance between the rights of the copyright owners and the users of protected works". Department of Justice *Reform of the Copyright Act 1962 - A Discussion Paper*, (Department of Justice, Wellington, 1989) para 1.1, 7.

[106]This was not the case prior to the Statute of Anne 1709 (GB). See Patterson & Lindberg, above n 103, 30.

[107]*Twentieth Century Music Corp* v *Aiken* 422 US 151, 95 S Ct 2040, 45 L Ed 2d 84, 89 (1975) per Stewart J. "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an [author's] creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good".

limited to that provided in the Act.[109] Copyright law created the concept of the "public domain". General ideas, and un-original works cannot be monopolised, and are free for unrestricted use. The copyright holder's exclusive rights relate only to the market for the work, the period of protection is limited, and "users' rights" are provided.[110] Any creator is entitled to copyright protection[111] and the threshold for protection is low. A work need not exhibit any novelty or social utility to come within the Act's protection.[112] All that is required is that the work be an "original" expression of an idea.[113] The user's rights and the built in limitations on copyright rights are the *quid pro quo* for this ease of protection.[114] The scheme suggests that copyright provides limited protection for a work's market as an incentive to encourage creativity for the public good. The tension in copyright law is the need "simultaneously to protect copyrighted material and to allow others to build upon

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[108]When interpreting sections of an Act, s 5(j) of the Acts Interpretation Act 1924 mandates a purposive approach. The Act shall receive "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act... according to its true intent, meaning, and spirit...".

[109]Section 5(1) of the Copyright Act 1962 states that "no copyright shall exist other than by virtue of this Act". The rule is designed to prevent recourse to "common law" copyright. Section 4 of the Copyright Act 1913 articulated the rule more clearly. "No person shall be entitled to copyright *or any similar right* in any...[musical work]... otherwise than under and in accordance with the provisions of this Act..." (emphasis added). As section 5(2) of the current Act makes an exception to s 5(1) by stating that "[n]othing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence" it is evident that the current Act intends to afford protection for works only as expressly provided or excepted, and that the meaning of s 4 of the previous Act was comprehended.

[110]In New Zealand, users' rights comprise of the substantiality test in s 3(1) of the Act, and the "fair dealing" defences in s 19. These are discussed below in Part VI and Part VII of the text respectively.

[111]Prior to the statutory scheme introduced by the Statute of Anne 1709 (GB) only members of the Stationers Company (ie publishers) where entitled to protection. See Patterson & Lindberg, above n 103, 29 and chapter 2 generally.

[112]This in contrast to patent law which requires novelty for protection but has fewer restrictions on the monopoly during the period of protection.

[113]The converse of this rule is that ideas themselves are not protected.

[114]These characteristics of copyright suggest that its rationale is an incentive theory rather than a property right theory.

it...".[115] Hence unless the Act receives a balanced interpretation, its policy objectives of serving the public interest may be disrupted.

Most precedent on musical plagiarism is from the United States. While the scheme and origin of copyright legislation is similar throughout common law jurisdictions,[116] the judicial approach to copyright infringement in the United States and the Commonwealth has subtly diverged. United States case law consistently reflects the copyright objective of protecting the market for a work as an incentive to create for the *good of society*.[117] Commonwealth courts have not always acknowledged a "public policy" interpretation of the Act, instead leaning towards a "sweat of the brow" approach that rewards the creator's skill and labour by preventing appropriation. The divergence is most marked in interpretations of the "idea-expression" dichotomy[118] and of the "substantiality" test.[119] This paper submits that the United States' approach is preferable as it better balances the competing interests of creators, publishers, and users of copyright material. Ironically the US Supreme Court has cited English authority in support of its approach.[120]

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[115]*Acuff-Rose*, above n 16, 513.

[116]All modern copyright statutes the scheme described above that was first established in the Statue of Anne 1709 (GB).

[117]The United States Supreme Court has reiterated this principle in several cases in the last two decades. See *Twentieth Century Music*, above n 107; *Sony Corp* v *Universal City Studios Inc* 464 US 417, 78 L Ed 2d 574, 104 S Ct 774; *Harper & Row* v *Nation Enterprises* 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218; *Feist Publications Inc* v *Rural Telephone Service Company Inc* 499 US _, 113 L Ed 2d 358, 111 S Ct _; and most recently *Acuff-Rose*, above n 16. See also P N Leval "Towards A Fair Use Standard" 103 Harvard Law Review 1105 (1990), 1107.

[118]See Part V B of the text.

[119]See *Harper & Row*, above n 117, and Part VI A of the text.

[120]*Acuff-Rose*, above n 16, 513. Souter J quotes *Carey* v *Kearsley*, 4 Esp 168 (KB 1803), 170, 170 ER 679, 681. "[W]hile I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science". See also *Twentieth Century Corp*, above n 107, where Stewart J cites *Sayre and Others* v *Moore*, reported in footnote to *Cary* v *Longman* 1 East 358 (1785), 362 n (b), 102 ER 138, 140 n (b). In *Sayre* the defendant had copied the defendant's sea charts, but had made numerous improvements and corrections. Lord Mansfield CJ stated that "we must take care to guard

A *Copyright Infringement Mechanics*

Assuming musical plagiarism or sampling has occurred, there are three means of avoiding infringement liability in copyright actions. First, the validity of the copyright in the copied work, or the relevant excerpts, can be attacked. This can be achieved by proving that the elements borrowed were not original enough to be protected, or that the elements borrowed from the work were only ideas. Section 27(1) of the Copyright Act 1962 ("the Act") presumes that copyright subsists in a work unless the defendant contests the issue.[121] Secondly reproduction may not be able to be proved. The "substantial similarity" test is used to prove reproduction. Substantial parts of the original work are similar to the new work. Evidential hurdles must be overcome to establish whether any copying in fact took place. Finally the plagiarist can establish a valid defence. Defences revolve around fair dealing for one of the prescribed purposes in section 19 such as criticism (particularly relevant in rap). As fair dealing defences relate to fact-specific circumstances, this paper focuses on the first two elements to assess the scope for pure artistic development within the confines of the statutory scheme.

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against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts retarded".

[121] See *Bleiman* v *News Media Auckland Ltd* Unrep 13 May 1994, Court of Appeal, CA 70/94, 2.

V SUBSISTENCE OF COPYRIGHT

Three distinct copyrights subsist in a phonorecord,[122] subject to the limitations of the copyright term.[123] First, the copyright in the musical work.[124] This is the copyright of the music created by the composer.[125] These are the elements of a song that can be reduced to notation. Secondly, the copyright in the lyrics of the song. This is a literary copyright and is not dealt with here. Thirdly, the copyright in the sound recording.[126] This is a specific realisation of the musical work (and lyrics).[127] If a work is copied rather than sampled, only the copyright in the musical work will be affected.

A *Originality of Expression*

Copyright's goal of encouraging creativity will only be achieved by protecting *new* works. Thus the Act requires that works be original to gain protection.[128] The threshold is low however.[129] As long as the creator has exercised some degree of original "skill and labour"

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[122]Domestic protection for foreign works is effected by s 49 of the Act.

[123]Copyright in a musical work exists for 50 years from the author's death under s 8(1)(a) of the Act. Copyright in a sound recording exists for only 50 years under s13(3).

[124]Section 7(1) of the Act.

[125]Session musicians and arrangers may contribute to the authorship of the musical work through the construction and realisation of their parts. In practice any claim in the musical work copyright is contractually waived. See Shemel, above n 28, 623, Form 4.

[126]Section 13(1) of the Act. This copyright is sometimes called a "secondary copyright" as it embodies a pre-existing and distinct copyright (ie the copyright in the musical work).

[127]The sound recording copyright includes the contribution of the performers and producer. The artist will receive performance royalties. The producer usually receives a small performance royalty also. Session musicians are paid "one-off" fees.

[128]Section 7(1) of the Act for musical works. See text at n 134 for sound recordings.

in execution, copyright will subsist. Likewise the court will not make a value judgment about the artistic worth of the work.[130] Original does not mean "novel", as is required for patent protection, and thus originality of execution, and not of thought, is protected.[131] If the "execution" is not copied then it is original.[132] The converse of this low threshold is that *independent* creation of the same work will not be a copyright infringement. This necessitates proof of copying, which may be problematic where the copied material is hackneyed in nature.[133]

A difficulty that occurs with sampling, but not with plagiarism, is that the realisation of a public domain musical phrase by a performer will endow sufficient originality to gain protection under the sound recording copyright.[134] The *performance* is original, not the choice of notes.[135] This principle can be applied to sampling drumbeats.[136] Many drum beats are just variations of standard patterns, and therefore not original. The recording of a

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[129]*Artifakts Design Group* v *N P Rigg Ltd* [1993] 1 NZLR 196, 210.

[130]Although the "right of integrity" proposed by the Copyright Bill 1994 may alter this convention. See the text at n 288.

[131]"Copyright protection is given to literary, dramatic, musical and artistic works and not to ideas, and therefore it is original skill and labour in execution, and not originality of thought that is required". *Copinger and Skone James on Copyright* (11 ed, Sweet & Maxwell, London), 48, cited in *Martin* v *Polyplas Manufacturers Ltd* [1969] NZLR 1046, 1050, and *Johnson* v *Bucko Enterprises* [1975] 1 NZLR 311, 315; See *Artifakts*, above n 129, 210 for a discussion of the authorities on this point.

[132]*University of London Press Limited* v *University Tutorial Press Limited* [1916] 2 Ch. 601, 608.

[133]See text at n 232 below.

[134]Section 13(1) has no originality requirement for sound recordings as a new recording is by nature original.

[135]See R Tinsley "The Application of Copyright Laws to Digital Sound Sampling" in J D Viera (ed) 1992-93 Entertainment, Publishing and the Arts Handbook (Clark Boardman Callaghan, Deerfield Il, 1992-93) 47, 54; German musicians "Enigma" faced this difficulty in *Sadeness Part I* when they sampled recordings of medieval plainchant. Plainchant is public domain material, but the recording of it was original and still within the period of protection. See Brown, above n 6, 1952 n 56 citing E Weinert "'Sadeness' Creator Settles Sampling Suit" September 14, 1991 Billboard 80.

[136]James Brown's *Funky Drummer*, above n 50, contains probably the most sampled drum beat.

drum beat will be original, and therefore liability for sampling can not be avoided for want of originality.

1 *Originality in musical works*

While public domain material is not in itself protectable by copyright, such material may receive protection by virtue of a particular arrangement. In *Francis Day & Hunter Ltd* v *Bron* Wilberforce J noted that commonplace musical devices can be used together to create an original composition.[137]

> [T]he theme of "Spanish Town" is made up of commonplace elements or, as some witnesses have called them, cliches. The first six notes are a commonplace enough series... The device of repetition, of resting for two bars on a long note and of repetition in sequence, are the commonest tricks of composition. But many writers of great music have used cliches to produce masterpieces... It is generally agreed by witnesses on both sides that the *combination* which has in fact been adopted by the composer of "Spanish Town" is something which has character and charm and that to produce it is an act of composition.

This situation would occur in modern music where a groove has been constructed from public domain material, and then appropriated as a whole. While commonplace phrases combined in a "harmonious and balanced fashion"[138] are protected, these phrases have no protection outside a particular combination.[139]

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[137]*Francis Day & Hunter Ltd* v *Bron* [1963] 1 Ch 587, 594 (emphasis added). Wilmer LJ on appeal wholly accepted Wilberforce J's assessment of "Spanish Town". See *Francis Day*, 609. The facts are discussed in the text at n 207 below.

[138]*Thornton Hall*, above n 34, 245.

[139]In *Ladbroke (Football) Ltd* v *William Hill (Football) Ltd* [1964] 1 All ER 465; [1964] 1 WLR 273 (HL), 481, Lord Pearce noted that "that which would not attract copyright protection except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the courts will not hold its reproduction to be an infringement..."; The Copyright Bill 1994

Many grooves may be constructed from insufficiently original building blocks. A borrower may use these building blocks outside of their original context, even if the building blocks are commonly "identified" with the first work.[140]

B *The Idea - Expression Dichotomy*

"It is one of the sacred canons of copyright law, one almost might say a cliche, that copyright does not subsist in ideas per se but only in their form of expression".[141] This limitation on the monopoly is a logical consequence of copyright's low threshold in protecting any original expression, and reflects the policy elements of copyright in promoting the public welfare.[142]

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appears to articulate this principle in cl 14(2)(b). A work is not original if "[i]t is, or to the extent that it is, a copy of another work". Under cl 14(1) only original works are protected.

[140]A good example is the Lion Brown "Just Good Mates" TV commercial. The tune at one point alternates between the four-note guitar and bass riffs from Muddy Water's *Mannish Boy*, above n 37. These riffs in themselves are commonplace and probably not original to *Mannish Boy*. As the Lion Brown commercial does not use the phrases in the same combination as *Mannish Boy* (ie repeated relentlessly throughout the song) copyright is not infringed even though on hearing the commercial the listener is reminded of *Mannish Boy*. A contrasting example is the recent "Learn To Swim" advertising campaign. The commercial features a women walking around a menacing swimming pool. A repeated motif consisting of a two notes, a semitone interval apart, "sliding up", and increasing in speed, is played. This is of course a *very* thinly disguised version of John Williams' famous *Jaws* theme. While a semitone interval is un-original in every sense, the combination of repeated intervals with a distinct phrasing is quite original. The advertisement copies the original combination exactly and therefore would impinge on the market for the original work if permission for the use had not been granted.

[141]J C Lahore & P C B Griffith *Copyright and the Arts in Australia* (Melbourne University Press, 1974) 13.

[142]*Bleiman* v *News Media* Unrep CP 185/94, 30 April 1994, HC Auckland Registry, 11. *Bleiman* concerned a newspaper competition called "Fantasy Football". The defendants had copied the key elements of the format and content of the game, without copying any specific wording. In the High Court Blanchard J observed that "[i]t may be thought to be hard on an originator of an idea or system that it is incapable of copyright protection, but that is the law as I understand it. The law reflects the fundamental value that ideas should, except to the limited extent that patent and design protection law may grant a monopoly for a period, be in the public domain, *to be used and built on to the advantage of the public*" (emphasis added). Blanchard J's decision was however overturned by the Court of Appeal on the application of the doctrine to the facts. See the text at n 152.

The idea-expression dichotomy is not expressly articulated in the Copyright Act 1962,[143] as it is in the US Act.[144] In principle the idea expression dichotomy is upheld in New Zealand, although the court's application of the doctrine to the facts will often be determinative.[145]

The idea-expression dichotomy may be applied to musical works to separate the protectable elements from the non-protectable elements. As mentioned, copyright seeks to encourage creativity and protecting ideas would not advance this goal. Borrowers should be free to use the ideas of another's work.

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[143]Interestingly Article 9(2) of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") provides that "copyright shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such". The Copyright Bill is intended to effect the TRIPS agreement, but makes no specific mention of the idea-expression dichotomy.

[144]Section 102(b) of the Copyright Act 1976 (US). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work". The United States Supreme Court recently applied this principle in *Feist Publications,* above n 117. The Court held that the reproduction of a telephone directory by a rival firm did not amount to copyright infringement, as copyright does not subsist in compilations of factual data. Citing *Harper & Row*, above n 117, O'Conner J observed "[t]hat there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates'". *Feist Publications* was cited *Artifakts*, above n 129, 214, but was distinguished ostensibly because it dealt with a different class of copyright. "The decision of the Supreme Court is most interesting but it must be pointed out that it was focused totally upon a literary work whereas here we are concerned with artistic works".

[145]In *Wham-O MFG Co* v *Lincoln Industries Ltd* [1984] 1 NZLR 641, the court characterised concentric ribbing on the top of a frisbee as an expression of the idea of a frisbee. This was despite the fact that the plaintiffs had obtained *patent* protection for the ribs in the US, suggesting that rigging was in fact an idea. The defendant's ribbing was of different dimensions, but this was of immaterial given the court's application of the dichotomy; In *Wilson* v *BCNZ* [1990] 2 NZLR 565 the defendant copied the format of a TV program from the defendant's feasibility study. This was held to be copyright infringement even though witnesses described the feasibility study as "ideas" or "concepts" etc. The idea-expression dichotomy was avoided by granting relief as a "dramatic" work. The judgment is brief and unusual, as a story line, whether for a book or play, is often cited as the classic example of an idea; Also see generally *Artifakts* above n 129, *Green* v *BCNZ* [1988] 2 NZLR 490 (CA), and *Bleiman* above n 121.

While musical works do not convey precise ideas, the expression in music is often conveyed through an identifiable musical genre. The definitive exposition of a genre will shape much of the music that follows; Corelli and the Concerto Grosso, Nick La Rocca and "Dixie-land" jazz, and James Brown and Funk. Such an exposition will define the role of the instruments, the structure and form of the music, and the style. In short, the form of a genre can be described as the "idea" embodied in a musical composition. Artists may rework one form as an author may rework a general story line.

Musical work copyright infringement analysis has almost always centred upon a note for note comparison. Copying another's style is not enough without copying exact notes as can be determined from a written score. Melody, harmony, and structure will be relevant. Textures, voicings, moods, tonality, are available for unrestricted use. General "timbres" may amount to an idea implicit in a sound recording.[146]

There is not often a sharp distinction between ideas and expression.[147] Rather than copying the broad outlines of the genre, features peculiar to a *specific* composition may be imitated such as a song's structural "landscape". Alternatively the individual building blocks of a groove may be imitated and then "reassembled" in the same manner as in the original work. In this way it is possible to evoke in a lay listener the original composition, especially if no "side by side" comparison can be made by the audience. Yet when the compositions are analysed, it may be impossible to demonstrate "substantial similarity" in respect of precise notes. This technique is common in advertising,[148] and the current Salon

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[146]Timbre is the characteristic sound of an instrument.

[147]See generally P M Grinvalsky "Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement" 28 California Western Law Review 395 (1991-1992).

[148]See below n 201.

Selectives commercial is an example.[149] The "abstractions" test originally formulated by Learned Hand J may be helpful.[150] Somers J paraphrased this test in *Green* v *BCNZ*:[151]

> Copyright does not protect a general idea or concept... The abstraction implicit in a general idea or concept may however be delineated by or attended with detail or pattern or incidents sufficiently substantial to attract copyright in the whole.

If the abstractions test is applied, imitation of the constituent parts of a composition may amount to appropriation of "expression". Similar reasoning can be extended to the timbres in a sound recording. Where a performer's particular sound has been sampled, rather than just the instruments general sound, then more than ideas may have been taken.

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[149]The current Salon Selectives hair-care products commercial uses ideas from *Cantaloop (Flip Fantasia)*, a track from US3's "Hand on the Torch", above n 56, (itself a pastiche work!). The commercial mimics the constituent elements of the original "groove", namely the piano riff, "rolling" base line, and drum beats. When these elements have been introduced, a solo trumpet enters playing short snaps of melody in a smooth "jazz" style, as in the original work. The commercial also imitates the structural "break" in the original work where all instruments pause except for the drum kit which plays a simple alternation of snare drum beats. The use of the same structure, layered construction, and unusual combination of instruments leads to a high degree of similarity. A casual listener would think they were the same work, or at least wonder where they had "heard" the work before. However the actual notes used are unlikely to be similar.

[150]*Nichols* v *Universal Pictures Corporation* 45 F (2d) 119, 121 (2nd Cir. 1930). "[W]hen the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work... a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may be perhaps no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended".

[151]*Green* v *BCNZ* [1988] 2 NZLR 490 (CA), 497. The case concerned BCNZ's use of the format of the TV show "Opportunity Knocks" for which it did not have rights. The Court held that only the ideas for the show had been appropriated (Gallen J dissented on the grounds that dramatic copyright subsisted in the format). For the proposition in the second sentence of the quotation Somers J cited *Emerson* v *Davies*, above n 32, as approved by the Privy Council in *McMillan & Co Ltd* v *Cooper* (1923) 93 LJPC 113, 118. Somers J's test was cited in *Bleiman*, above n 121, 9.

In *Bleiman* Gault J offered an alternative to the abstractions test:[152]

> In copyright law the conventional distinction between ideas and the expression of those ideas is helpful only up to a point... It is all a matter of to what degree of particularity or generality the idea is taken... It is perhaps more helpful to consider whether the effort, skill and judgment of the copyright owner in the making of his original work has been taken in the making of what appears, on a realistic assessment, to be a reproduction of a substantial part...It is often said that the test is whether the essence of the copyright work has been taken...

For the "effort, skill, and judgment"[153] part of Gault J's test to be applied, a line must be clearly drawn between the protectable elements of a work and the ideas because public domain material cannot be a substantial part of a work.[154] Skill and labour expended upon a combination of public domain expressions could be protectable, but in principle the same has not been acknowledged for ideas. Gault J's test may have some useful application in situations where it can be difficult to distinguish between ideas and expressions. Into which category would the 12 bar blues pattern fall? Here it may be beneficial to consider whether the "essence" of the plaintiff's skill and labour has been taken. In substance, Gault J's test may only be another way of conceptualising the issue of separating "ideas" from "expressions".

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[152]*Bleiman*, above n 121, 8-10. Gault J, in delivering the Court of Appeal's decision, overturned the High Court judgment of Blanchard J, above n 142, on the grounds that the elements appropriated could not be characterised as ideas.

[153]Skill and effort may be expended in many ways, including upon the collation of public domain material such as "ideas", but this is not on its own the focus of copyright inquiry. For example the telephone book involves a considerable degree of work in its compilation, but is composed only of facts. See *Feist Publications*, above n 117.

[154]In *Nichols*, above n 150, 122, Learned Hand J noted that "while we are as aware as any one that the line [between ideas and expressions], wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases".

The idea-expression dichotomy must be preserved to allow artistic development. Copyright should not bar imitation of a general style or form. However where the *specific incidents* of a composition have been copied arguably copyright should be infringed. It is relatively easy to construct a "sound-alike" piece. Such works may lessen the appeal of the original, and thus act in direct substitution for it. This compromises the economic incentive to create.

VI REPRODUCTION

"The section setting forth the exclusive rights of the copyright owner is the heart of any copyright law. This section determines the limits of protection granted to authors and their successors in interest."[155] The heart of the Copyright Act 1962 is in several sections for various classes of copyright. Section 7(3) defines the acts restricted by copyright in musical works as, amongst other things, "reproducing the work in any material form". The restricted acts for sound recordings are dealt with separately in section 13(5) and include "making a record embodying the recording".

The Copyright Bill 1994 contains the exclusive rights for all classes of work in *one* clause. Greater generality is therefore required in the wording of the "bundle of rights". The drafters have fallen into the error made in the Copyright Act 1909 (US) of including the right "to copy" as an exclusive right.[156] This suggests that copyright *is* the right to copy.[157]

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[155]M Peters *General guide to the Copyright Act of 1976* (Copyright Office, Library of Congress, Washington D.C., September 1977) chapter 7, 1; Note though that the copyright holder's protection is also subject to infringement defences and exceptions.

[156]Section 1(a) of the Copyright Act 1909 (US) deemed copyright holders to have the exclusive right to "print, reprint, publish, copy, and vend that copyrighted work". The right to copy was introduced to cater for visual art works.

[157]The word "copyright" originates from prior to the Statute of Anne 1709 (GB) when rights were vested in the owner of the "copy" (ie original manuscript) of a work. The word "copy" was used as a noun and

This proposition has severe ramifications for the right to criticise or improve works as *total* control by the copyright holder is implied.[158] Such a right upsets the delicate balance of the Act, and does not help to resolve the copyright "tension".[159] It seems likely that this wording will be amended.[160]

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not a verb. The Copyright Act 1962 does not use "copy" as a verb. Section 14(5)(a) includes the right to make a "copy of the film", which uses the word a a noun. Nonetheless the view that copyright is the right to copy is common. See Patterson & Lindberg, above n 103, 22; *AMCOS - A Guide to Music Reproduction Rights & the Concept of Copyright*, 3 "[T]he Copyright Act of New Zealand grants the writer a bundle of exclusive rights besides (as the name suggests) the right to copy. These rights are..."; Shemel, above n 28, 133, quotes a US Copyright Office description of copyright. "'Copyright' literally means the right to copy".

[158]Clause 14(1) of the Bill also describes copyright as a "property right". This terminology has connotations of unrestricted control, and should be avoided for the same reason as the right "to copy". Bearing in mind the substantial limitations of the copyright scheme, it may be more accurate to refer to copyright as a "limited grant of a statutory monopoly"; Melville in *Forms and Agreements on Intellectual Property and International Licensing* (3 ed 1979, rev 1991, Clark Boardman Company New York, Sweet & Maxwell Ltd, London) § 1.05 [3] argues that using the term "monopoly" in intellectual property carries anti-competitive connotations, however this does not concern us here; J Phillips *Introduction to Intellectual Property Law* (Butterworths, London, 1986), 3-4. Phillips argues that "property" can be an accurate description for copyright, as strictly speaking, "property" means rights that may be asserted over something, in this case, the products of the human intellect. Phillips notes that the discussion is largely academic as the limitations and extent of copyright are clearly prescribed. See Phillips, 104.

[159]Viewing copyright as the right to copy may even operate to the detriment of creators works. As noted in R F Whale *Copyright - Evolution, Theory and Practice* (Longman Group, London, 1971) 1: "The first thing to understand about copyright is that it is not merely the right to copy. The word 'copyright' is, therefore, a misnomer, and a most unfortunate one because not only has it obscured the moral basis of the right it designates but it has also led to misconceptions which it is suggested have influenced legislation in a sense unfavourable to authors". Patterson & Lindberg, above n 103, 81, argue that the "right to copy" restrains use of copyright works in a sense unfavourable to *users*.

[160]Section 106 of the Copyright Act 1976 (US) defines all classes of exclusive rights in one section without recourse to the words "to copy".

Reproduction is proved by the "substantial similarity" test. In New Zealand the elements of the test are established by *Wham-O* v *Lincoln Industries*:[161]

> To amount to infringement by reproduction:
>
> (a) The reproduction must be either of the entire work or of a substantial part.
>
> (b) There must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof.
>
> (c) There must be some causal connection between the copyright work and the infringing work. The copyright must be the source from which the infringing work is derived.

The rationale of the test is that if the works are substantially similar then the defendant's borrowing will significantly lessen the consumer's interest in the original work. Impinging on the market for the original work compromises the economic incentive to create.

The United States approach to infringement is the same in substance but proceeds differently due to the drafting of the "fair use" defence in section 107 of the Copyright Act 1976 (US). First, reproduction is proved by the "substantial similarity" test. In the US this test does not involve substantiality,[162] but only objective similarity and proof of copying. Secondly, substantiality is considered along with other factors as part of a defence to reproduction.[163] This is because section 107 looks directly to the effect of the copying on

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[161] *Wham-O MFG*, above n 145, 666.

[162] If the excerpt is totally insignificant then the inquiry may be abandoned at this point under the *de minimis non curat lex* doctrine. See *Fisher* v *Dees* 794 F 2d 432 (9th Cir. 1986).

[163] Prior to the codification of the fair use defence in the Copyright Act 1976 (US), this stage of inquiry was termed "illicit copying" or "improper appropriation". See *Arnstein* v Porter 154 F 2d 464, 468. The consideration of substantiality in the fair use defence also affects the rules relating to expert testimony. See below n 239.

the market for the original work.[164] Hence the fair use defence comprises the equivalent of section 3(1) and the section 19 fair dealing defences.

A *Substantiality*

Section 3(1) of the Act provides that for the copyright holder's exclusive rights to be violated a substantial part of the original work must be reproduced.[165] Section 3(1) applies to both musical works and sound recordings.[166] Where substantial use occurs the Act presumes that the economic incentive to create is disrupted. Fair use was originally a

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[164]Section 107 of the US Act reads:

> Notwithstanding the provisions of sections 106 and 106A [the exclusive rights sections], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include*-
>
> (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. [Emphasis added].

These factors are not exhaustive as under s 101 the terms "including" and "such as" are illustrative and not limitative. See also *Acuff Rose*, above n 16, 514.

[165]Section 3(1) of the Act reads: "Except so far as the context otherwise requires, any reference in this Act to the doing of an act in relation to a work or other subject matter shall be taken to include a reference to the doing of that act in relation to a substantial part thereof, and any reference to a reproduction, adaptation, or copy of a work or other subject matter, or a record embodying a sound recording, shall be taken to include a reference to a reproduction, adaptation, or copy of a substantial part of the work or other subject matter, or of a record embodying a substantial part of the sound recording as the case may be...".

[166]It could be argued that the "statutory licence" is the only form of musical "copying" envisaged by the Act. Under s 22 the statutory license permits the making of recordings of musical works that have already recorded and published, providing the statutory fee is paid and formalities complied with. If copying *parts* of musical works is not permitted, then as a consequence copying parts of existing recordings would also be proscribed. However section 3(1) specifically includes musical works and sound recordings, thus permitting copying that does not constitute a substantial part of either class of work.

judicial doctrine, and in the United States was developed by *Folsom* v *Marsh*:[167]

> If so much is taken, that the value of the original is *sensibly* diminished, or the labours of the original author are *substantially* to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto... In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Although this test was narrower than the abridgment doctrine which it replaced,[168] it still permitted competitive use that did not sensibly diminish the value of the original work. The substantiality test was applied as a judicial doctrine by the Court of Appeal in *Cooksley* v *Johnson & Sons*.[169] The remnants of this doctrine survive in section 3(1).[170] Fair dealing in fact-specific situations is now a separate issue and is dealt with as a defence to infringement.[171] Importantly section 3(1) makes no reference to how or for what purposes a work is used, thus permitting commercial use.

As an aside, Posner has noted that copyright act "fair use" provisions may be economically efficient.[172] In a musical context the use of an excerpt may arouse interest in the original

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[167]*Folsom* v *Marsh* 9 F. Cas. (No. 4901) 342 (C.C.D. Mass. 1841), 348 (emphasis added).

[168]Patterson & Lindberg, above n 103, 67.

[169]*Cooksley* v *Johnson & Sons* [1905] NZLR 834, 850 (CA). The substantiality requirement for infringement however has been part of the common law since New Zealand's first copyright law, "An Ordinance to secure the Copyright of Printed Books to the Authors thereof", of 15th March 1842. The headnote to *Cooksley* reads "[c]opyright under the New Zealand Ordinance is not infringed unless the matter the printing of which is alleged to be an infringement is a substantial part of the publication".

[170]The substantiality test was first codified in New Zealand in the 1962 Copyright Act.

[171]Sections 19-22 in Part III of the Act. These defences will sometimes permit very substantial portions of a work to be used, although not usually for commercial purposes. See Part VII of the text below.

[172]R Posner *Economic Analysis of Law* (3 ed, Little, Brown and Company, Boston & Toronto, 1986), 38.

work or the original artist.[173] Whether the royalties from increased sales of the original work will offset a share of the royalties for the new use will vary for each use.[174] In most cases, a share of royalties for the new use will be the greater sum. However positive "spin-offs" will certainly be a factor bearing on whether a clearance is given.[175] EMI has realised the benefits of sampling for reviving old catalogues,[176] as has the Blue Note Label.[177]

1 *Quality and quantity*

Longman v *Carrington Technical Institute*[178] addressed the issue of substantiality in a commercial use context. The case concerned reproduction of materials from various textbooks in a course book for use at the Institute. 70% of the course book consisted of extracts borrowed from various sources, and 30% was original text linking the extracts. Copying was admitted so the case turned first on whether the reproduction was

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[173]Citing D Snowdon "Sampling: A Creative Tool of License to Steal?; the Controversy" LA Times, August 6, 1989, Brown, above n 6, 1975, notes that Bobby Bird, a member of the "Famous Flames" (James Brown's backing vocalists) experienced a revival in his career when rappers began sampling his recordings. Likewise, James Brown's recordings are experiencing new vitality. See n 50 above.

[174]Although a publisher will reap full royalties for the original recording, and only part of the royalties for the new recording, the new work will usually sell in much greater quantities.

[175]James, above n 95, notes the spin-off effects from licensing entire compositions in advertising. "I put Eagle Rock into the Australian Tourism Commission[']s ad. for Australia, which screened here, and there was a pleasant side effect, in that the single went to No. 1. Now it's one of those things that you can't really calculate on but they figured it out in England in the Levis ads... If you can work it properly, surprisingly, the advertising can actually give you quite a kicker for your original songs".

[176]See McAdams, above n 79.

[177]Wentz, above n 56, 35. Hip Hop/Rap group US3 had illegally sampled selections from vintage Blue Note Records tracks. Rather than suing, Blue Notes Records collaborated with US3 to produce the single *Cantaloop (Flip Fantasia)*, above n 56, which became the Blue Note's highest charted track ever. Samples were used extensively from Herbie Hancock's *Canteloupe Island*. "The [new] single... proves to have generated sales of old Blue Note recordings".

[178]*Longman Group Ltd* v *Carrington Technical Institute Board of Governors* [1991] 2 NZLR 574.

substantial. Doogue J noted that[179]

> [i]t is common ground that whether a substantial part of a work has been reproduced is a question of fact and degree. That is a question to be determined more on the quality than on the quantity of what is reproduced from the copyright work.

This is a particularly important consideration for contemporary music which is often minimalist in nature as far as musical material is concerned. Qualitative reproduction will include using the "hook" of a song. In *Francis Day* Wilberforce J noted that "[t]he essential part of 'Spanish Town' lies in its first eight bars; they imprint themselves on the mind... They give it its character and its memorability...".[180] Gault J's "essence" test is also appropriate to "substantiality". These tests may be too high a threshold where only part of a work is used. Consider the Betty Boo and James Brown examples. The phrase would hardly be considered the "essence" of the original work. It does not give the "character and memorability" to *I Got You*,[181] yet it might be a substantial part of the work. If the phrase had been used in the same context then *Where Are You Baby?* may supersede some of the objects of *I Got You.*

In *Longman*, whether the excerpts were qualitatively important to the original work (ie substantial) was resolved by asking whether the part reproduced was essential for the *integrity* of the original work.[182] The James Brown phrase would be integral to *I Got You.* However the integrity test has the potential to expand the protection given to the

[179]*Longman*, above n 178, 581.

[180]*Francis Day*, above n 137, 594.

[181]The musical work copyright of *I Got You* has been licensed in New Zealand for a long running series of commercials for the Deka department store chain. Interestingly, the advertisements do not use the bridge passage from the song suggesting that the "memorability" of the work may be only in the verse.

[182]*Longman*, above n 178, 581.

copyright holder by the market principle. Arguably almost anything could be integral in a complex composition, yet its use by another may not affect the market for the original work.

These cases suggest that re-phrasing the statutory language may only serve to cloud the issue of *why* the courts look for substantiality.

2 *What is worth copying is worth protecting*

In *Longman* Doogue J quoted Peterson J's well known comments in *University of London* v *University Tutorial Press*[183] that "there remains the rough practical test that what is worth copying is prima facie worth protecting".[184] Doogue J also noted that the degree of skill employed by the original author, and whether the reproduction saved the defendant from exerting similar skill and labour are also relevant factors.[185] *Longman* follows the application of Peterson J's dictum to the substantiality test in *Ladbroke (Football) Ltd* v *William Hill (Football) Ltd.*[186] However the dictum has been quoted out of context. In

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[183]*University of London Press*, above n 132, 610.

[184]*Longman*, above n 178, 582. "The quality and value of the work copied is established by its choice for the particular purpose... The extracts from the copyright work would not have been copied unless they were essential to the teaching of technical drawing, significant portions of the works copied[,] and of undoubted quality".

[185]*Longman*, above n 178, 582.

[186]*Ladbroke*, above n 139. In *Ladbroke* the House of Lords considered whether copyright subsisted in lists of football matches printed on fixed odds betting coupons and, if it did, whether the defendant had infringed the copyright in the coupons. The Law Lords decided that the correct approach was first to determine whether the work as a whole is entitled to copyright, and then to decide whether the defendant had reproduced a substantial part of this whole. *University of London Press*, above n 132, was cited with approval. On the second point Lord Reid in closing his speech commented that "[the copying] appears to me to amount to a very substantial part of the coupon both in quantity and quality. In this connection, I think that there is much wisdom in the reference by Peterson, J., to the 'rough practical test that what is worth copying is prima facie worth protecting'...". See *Ladbroke*, above n 139, 471. Likewise Lord Devlin in closing his speech commented that "I cannot regard [the copyings] taken together as other than

University of London Press Peterson J's remarks where addressed to whether the work in question was an original work warranting copyright protection, not whether the excerpts copied were substantial, which was considered later in the judgment.[187] The dictum stands for the proposition that the originality threshold for copyright protection is low.[188] In any case *Longman* should be restricted to its peculiar facts. *Wholesale* appropriation occurred, and in this light the defendant's expertise in knowing what to take may only have been an *evidential* factor leading to liability.

It is respectfully submitted, even though Doogue J noted the admonition that the dictum must be approached with caution,[189] that applying the dictum to substantiality is an incorrect approach on principle. The danger of even citing the dictum in connection with substantiality is that it obscures the rationale for the substantiality test. In a case where musical borrowing has occurred, a judge may be tempted into finding infringement on the basis that the defendant has borrowed to save the effort required for original work, and therefore what was taken must have been a qualitatively important part of the work. These are inappropriate considerations. It is difficult to see how the work of others can be built upon, or improved, when anything borrowed will be presumed to be substantial *because* it was borrowed. This is no more than an ill-defined principle that one should not free-ride

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substantial. There is force in the words of Peterson, J., in the case of the *University of London Press, Ltd.* that 'what is worth copying is... worth protecting'". See *Ladbroke*, above n 139, 481.

[187]In *University of London Press*, above n 132, the defendant had copied whole exam papers belonging to the plaintiff. The issues were first, did copyright subsist in the exam papers as literary works, secondly who was the copyright holder (a 'work for hire' issue), and thirdly did infringement occur. In considering the first issue Peterson J defined the word "original", and stated at 609 that "[t]he book and the papers alike originate from the author and are not copied by him from another book or other papers. The objections with which I have dealt with do not appear to me to have any substance, and, after all, there remains the rough practical test that what is worth copying is prima facie worth protecting. In my judgment, then, the papers,... are 'original literary work' and proper subject for copyright under the Act of 1911".

[188]In *Artifakts*, above n 129, 215 and *Thornton Hall*, above n 34, 245 the test was (correctly) applied to establish that works crossed the threshold for copyright protection.

[189]*Longman*, above n 178, 582.

on another's work. The problem is that intellectual property has almost unlimited marketing potential, especially when the work is reduced to its "constituent" parts. Any commercial use can be deemed harmful to the copyright holder simply because the competitor is making money and not paying a royalty, even if sales of the original work remain unaffected.[190] It is suggested that if the courts examine whether the excerpt's use in another work would affect the market for the original work, and interpret section 3(1) accordingly, then the fruits of the creator's skill and labour will be preserved while promoting the progress of the arts.

3 *Identifiability*

Many musical excerpts are chosen for their recognition value and so the music industry could be expected to prefer infringement to be made out where there is identifiability.[191] One rationale for such a test is that the use of highly recognisable excerpts could lessen the uniqueness, and hence the desirability, of the original work in the consumer's eyes. The degree of recognition necessary to cause this effect will only be present when the excerpt is qualitatively important. This is a different issue from using an excerpt that can be *traced* to another work. Almost anything may be "identifiable" if examined closely enough. As Nimmer has observed, copyright "is intended to protect writers from the theft of the fruits of their labour, not to protect against the general public's spontaneous and immediate impression that the fruits have been stolen".[192] If the recognition is due to the sample

[190]In *TVNZ* v *Newsmonitor Services* Unrep, 15 November 1993, High Court, Auckland Registry, CL 79/91, 45 Blanchard J observed that TVNZ were losing the opportunity to exploit transcripts, if not by supplying transcripts themselves for a fee, then by not receiving a royalty. These comments must be read in light of the fact that the market for derivative works is a market anticipated by the Act. The use by Newsmonitor was of the entire work and was therefore by definition a "substantial" portion of the original work.

[191]James, above n 95, Discussion from the Floor. "The usual copyright test is whether [the sample] is identifiable as the original work".

being an important part of the original, then even a small sample may be "substantial". This will be likely if the excerpt is the most recognisable feature of the composition (ie the most valued by the consumer).

A second reason that the music industry might prefer infringement to follow from identifiability is to allow protection of the marketing investment in the artist. The borrower's interests in evoking the desired image or association may be served without using a substantial part of the original work. In *Arnstein* v *Porter* the court observed that *the artist's legally protected interest is only in the market for the work*, and that this is the focus for the "improper appropriation" test (ie substantial appropriation to an economically prejudicial effect).[193]

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

It is arguable the Act is consistent with *Arnstein*. Under the "statutory licence" provisions an artist is permitted to make a recording of a musical work that has been previously released as a recording, providing the statutory licence fee is paid and the formalities complied with. Profiting from the popularity of the first artist is envisaged. Where only part of a musical work is used, the context of the new use may affect the original artist's reputation. This is not related to free-riding on a marketing investment, and is more appropriately addressed by moral rights, not the substantiality test.

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[192]M Nimmer *Nimmer on Copyright* (M Bender, New York, 1978) Vol 3, § 13.03 [E] [2].

[193]*Arnstein*, above n 163, 473.

4 *Nature of the use*

An inadequacy in New Zealand copyright law occurs because the substantiality test accounts only for the excerpt's significance in the *original* work, and not the new work. The borrower's contribution is irrelevant. "...[C]opyright infringement focuses on what has been taken, the similarities. Differences are of less moment. The fact that original work has been added to an infringement does not make it any the less an infringement".[194] If a significant part of the original work is used insignificantly in the new work, there will be infringement even though the market for the original work is unaffected. The corollary is that an insignificant part of one musical work may be looped to form the basis of a new composition, even if this has a detrimental effect on the original work. Such a use may detract from the appeal of the original work.[195] A judge in the latter of these situations may be tempted to overstate the substantiality of the borrowed part by emphasising its qualitative importance. This may be achieved by characterising the borrowed part as the "hook" of the original composition. This would set an unfortunate precedent for any later use of the excerpt that would not affect the market. If the use is creative and "transformative", then the excerpt may not be sufficiently similar and would not infringe copyright irrespective of its substantiality.[196]

It would be preferable to have a more flexible "substantiality test", although the Copyright Bill does not address this issue.[197] The US fair use defence is more effective at protecting

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[194]*Bleiman*, above n 121, 10.

[195]*Funky Drummer* has been looped and used in this way. See n 50; *Where Are You Baby?* also makes extensive use of an excerpt. See below n 221 and n 222.

[196]See Part VI B 2 of the text.

the right to market a work. Rather than assuming that the use of substantial portions of a work will detrimentally affect the marketing of a work, the test permits consideration of a variety of factors derived from *Folsom* v *Marsh*.[198] The factors include the purpose and character of the use (including consideration of whether the use is commercial or educational), the nature of the copyrighted work, the substantiality of the portion used in relation to the original work, and the effect of the use upon the potential market for the original work.[199] A court could consider whether the "infringing" work is of a type that would appeal to purchasers of the original work.

B *Objective Similarity*

If a substantial excerpt is not readily identifiable in the new work then the market for the original work is not affected.[200] Objective similarity presents two issues for contemporary music. First, the plaintiff must establish similarity of the notes themselves. Secondly, the excerpt, although using the same notes, may have been "transformed" in the new work by contextual so that is no longer recognisable as belonging to the original work.

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[197]Clause 29(2)(a) of the Bill provides that copyright in a work is infringed by doing any restricted act [ie copying] "to the work as a whole or any substantial part of it".

[198]See *Acuff-Rose*, above n 16, 514.

[199]See above n 164 for the text of s 107 of the US Act.

[200]A further rationale for the objective similarity test is as an evidential aid to infer that copying did in fact take place. See Part VI C below.

1 *Alteration of the notes*

If infringement occurred only when the reproduction was exact, it would be easy to frustrate the Act's purpose by changing enough of a song to make the reproduction imprecise, even though a listener may not perceive this difference.[201] This is particularly true of modern pop music where there is a *large* degree of flexibility in the rendition of precise notes.[202] Hence "[i]nfringement of copyright in music is not a question of note for note comparison, but of whether the *substance* of the original work is taken or not",[203] and thus precise identity is not required.[204] The substantial part used need only be "objectively similar" to the equivalent part of the original work.[205] A plagiarist may copy a work imprecisely or a sampler may electronically alter some parameters of the sound, although in some cases too much alteration will defeat the purpose of copying. Nonetheless, "the determination of the extent of similarity which will constitute a

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[201]James, above n 95. "... [U]nfortunately in advertising it's become common practise for someone to change the music just substantially enough to avoid [infringement]. I suppose [in] the best light it could be viewed in is subconscious plagiarism. At worst it is blatant stealing".

[202]In contemporary music the precise notes are often not as important as the mood or feel of a composition. A performer will feel free to vary the performance at will or improvise. Often an artist may create a new song out of variations of earlier material. A lay listener usually only hears melody, harmony and feel. The feel, though, is created by many of the notes the listener may be unaware of such as the bass line or synthesiser parts. It will often be difficult to precisely ascertain what is being played in a recording, so the imitator must approximate and aim for the same effect. As the market for a work may be usurped by a close imitation, a sufficient degree of objective similarity will suffice for "reproduction".

[203]The headnote of *Austin* v *Columbia Gramophone Company Ltd.* (1923) Macg.C.C. (1917-1923), 398, cited in *Francis Day*, above n 137, 612.

[204]*Francis Day*, above n 137, 611 per Wilmer LJ. "...I can find no warrant for the suggestion that reproduction, within the meaning of the section, occurs only when identity is achieved. This not only offends against commonsense, but is, I think, contrary to authority".

[205]Wham-O MFG, above n 145, 666. "It is important to bear in mind... that it is not necessary for a plaintiff to establish a sufficient degree of similarity between the copyright work and the alleged infringing work, each taken as an entirety. It is sufficient to establish that such similarity exists between a substantial part of the copyright work and the alleged infringing work".

'substantial' [ie 'objective'] and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is least susceptible to helpful generalizations".[206]

The courts must consider a variety of factors to determine objective similarity, and musical analysis is always involved. The highest English authority on musical plagiarism is *Francis Day*.[207] The contested extract was the first 8 bars of the song *Spanish Town*.[208] The first 8 bars of a later composition, *Why*, were similar. It was "common ground" that these first 8 bars of the chorus constituted a substantial part of *Spanish Town*.[209] The issue therefore turned on whether there was a sufficient degree of similarity between the 8 bars in the two works. A traditional musical analysis led the Court to conclude that the excerpts were similar, notwithstanding the different meter of the two works. The Court looked at structure, phrasing, the use of repetition and sequences, specific melodic differences, harmonic structure, meter, melodic rhythm, and differences in note length.

Bright Tunes Music v *Harrisongs Music* is another case where a traditional musical analysis occurred.[210] Here the issue was more straightforward. George Harrison's song *My Sweet Lord* was built upon two melodic motifs.[211] Neither of these motifs were novel, but the use of the motifs in both songs was identical, as was the rather simple harmony.[212]

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[206]*Warner Brothers Inc* v *American Broadcasting Cos* 654 F 2d 204 (1982) (US District Court), 208.

[207]*Francis Day*, above n 137. The case is also interesting for the amount of American authority cited in argument. See Francis Day, above n 137, 600-605.

[208]The piano reduction of the compositions from the case is reproduced in Appendix B.

[209]*Francis Day*, above n 137, 609.

[210]*Bright Tunes Music Corp* v *Harrisongs Music Ltd* 420 F Supp 177 (1976) (US District Court).

[211]The motifs' notation from the case is reproduced in Appendix C.

This factor, combined with an identical "grace note"[213] in a repetition of one of the motifs, led the court to conclude that the songs were the same.[214] *Bright Tunes Music* is a good example of how appropriating a particular *combination* of public domain elements will amount to infringement. Taking one element from a combination is much less likely to infringe copyright.

Essentially the analysis in *Francis Day* and *Bright Tunes Music* was of melody, harmony, and the structural divisions within the song.[215] This approach may be inadequate for much contemporary music where melody and harmony are not the basis of a composition. The notes of the excerpt are likely to be similar, but the potential for transformative use in contemporary music means that a traditional analysis is incomplete without considering context.

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[212]This is a good example of a "harmonious and balanced whole" created from public domain materials. See text above at n 137.

[213]A grace note is a short ornamental note played quickly before the designated note in the melody.

[214]*Bright Tunes Music*, above n 210, 180. "[I]t is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase. There is motif A used four times, followed by motif B, four times in one case, and three times in the other, with the same grace note in the second repetition of motif B".

[215]See Wilberforce J in *Francis Day*, above n 137, 594-596. The Court of Appeal accepted this analysis. See *Francis Day*, above n 137, 610.

2 *Transformation by new contexts*

In *Acuff-Rose* the United States Supreme Court stated that a use is transformative when it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message".[216] Although the Court was considering parody (where transformation may be aided by words), such use may defeat objective similarity in some circumstances.

Transformative use is the main means that the sampler or plagiarist in modern forms of music makes an artistic contribution to the new work. Although the notes of the extract are likely to be similar, the sound may be "recontextualised". "Because the sounds in a musical composition are dependent on one another for their meaning, musical meaning is solely a function of context. Thus, *preservation of context must be a crucial element of copying*... The comparison must include the structures that the sounds articulate".[217] Whether transformative use is sufficient to avoid a finding of objective similarity is a matter of fact. In *United States* v *Taxe* infringement occurred where a pirated version of a song had been altered by adding new synthesiser generated sounds and adjusting tempos.[218] The transformative use was insufficient, and the extracts were too substantial. The context of the "extracts" was also preserved. The new work was plainly recognisable as the original work.[219] In this situation, substitution would plainly occur.

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[216] *Acuff-Rose*, above n 16, 515.

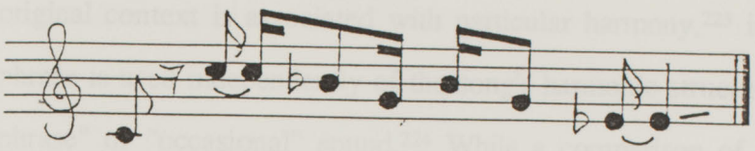
[217] Keyt, above n 10, 437.

[218] *United States* v *Taxe* 380 F Supp 1010, (1974) (C.D. Cal.), affirmed in part and vacated in part, 540 F 2d 961 (9th Cir.), Cert. Denied, 429 U.S. 1040 (1976).

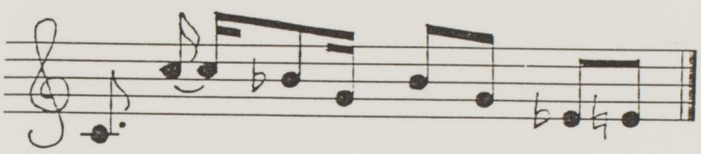
[219] *Taxe*, above n 218, 1017.

Consider the transformation of the following phrases in the James Brown and Betty Boo examples:

A - *I Got You*



B - *Where Are You Baby?*



The notes make a complete original musical phrase which on its own is highly distinctive. In essence the phrases are the same. The slight rhythmic differences do not rob the excerpts of objective similarity, however a different context might. In *I Got You*, the phrase is repeated twice to form a bridge passage between the verse and chorus. It is played by a saxophone accompanied only by drums. The bridge passage occurs twice in the song. In *Where Are You Baby?* the notes of the phrase are copied as exactly as possible but is used in a different way. The timbre is changed to something approximating a piccolo flute. The phrase is played in a higher register,[220] and the note values are doubled relative to the bar length. The increase in speed probably causes the lessening of

[220]The Copyright Bill 1994 implies that such alterations are superficial. Under cl 90(1)(ii) change of key or register are not "treatments" of a work for right of integrity purposes. However the Betty Boo example is an *extreme* change of register affecting the context of the use.

syncopation. The phrase also plays a different role in the song's structure. The phrase is not used to denote any transition from verse to chorus, but is looped as an "ostinato"[221] and appears in bursts throughout the song.[222] The texture of *Where Are You Baby?* is thicker at the points where the phrase is used, so its presence is not as pronounced, and it does not form the "tune" as it does in *I Got You*. Furthermore, while the phrase in its original context is associated with particular harmony,[223] in *Where Are You Baby?* the phrase is used independently of the song's harmonic structure, almost as a sort of "pedal phrase" or "occasional" sound.[224] While a comparison of just the melody would have suggested that the phrases were identical, the result of the transformation and new context is that the excerpt is difficult to identify in the new work.[225]

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[221]A recurring theme acting as a foundation for the work.

[222]The repetition or different use of an extract may sometimes serve to illustrate the likeness between two compositions, as in *Francis Day*, above n 137, 594. "It would follow that if... 'Why' has borrowed this essential theme in its fist eight bars, the procedure adopted by 'Why' of staying with it and varying the development instead of following the 'Spanish Town' procedure of contrast, would not make a significant difference with 'Spanish Town'; it might even accentuate the likeness". In *Francis Day* the use was different but hardly very transformative. The repetition in *Where Are You Baby?* actually alters the *context* from melody to ostinato.

[223]The phrase originally appears only with Chord I (ie the tonic or "root" chord).

[224]The phrase remains unchanged while the harmony progresses. This creates a dissonance until the harmony returns to a compatible chord.

[225]The writer demonstrated this example to an intellectual property Masters class (Victoria University, 21 July, 1994). The class were played James Brown's *I Got You* and then Betty Boo's *Where Are You Baby?*, having been asked to listen for any potential infringement issues. None of the class were able to detect any similarities between the two works, and even when the specific phrase was identified (and its use in the new work described) many still had difficulty recognising the excerpt in the new work. This is in total contrast to how similar the phrases appear when notated. Interestingly, the "Boomania" album contains the "King John Mix" of *Where Are You Baby?*. This mix does not use the excerpt from *I Got You*, suggesting that the excerpt does not play a prominent role in the success of *Where Are You Baby?*.

C *Proof of Copying*

While substantial similarity between two works may affect the market for the "original", copyright is only infringed where the similarity is attributable to copying. This is because of copyright's low "originality" threshold for protection.[226] Enough incentive to create is provided by protecting works from appropriation, not from independent creation of the same work.

Without an admission of reproduction, copying is usually established by evidence of objective similarity and proof of access to the original work.[227] This creates a rebuttable presumption.[228] Proving access to a commercially released work will not be difficult.[229] In cases of alleged subconscious copying or where the similarities are only of common place musical material, additional proof of copying may be required.[230] Alternatively, if the

[226]Patent confers a "total" monopoly that protects against independent creation, but the threshold for protection is one of "novelty" - a higher standard than "originality".

[227]See *Francis Day*, above n 137, and *Bright Tunes Music*, above n 210, generally.

[228]*Francis Day*, above n 137, 612. In *Francis Day* the defendant denied copying. The original work was commercially released, so it was likely that the defendant had previously heard it, and the similarities between the two works were enough to infer copying. Wilmer LJ stated that this was not determinative as "the most that can be said, it seems to me, is that proof of similarity, coupled with access, raises a prima facie case for the defendant to answer".

[229]If the victim of the borrowing is a relative unknown, then the test will discriminate against them. However this is not the case in most borrowing situations. Few of the reasons for borrowing enumerated above in Part II A of the text would be satisfied by borrowing from an "unknown".

[230]*Francis Day*, above n 137, 612. Wilmer LJ noted: "I confess that I have found the notion of subconscious copying one of some difficulty, for at fist sight it would seem to amount to a contradiction in terms, the word "copying" in its ordinary usage connoting what is essentially a conscious process". In *Francis Day* an inference of subconscious copying was not drawn as, although access was possible, it was not shown that the defendant was in fact familiar with the original work. See *Francis Day*, above n 137, 614. In *Bright Tunes Music*, above n 210, Harrison also denied consciously copying *He's So Fine* and gave considerable evidence about the circumstances in which the song was composed. The court found access had been proved, as the song spent 7 weeks as a hit on the UK charts, and indeed was No. 12 at the same time the Beatles had a single at No. 1. Bright Tunes Music, 179. Owen J concluded that subconscious copying was possible. See *Bright Tunes Music*, above n 210, 180. The striking similarities were a factor here.

similar excerpt was "so distinctive and idiosyncratic" as to preclude the possibility of independent creation, then copying may also be inferred.[231]

Sampling is by nature "copying", so unless the parameters of the sound have been altered beyond recognition proof of copying will probably not be an issue. Plagiarism is more problematic for the following reasons. Although a change of context will not present evidential difficulties, alteration of the excerpt's notes will. This usually occurs to some degree with plagiarism. Even if objective similarity is satisfied, the excerpt may be un-novel and therefore independent creation is possible. In *Francis Day* Wilmer LJ drew attention to the hackneyed nature of the material in the original work as a factor militating against an inference of copying.[232] "[T]he six quavers which form the opening bar of [the original composition] are... a commonplace series to be found in other previous musical compositions...".[233] Furthermore "the devices used by the two composers for developing the phrase stated in the first bar are among the commonest tricks of composition and, I would add, exactly the sort to be expected from the composer of a popular song [!]".[234]

Wilmer LJ's arguments have some relevance to modern blues-based music. The limited range of available notes and tonalities, combined with minimalist styles of composition, could make proof of copying more difficult than in other genres. The corollary of Wilmer

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[231]*Francis Day,* above n 137, 616 per Wilmer LJ. "If it could be said that [the] method of development was so distinctive and idiosyncratic as to preclude the possibility that its adoption by the two composers was the result of coincidence, this would be a very strong argument in the plaintiffs' favour". The position is essentially the same in the United States. See *Arnstein*, above n 163, 468 and 469. "If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result". *Selle* v *Gibb* 741 F 2d 896 (7th Cir. 1984) was a case where the striking similarities test failed to result in a finding of infringement.

[232]*Francis Day*, above n 137, 615. Wilberforce J also made this observation. The similarities between the two works may have been due to coincidence, or the existence of other influences on the composer.

[233]*Francis Day*, above n 137, 615.

[234]*Francis Day*, above n 137, 616.

LJ's argument is that the greater the novelty of a work, the more easily an inference of copying may be drawn. The Betty Boo and James Brown example demonstrates that some blues phrases can be very novel however.

In *Bright Tunes Music*, although Owen J did not believe Harrison deliberately copied, it was "clear that *My Sweet Lord* is the very same song as *He's So Fine* with different words".[235] This amounted to infringement. The motifs used to build the melody of *He's So Fine* were in the public domain because they were un-original, but their sequential use was "so unusual" that it was unlikely to have independently occurred, and copying could be inferred.[236]

All circumstances of the case will be relevant for determining copying. It may be possible that "ancestor worship" motives can be attributed to an artist. In general however, the greater the similarity, the more readily copying will be inferred. But the lesser the novelty of the original, the easier it will be to rebut a presumption of copying.

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[235] *Bright Tunes Music*, above n 210, 180.

[236] *Bright Tunes Music*, above n 210, 180 n 11.

D *Expert Evidence*

The role of the expert witness has received much attention in the United States.[237] The rule in *Arnstein* v *Porter*, elaborated in *Sid & Marty Krofft* v *McDonald's Corp*,[238] is that expert evidence is admissible only to establish substantial (ie objective) similarity and copying. Whether the use was "improper" (ie substantial) remains a decision for the fact finder.[239] The difficulty with the rule is that once the fact finder has heard expert evidence about objective similarity and the probability of copying, this evidence must be disregarded when considering "unlawful appropriation". In reality the findings on the second limb will be affected by the preceding expert testimony.[240] The rule does not apply in New Zealand, in any case, as the mechanics of the reproduction test do not lend themselves to this bifurcated approach.[241] The discussion has focused attention on the helpfulness of expert evidence in music infringement litigation.

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[237]See generally M Der Manuelian "The Role of the Expert Witness in Music Copyright Infringement Cases" 57 Fordham Law Review 127 (1988) and D P Brent "The Successful Musical Copyright Infringement Suit: The Impossible Dream" 7 Entertainment & Sports Law Review 229 (1990).

[238]*Sid & Marty Krofft Television Productions Inc* v *McDonald's Corp* 562 F 2d 1157 (9th Cir. 1977).

[239]*Arnstein*, above n 163, 468. "[I]t is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation... On [the first] issue, analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of facts... If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue... the test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant". Clark J dissented stating that he found "nowhere any suggestion of two steps in adjudication of this issue, one of finding copying which may be approached with musical intelligence and assistance of experts, and another that of illicit copying which must be approached with complete ignorance", 476 n 1. Note that *Arnstein* was decided before the fair use defence was codified in the Copyright Act 1976. *Selle* v *Gibb*, above n 231, confirms that the rule still applies. See Der Manuelian, above n 237, 139 for an analysis of *Selle*.

[240]On this point in Arnstein, above n 163, 476 n 1, Clark J observed in his dissenting judgment "nor do I see how rationally there can be any such difference, even if a jury - the now chosen instrument of detection - could be expected to separate those issues and the evidence accordingly".

Expert evidence is relevant to all elements of reproduction.[242] Lay audiences may overestimate the similarities between two excerpts by not being aware of the differences.[243] This may be particularly so where the lay listener is unfamiliar with the genre of music in issue:[244]

> [C]onsider the stereotypical middle-American family of the 1960s with children who listened to Elvis Presley, Little Richard, and The Beatles. To those children, the songs of these performers were completely different. The parents, in contrast, heard only incessant banging.

However, a technical analysis may defeat the purpose of the substantial similarity test.[245] "[T]he right balance must be struck between informed analysis and overall impression as a

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[241]See the text at n 162 about differences in approach. In New Zealand substantiality is an issue considered as part of the test for reproduction, whereas in the US it is considered as a defence. Although *Arnstein* was decided before the fair use defence was codified in the United States, the procedural structure was the same. Citing *Folsom* v *Marsh*, Frank J stated "[a]ssuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying', copying which is not illicit". See *Arnstein*, above n 163, 472. Hence the question of fair use, whether at common law or in statute, is still to be decided without expert evidence.

[242]Clark J, in his entertaining dissent in *Arnstein*, above n 163, 476, noted that "[m]usic is a matter of the intellect as well as the emotions; that is why eminent musical scholars insist upon the employment of the intellectual faculties for a just appreciation of music". Clark J dissented from the decision about the non-admissibility of expert evidence on the matter of substantiality characterising his brothers' decision as "anti-intellectual and book burning" in nature. Clark J also offered thoughts on the value of aural analysis in music infringement actions. *Arnstein*, above n 163, 475. "In an endeavour to assist us, [the defendant] caused to be prepared records of all the musical pieces here involved... [T]he tinny tintinnabulations of the music thus canned resounded through the United States Courthouse to the exclusion of all else, including the real issues in the case. Of course, sound is important in a case of this kind, but it is not so important as to falsify what the eye reports and the mind teaches. Otherwise plagiarism would be suggested by the mere drumming of repetitious sound from our usual popular music, as it issues from a piano, orchestra, or hurdy-gurdy - particularly when ears may be dulled by long usage, possibly artistic repugnance or boredom, or mere distance which causes all sound to merge. And the judicial eardrum may be peculiarly insensitive after long years of listening to the 'beat, beat, beat'... of sound upon it, though perhaps no more so than the ordinary citizen juror - even if tone deafness is made a disqualification for jury service, as advocated"; See also Der Manuelian, above n 237, 133.

[243]An expert witness may separate the public domain material from the original and explain the peculiarities of the genre to the fact finder.

[244]Brown, above n 6, 1966 n 139.

listener, to protect against dredging up insignificant similarities through minute dissection".[246] The temptation to "atomise what is a living phrase" must be avoided.[247] Since the artist's financial reward derives from the lay public's approbation of the artist's efforts,[248] objective similarity should be a matter for the lay fact finder. The incentive to create will not be compromised by substitution if the public cannot perceive the similarities with another work. Whether "an ordinary reasonably experienced listener might think that perhaps one had come from the other" is an appropriate test.[249] Thus in *Francis Day* Wilberforce J concluded that:[250]

> [i]n endeavouring to reach an approach which is neither too superficial nor unduly academic or technical, I think I must to some extent rely on my own aural judgment, instructed as it has been by these various experts. ...I think I must rely on the ear as well as the eye, and on the spoken words of the witnesses.

Some US authorities have noted that where the intended audience possesses specialised knowledge that an ordinary listener would lack, then this should be taken into account.[251] Experts may be able to identify such knowledge.

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[245]In *Francis Day*, above n 137, 593, Wilberforce J observed that, though many [expert] witnesses were called to analyse the musical character of the contested songs, "[t]hey represented different attempts to put into words what is ultimately a matter for the ear, and there was necessarily some difference of approach, according to the individual backgrounds of the individual witnesses; there was the composer's approach, the conductor's approach and the approach of the lecturer".

[246]*Arnstein*, above n 163, 476.

[247]*Francis Day*, above n 137, 596.

[248]*Arnstein*, above n 163, 473.

[249]*Francis Day*, above n 137, 610.

[250]*Francis Day*, above, n 137, 594 (emphasis added).

[251]*Dawson* v *Hinshaw Music* 905 F. 2d 731, 733 (1990).

Expert evidence is helpful in distinguishing what elements of a composition are protectable. Parts of the excerpt may be unoriginal or only ideas. Public domain material cannot be a substantial part of a work. This is related to whether copying actually occurred. Some elements of the excerpt's similarities may arise for reasons unrelated to copying, such as the "borrower's" pre-existing musical style,[252] or "other influences".[253]

The credibility of the expert witness will also be an issue. In *Selle* v *Gibb*[254] the plaintiff had submitted a chord chart[255] and demo tape[256] of his song to the defendant record company. The Bee Gees later released *How Deep Is Your Love*, which the plaintiff claimed had been copied. However the plaintiff's "expert" had little experience of popular music.[257] The inference was that such a witness would be unaware of similarities arising for reasons other than copying.

A further difficulty with expert evidence is that music must be transcribed for analysis. Popular music is learnt, and transmitted, aurally. Traditional musical notation does not

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[252]See Der Manuelian, above n 237, 142.

[253]*Francis Day*, above n 137, 615. Other influences on the defendant may have explained the similarities.

[254]*Selle*, above n 231.

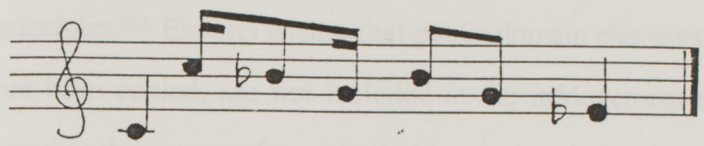
[255]See n 35 and n 52 above.

[256]See n 88.

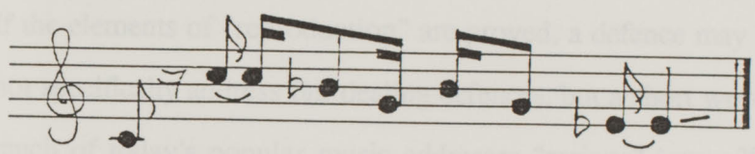
[257]*Selle*, above n 231, 904.

easily represent the rhythmic subtleties in "syncopated" music. Consider the James Brown example again.

A - "Straight" version.



B - "Funky" version as it appears in *I Got You.*



Phrase B above is not a particularly syncopated example, but even a simple "funk" feel can complicate notation beyond the point of comprehension for the fact-finder. If the funky feel is removed and the phrase played "straight", then the notation appears quite different (there are four specific differences). It may be difficult to assess the importance of slight rhythmic differences when presented in this way even though the "substance"[258] of the phrase has certainly been taken. The final difficulty is that transcription of the aural event will be a matter of judgment. Experts may disagree about what is actually being heard in a song. In *Selle* the defendant claimed that the plaintiff's expert witness had improperly relied on (inaccurate) printed versions of the contested songs.[259] Furthermore a sound

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[258]*Austin*, above n 203.

[259]See Der Manuelian, above n 237, 141, for a fuller analysis of the litigation.

recording of the plaintiff's written score used in the trial was made in *anticipation* of the trial.[260] Opportunistic presentation compromises the value of expert witnesses for determining whether the "substance" or "essence" of a work has been taken.

Hence both aural and expert analysis are needed to effect the incentive and market principles.[261] Experts ensure that public domain elements of a work, or elements that have not been copied, are not included in the infringement analysis, while aural examination assesses the impact of any similarities on the market for the original work.

VII DEFENCES - PARODY

If the elements of "reproduction" are proved, a defence may be available. This paper does not specifically address fair dealing defences, but a short word on parody is appropriate as much of today's popular music addresses "serious" issues.[262] Section 19(2) permits fair dealing with a musical work "for purposes or criticism or review, whether of that work or of another work", if such a use is accompanied by sufficient acknowledgment. By virtue of section 19(5) the defence applies to sound recordings as it applies to musical works. Parody, in promoting social comment on copyright works, is an obvious candidate for inclusion within this defence.

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[260]Der Manuelian, above n 237, 142.

[261]Wilberforce J's approach of using the ear as well as the eye is not only commendable from a practical perspective, but also in principle. *Francis Day*, above n 137, 594.

[262]See J R Sowerby "Parody and Fair Dealing in Copyright Law" LLM Research Paper, Intellectual Property, Law Faculty, Victoria University of Wellington, 1991 for a discussion on parody in New Zealand. Note that Sowerby's paper does not include The United States Supreme Court's 1994 decision in *Acuff-Rose*. See also D A Deck "Fine Tuning Fair Use Music Parody: A Proposal for Reform in *Acuff-Rose Music, Inc. v. Campbell*" 71 University of Detroit Mercy Law Review 59 (1993) which discusses the Court of Appeal's judgment and anticipates a response from the Supreme Court.

Strictly defined, parody attacks only the original work and is not a vehicle for satirical comments about society in general.[263] In the US the parodist may take enough of the original work to evoke that work, and this will often amount to a substantial part. The same approach would arguably apply in New Zealand.[264] A parody is entitled to destroy demand for a work by bringing the work into contempt.[265] Commercial use in itself will not militate against a valid defence,[266] as long as the new work does not destroy the market for a work by acting as a *substitute* for the original work.[267] In *Hubbard* v *Vosper* Lord Denning commented of the criticism defence that "[i]f [the extracts] are used to convey the same information as the author, for a rival purpose, they may be unfair".[268] This is consistent with the market principle.

It should be noted that the scope of section 19(2) has not yet been tested,[269] and that English courts have tended to treat parody in terms of the substantiality test, rather than the criticism defence.[270]

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[263]*Acuff-Rose*, above n 16, 516; Note that s 19(1) permits fair dealing with a work for criticism of *another* work. This would not permit general social comment and rather seems directed at making a critical comparison of two works, such as in a review.

[264]*Longman*, above n 178, 588. "...[F]air dealing must enable the use of a substantial part of a copyright work as otherwise the exception could not come into operation".

[265]*Acuff-Rose*, above n 16, 523, citing B Kaplan *An Unhurried View of Copyright* (Columbia University Press, New York, 1967), 69. "We do not, of course, suggest that a parody may not harm the market [for the work] at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce harm cognizable under the Copyright Act. Because 'parody may quite legitimately aim at garrotting the original, destroying it commercially as well as artistically'"; *Fisher*, above n 162, 438 (9th Cir. 1986). "Biting criticism suppresses demand; Copyright infringement usurps it".

[266]In *Newsmonitor*, above n 190, 42, Blanchard J noted that s 19(1), fair dealing for research or private study, did not preclude uses with a commercial end in mind providing there was no direct competition.

[267]*Acuff-Rose*, above n 16, 523.

[268]*Hubbard* v *Vosper* [1972] 2 QB 84, 94; Souter J's words in *Acuff-Rose*, above n 16, 516, are appropriate here also. "If... the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly...".

VIII MORAL RIGHTS

Part IV of the Copyright Bill 1994 introduces a "moral rights" regime.[271] Moral rights vest in the creator of a work and are unassignable.[272] Moral rights apply to musical works, but not to sound recordings.[273] Hence performers[274] and record companies have no recourse to these rights. Sampling is affected only to the extent the sample uses the underlying musical work.[275] The Bill provides for three rights: the "paternity" right,[276] the right of

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[269]See generally W R Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell, London, 1981) 363-365 on the English defence. No New Zealand cases have yet addressed s 19(2).

[270]Sowerby, above n 262, 15; Cornish, above n 269, 349, notes that *Glyn* v *Weston Feature* [1916] 1 Ch. 261 and *Joy Music* v *Sunday Pictorial* [1960] 2 QB 60 were both analysed in terms of substantiality. "In both decisions it was asked whether the defendant had bestowed such mental labour on what he had taken and subjected it to such revision and alteration as to produce an original work. Today this is probably best understood as a way of emphasising that nothing substantial must remain from the plaintiff's work".

[271]The Copyright Bill effects the legal revisions necessary for New Zealand to comply TRIPS. Although Article 9 of TRIPS does not require compliance with Article 6*bis* of the Berne Convention (1971), the Justice Department has taken the opportunity to comply with the Convention. Interestingly, no mention is made of moral rights in either the Justice Department's 1985 discussion paper *Reform of the Copyright Act 1962*, above n 77, or in the Justice Department's *The Copyright Act 1962 - Options for Reform*, above n 105.

[272]Clause 109.

[273]Clause 87(1)(a) and (b), cl 90(2)(a) and (b), cl 93(2)(a) and (b). Sound recordings are not included within the Berne Convention (1971) definition of artistic or literary works under Article 6*bis*. The Bill aims to comply with the Berne Convention (1971) but does not aim to exceed the Convention's scope.

[274]Moral rights are outside the scope of the "performers' rights" outlined in Part IX of the Bill which are aimed primarily at preventing the recording of performances without the performer's consent.

[275]A performer would may have recourse to the tort of passing off to restrain use though. See text below at Part IX.

[276]Clause 87(1)(a) contains the right to be identified as the author of a musical work. The author must be clearly and reasonably prominently named in or on each copy of the work. For the reasons discussed in the text below, it is debateable whether moral rights apply to insubstantial excerpts of a work. The Fair Trading Act 1986 may require attribution for this type of use. See Appendix A. Attribution must be given for a parody of a work under cl 41(3) of the Bill and under s 19(2) of the Act.

protection against "false attribution",[277] and the right of "integrity". Under clause 90(2)(a) the right of integrity allows the creator of a musical work to object to derogatory treatment of that work. If this right applies to insubstantial use (and fair dealing) it may prevent criticism and comparison and inhibit artistic growth.

Moral rights originate from civil law countries where a "natural law" approach to copyright prevails, rather than an "incentive" approach.[278] In the former, the interests of the creator are paramount. Copyright in commonwealth countries has traditionally been concerned with preserving the *economic* incentive to create, not protecting reputation. Parody is an obvious candidate for conflict with the right of integrity, [279] as is insubstantial use.

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[277]Clauses 93(2)(a) and 94(2) allow a creator to object to a musical work or adaptation being falsely attributed to them. These sections largely mirror s 62 of the present Copyright Act, but are unlikely to apply in musical borrowing cases as *lack* of any attribution is the usual complaint.

[278]See Whale, above n 159, 17-27 and 25. Whale, above n 159, 22-23, notes that the English copyright system "appears to be concerned only with the copyright, that is, the right to do certain acts in relation to the work, and when these rights have been transferred it is not concerned with the fate of the work itself - the emanation of the author's mind and personality". This is in contrast to some European systems where the "authors' right" is composed of two elements, "the first of which is the moral or personal right of the author to assert his creative relationship to his work, and the second the right to put his work to economic purpose..."; G Dworkin, "Moral Rights and the Common Law Countries" (1994) 5 Australian Intellectual Property Journal 5, 5, notes the widely held belief that common law countries "by dint of Art 6 bis of the Berne Convention, are being compelled, kicking and screaming, to dilute their pure economic approach to copyright with alien personality rights". Dworkin, 6, cites *Millar* v *Taylor* (1769) 4 Burr 2303, 98 ER 201, 252 as evidence that this view is inaccurate. In *Millar* Lord Mansfield stated that without copyright protection the author "is no more the master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published". Some of Lord Mansfield's observations are no more than natural incidents of the limited copyright term, and thus Lord Mansfield held that "common law" copyright would subsist in a work after the statutory protection had expired. This was in contradiction to the statutory scheme which created the public domain. Patterson & Lindberg, 33, view *Millar* as an aberration in copyright law, sponsored by publishers bent on preserving privileges enjoyed before the Statue of Anne 1709 (ie a perpetual copyright). As far as the right to a integrity is concerned, by 1785 Lord Mansfield seems to have recanted a little, observing the importance of copyright law allowing others to build on the work of those before them by improving a work and making corrections. See *Sayre*, above n 120.

[279]Clause 89(2)(b) of the Bill exempts fair dealing under clause 41(1) (criticism and review) from the paternity rights provisions. As no specific exemption is made for clause 41 in the integrity rights, it is

Arguably moral rights exist to protect creators from publishers. Copyrights in musical works are usually assigned to a publisher because of the inequality of bargaining power. The interests of a commercially-orientated publisher may not coincide with the creator's interests.[280] The right to object to derogatory treatment may be a valuable "personal" right, as some industry (standard form) contracts do not give the composer any say in how the publisher licenses, or treats, their works.[281] The fact that moral rights are inalienable under clause 109, in contrast to the commercial "exclusive" rights, suggests that moral rights[282] exist as protection against *authorised* users such as assignees and their

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arguable that "derogatory" parody can be restrained. However the exemption from paternity rights is because clause 41 *already* requires attribution to be made. The prospect of a parodist being restrained is alarming given parody's social utility. After all, the very purpose of parody is to mock the work and what it represents. Cornish, above n 269, 349, has noted that in cases where substantial portions of a work have been used "[a]n English court might... be rather willing to find the transformation sufficient in parody cases; whereas a system imbued with notions of moral right might more readily defend the original author's honour".

[280]Singer-songwriter Tom Waits contested his publisher's decision to license his compositions for Levi's commercials in the UK. Third Story Music (the publisher) maintained that an amended publishing agreement permitted them to license without Waits' approval if they obtained "a high enough fee, or if the use is a regional use". Third Story Music argued that "Waits' interference with its licensing efforts is motivated by an attempt 'to maintain and fortify his own distorted image of his own self-importance, and... [is part of] a continuing attempt to oppress and annoy" the publisher. See C Morris "Third Story Countersues Waits Over Commercial" 1 May, 1993 Billboard.

[281]Clause 4(k)(vi) of the Songwriters Guild of America standard form contract publishing contract provides that the publisher shall not, without the writer's written permission, grant licenses for "the use the composition or a quotation or excerpt therefrom in any article, book, periodical, advertisement or other similar publication". "Customary" commercial exploitation does not require specific permission. See Shemel, above n 28, 616, Form 1. Shemel reproduces a further standard form contract which is less generous. See Shemel, above n 28, 625, Form 2. The contract makes no mention of writer's rights in respect of potentially "offensive" uses, and clause 8 states that the writer "consents to such changes, adaptations, dramitizations, transpositions, editing and arrangements of said composition, and the setting of words to the music,... and the change of title as the publisher deems desirable".

[282]"Personal rights" might be a better description, as the essence of these rights is that they are inalienable. See cl 109 and M Weir "The Story of Moral Rights or the Moral to the Story?" (1992) 3 Australian Intellectual Property Journal, 232, 232. Under cl 110 of the Bill moral rights will pass with an estate upon death.

licensees.[283] Thus moral rights need not disrupt the objects of copyright law by applying to insubstantial use or fair dealing with a work.

Clause 98 of the Bill allows moral rights to be waived for existing works or future works. This seems in contradiction to clause 109. A publisher can insist that creators waive their moral rights, at least as far as the publisher is concerned. Therefore the effect of clause 98, in practice, is that publishers are able to engage in derogatory treatment (subject to contract), but unlicensed "fair users" might be caught by the provisions. A further irony in clause 98 is that the potential to *license* derogatory use turns moral rights into *economic* rights. If a treatment prejudicially affects the creator's honour and reputation, why would the creator permit it? Waiving moral rights for a fee suggests that, in reality, the treatment is not derogatory. This casts some doubt on whether "derogatory treatment" is a sound legal test. The courts should be wary of moral rights claims that are, in substance, attempts to gain compensation for what is otherwise a non-infringing use. It is to be hoped that clause 98 will not be enacted in its present form.

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[283] D Vaver "Author's Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?" (1988) 14 Monash University Law Review 284, 287-289, suggests that moral rights serve to protect authors with weak bargaining positions from publishers. Also moral rights maintain the broader economic incentive for creators by ensuring their name is in the public eye. The public too have an interest in knowing the truth about a work and having it in the form the author intended. The preservation of cultural heritage is also an important object. The four objects of moral rights that Vaver advances are all explainable by reference to the intervention of publishers in the creative process. The objects of moral rights will still be met if the rights do not apply to "non-infringing" uses; M F Flint, C D Thorne, A P Williams *Intellectual Property - The New Law: A Guide to the Copyright, Designs and Patents Act 1988* (Butterworths, London, 1989) 62, also suggest that moral rights originate from the imbalance of bargaining power between authors and publishers. The English legislation, upon which the Copyright Bill is modelled, also appears to address the publishers. See Flint, chapter 7. Clause 94 of the Bill prevents representations that a literary, musical, or dramatic work, is an adaptation of the author's work where this is not the case. Clause 95 prevents representations that an artistic work is the unaltered work of the author where this is not the case. As the right to make adaptations of a work is an exclusive right under cl 16(1)(g), these clauses suggest that the publisher's (ie assignee's or licensee's) activities are the focus of the rights.

Can moral rights be applied to insubstantial use? Clause 90(1)(a) defines "treatment of a work" as "any addition to, deletion from, alteration to, or adaptation". is applies to borrowing is arguable. The definition seems directed towards changes that leave the work still recognisable as the original work. Where an insubstantial portion of a work is incorporated into a new work, it cannot be said that the new work is an alteration of the original.

A treatment will be "derogatory" if "by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author...".[284] Weir suggests that the "right of integrity" includes[285]

> restricting the placing of site specific art (such as a sculpture) in an inappropriate site or the use of music as part of a film which portrayed a theme obnoxious to the author...This right would protect a work from inappropriate editing, dismemberment or performance.

"Dismemberment" on a purely musical level may not amount to derogatory treatment, as without words, musical meaning determined from the notes only may be too abstract. Furthermore, most cases of recontextualisation (even where the work contains lyrics) are relatively innocuous. The right of integrity does not protect the integrity of the work itself, but only the *creator's reputation*. "Derogatory" should be a high threshold to permit artistic development or criticism, particularly as integrity rights are clothed in subjective impressions of a work's worth[286] which perhaps reflects an overly romantic view of the

[284]Clause 90(1)(b).

[285]Weir, above n 282, 233.

[286]The right against derogatory treatment has political implications. Consider the book *Mein Kampf*. Moral rights pass with the estate upon death, and are enforceable until the work is no longer within copyright protection. See clauses 109 and 110. Assuming an heir could be found to enforce the right, Mein Kampf is protected from derogatory treatment until the end of 1995. What treatment of this work would be derogatory, and who has the right to decide this? It would be unfortunate if the right could be used to restrict debate and social comment, or define what debate and comment is acceptable. As the right

artistic creator.[287] Worst of all, a judge must make these judgments about authors and their works: something copyright law has traditionally avoided. [288]

Some types of insubstantial use may prejudicially affect the reputation of the creator. Chuck D, a member of the rap group "Public Enemy", was sampled by St Ides, a malt liquor company.[289] The distinctive phrase "The incredible! Number one!" was used on an advertisement targeting black youth.[290] Chuck D was an avowed opponent of the liquor companies' marketing tactics. Finding Chuck D's claim to be an infringement, by applying moral rights to insubstantial use, would close the door for uses with more laudable motives, such as genuine criticism and artistic development. Chuck D's complaint is really that a representation of endorsement was made, and perhaps could be dealt with under the tort of passing off.

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does not account for whether the treatment is made in good faith, but focuses only upon the author's interests, the enforcement of such a right will restrict artistic development and criticism if the right of integrity applies to insubstantial use and fair dealing.

[287]Copyright does not just protect nice paintings and novels! What would be a derogatory treatment of a rubber lavatory pan connector? See *P S Johnson* v *Bucko Enterprises* [1975] 1 NZLR 311.

[288]As Justice Holmes explained in *Bleistein* v *Donaldson Lithographing* 188 US 239, 251, 47 L Ed 460, 23 S Ct 298 (1903), and quoted in *Acuff-Rose*, above n 16, 518, '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work] outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke'".

[289]See Brown, above n 6, 1943 n 9.

[290]Note that sound recordings are not eligible for protection under cl 90(2). Chuck D could only gain protection if the phrase amounted to an original literary work.

IX PASSING OFF AND THE RIGHT OF PUBLICITY

A musical borrower may seek to capitalise on the marketing investments made in an artist by evoking the work of the original artist.[291] Copyright is inadequate protection as it does not directly deal with reputation.[292] A copyright action may fail for lack of substantial taking or because only ideas were used.[293] Furthermore, the artist concerned may have no standing to bring a copyright action.[294] In the US "free-riding" on another's reputation is addressed by the tort of "right of publicity". This tort has not yet been recognised in New Zealand, but the tort of "passing off" may offer some relief. Neither of these actions operate to protect the work itself, as protection for the work is limited to that provided by the Copyright Act.[295] Rather protection is provided for the underlying "goodwill" or reputation of the artist. As breach of copyright is the easiest means of (indirectly)

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[291]See text at n 22.

[292]Interestingly, the compulsory licensing provisions of the Act allow a performer to "cover" an earlier composition. Arguably the Act envisages connections being made with the original performer or composer. Perhaps the distinction is that a cover recording is represented as such without any "connection" connotations in the public eye. See above n 166.

[293]An advertisement like the Salon Selectives one may fail to breach copyright under the idea-expression dichotomy. See above n 149.

[294]The musical work the copyright may have been assigned to a publisher. Copyright in the sound recording belongs to the record company. If the complaining artist was only a performer, and only the musical work was used, the record company acting on the performer's behalf would have no recourse to copyright protection, even if the work was the performers "signature" tune. The *Midler* case, below n 296, is an example of using alternative actions where no valid copyright interest exists.

[295]Section 5(1) of the Copyright Act prevents this. See above n 109. In *Waits* v *Frito Lay Inc* 978 F 2d 1093 (9th Cir. 1992) singer Tom Waits sued under State law for the mimicking of his voice in an advertisement. The US Court of Appeals held that the Copyright Act did not pre-empt this claim for right of publicity. An action under section 43(a) of the Lanham Act (which prohibits false designations or origin, false descriptions, and false representations in the advertising and sale of goods and services) was also permissible. These two actions are similar to passing off and section 9 of the Fair Trading Act respectively.

protecting reputational interests, the discussion here is limited to situations where a copyright action might fail.

In *Midler* v *Ford Motor Co* the defendant infringed the plaintiff's right of publicity by imitating her distinctive vocal style in a television commercial.[296] Brown notes that there are generally three elements to the right of publicity in the United States.[297] First, the plaintiff must be a celebrity with publicity rights worth protecting. The threshold is low, and almost anyone with commercially released recordings will fall into this category.[298] Secondly, the defendant must have used the plaintiff's personal attributes in a clearly identifiable manner. Thirdly, the commercial use must cause damage or irreparable injury.

The traditional requirements of the passing off action were stated in *Erven Warnink BV* v *J Townsend & Sons (Hull) Ltd.*[299] These can be summarised as requiring goodwill and reputation, a misrepresentation, and damage arising from the misrepresentation.[300] The traditional passing off tort differs from the right of publicity in requiring a misrepresentation.

Some Australian passing off cases have come close to the right of publicity by inferring a "business connection" misrepresentation.[301] In *Hogan* v *Koala Dundee Pty Ltd*[302] and

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

[297]Brown, above n 6, 1981.

[298]Tom Waits satisfied this element of the tort. See above n 295.

[299]*Erven Warnink BV* v *J Townsend & Sons (Hull) Ltd* [1979] AC 731.

[300]*Levi Strauss & Co* v *Kimbyr Investments* [1994] 1 NZLR 332, 379.

[301]See P Keyzer "The Protection of Digital Samples under Australian Intellectual Property Law" (1993) 4 Australian Intellectual Property Journal 127, 133.

[302]*Hogan* v *Koala Dundee Ltd* (1988) 83 ALR 187.

Pacific Dunlop v *Hogan*[303] the courts held that a fictional character had been wrongfully misappropriated by the defendants. The cases are based upon a misrepresentation that the personality has endorsed a product by permitting the use of their fictional character. The character itself however had no legal protection, and as has been observed, the reasoning of these cases is rather circular.[304] The Hogan cases followed the earlier decision of *Henderson* v *Radio Corp Pty Ltd.*[305] In that case the reputation of the plaintiff itself was protected on the basis that the defendant had falsely represented that the plaintiff recommended its products.[306] Under these cases it is no longer necessary to misrepresent the nature of the product. The Australian cases were discussed in *Tot Toys* v *Mitchell.*[307] Citing Terry[308] and Howell,[309] Fisher J noted that:[310]

> Some of those who work in intellectual property have unquestioningly welcomed this Australian method of extending their field... but others have regarded it as "a preparedness *artificially to infer a misrepresentation* to satisfy the requirements of the tort in cases where there has been misappropriation of promotional goodwill"... and "converting the tort of passing off to either the American 'misappropriation of business values' limb of their unfair competition tort (otherwise rejected in the Commonwealth) or to an 'appropriation of personality' tort" in a way which has been "achieved covertly" and is in fact "misappropriation in the guise of passing off"... I respectfully share the reservations of the last two

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[303]*Pacific Dunlop* v *Hogan* (1989) 87 ALR 14.

[304]*Tot Toys* v *Mitchell* [1993] 1 NZLR 325, 362.

[305]*Henderson* v *Radio Corp Pty Ltd* [1969] RPC 218.

[306]See H Carty "Character Merchandising and the Limits of Passing Off" (Nov 1993) 13 Legal Studies 289.

[307]*Tot Toys*, above n 304.

[308]Terry "The Unauthorised use of Celebrity Photographs in Advertising" (1991) 65 ALJ 587, 590.

[309]Howell "Character Merchandising: The Marketing Potential Attaching to a Name, Image, Persona or Copyright Work" (1991) 6 IPJ 197, 207.

[310]*Tot Toys*, above n 304, 363 (emphasis added).

> writers. It is not easy to escape the conclusion that on occasion the result in Australia may have sprung not so much from a finding of actual deception or independent damage as the tacit assumption that there should be a right of property in names, reputations and artificial images for character merchandising purposes.

The use of a musical extract is probably not analogous to the use of a fictional character. In *Tot Toys* Fisher J noted that in character merchandising cases the defendant "harnesses the beneficial associations intrinsic in the image itself, as distinct from associations with the real people and their property which may happen to stand behind the image".[311] Many instances of musical borrowing are directed to making an association not with the composition but with the original artist, who is much more visible to the public than the creator of a marketing image.[312]

Although the misrepresentation normally required for passing off relates to the nature of the product,[313] New Zealand courts have recognised the type of damage caused by free-riding on another's reputation. In *Taylor Bros* McGechan J observed in the High Court that: [314]

> Damage by suggestion of association of the plaintiff's business amounts to a *dilution* of the plaintiff's goodwill. A plaintiff who is entitled in principle to the protection of his property right in goodwill is entitled to protection against all such forms of attack without nice distinctions being drawn.

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[311] *Tot Toys*, above n 304, 361.

[312] The Hogan cases are similar to musical borrowing as the "property" appropriated (ie the fictional character) is strongly identified with the actor.

[313] See Cooke P below n 317.

[314] *Taylor Bros Ltd* v *Taylors Group Ltd* [1988] 2 NZLR 1, 22 (emphasis added). See *Taylor Bros*, 20-22, for a discussion of the authorities on this point. McGechan J's judgment was upheld on appeal.

A similar approach was taken by the Court of Appeal in *Wineworths* v *CIVC*.[315] The Court accepted "that in some cases it is legitimate to infer damage to goodwill from a tendency to impair distinctiveness".[316] In *Wineworths* v *CIVC* Penfolds had labelled one of their sparkling wines as "Australian Champagne". Cooke P held that the consumer, although not deceived into thinking they were buying French Champagne, would be deceived into thinking they were buying sparkling wine with the attractive attributes of Champagne.[317] Cooke P's misrepresentation was thus related to the nature of the product. The public would be "misled into thinking that there is no significant difference between the French and Australian products".[318] Gault J's approach to misrepresentation was different:[319]

> I have no doubt that erosion of the distinctiveness of a name or mark is a form of damage to the goodwill of the business with which the name is connected... The clear object of Penfolds is to use the name in New Zealand because of its attracting power so as to secure commercial advantage in having its wines *associated* in the minds of the purchasing public with the wines of high repute from France... It perhaps should be added that the principles applicable to the establishing, or destruction of, distinctiveness do not necessarily have any connection with product quality which may be a matter of personal preference in any event. *Distinctiveness involves indication of a connection in the course of trade and that is not a matter of product quality.*

Gault J's judgment provides some authority for applying the "artificial" Australian type of misrepresentation in New Zealand. In cases where an artist's "personal attributes" (ie

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[315] *Wineworths Group Ltd* v *Comite Interprefessionèl du Vin de Champagne* [1992] 2 NZLR 327.

[316] *Wineworths*, above, n 315, 332 citing *Taylor Bros*, above n 314, 37 "The expressions 'inundation' and 'dilution' in this context were apparently not taken by McGechan J from any prior authorities but are apt to describe a process whereby a trade nome losses its distinctiveness".

[317] *Wineworths*, above n 315, 332, per Cooke P, quoting Jeffries J in the High Court.

[318] *Wineworths*, above n 315, 332 (emphasis added)..

[319] *Wineworths*, above n 315, 343.

persona) have been used in a clearly identifiable manner, as required by the right of publicity, a business connection misrepresentation may be inferred. But can musical borrowing amount to a clear use of an artist's personal attributes?[320]

The excerpt would have to be "novel and distinctive" for an association to be made.[321] A "horn punch" is not novel in itself,[322] unless it is sufficiently distinct from other horn punches. This will not always be the case. Where an entire melody is used however, it will be easy to establish distinctiveness. Where a copyright action failed because the excerpt used had been transformed beyond the point of objective similarity, or the use was insubstantial, an association will be difficult to make. Where the copyright action fails because only the "ideas" were used, a misrepresentation may still be possible, especially if the music is coupled with other "indicia" such as distinctive vocal phrases[323] or visual images.[324]

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[320]A "Catch 22" situation may arise here if, to avoid a Fair Trading Act claim, the borrower has credited the excerpts used. However where the association can only be made by the credit given, a disclaimer could be made to the effect that the original artist has no connection with the later work.

[321]See *Klissers Farmhouse Bakeries Ltd* v *Harvest Bakeries Ltd* [1988] 1 NZLR 16 (CA). The contested elements of the plaintiff's packaging (checked patterning) was a common feature of bread packaging. The Court of Appeal held that the High Court Judge was justified in finding that Klisser's particular checks were not distinctive enough to attract goodwill, and therefore that Goodmans made no representation that their bread was made by Klissers.

[322]A horn punch is a note, or short sequence of notes, played by the brass and woodwind instruments for "percussive" effect.

[323]The phrase "Hit me" is closely associated with James Brown, but use of this phrase would not be a likely copyright infringement. The same could be said for the title of any song. See Brown, above n 6, 1982. See also *Carson* v *Here's Johnny Portable Toilets, Inc* 698 F. 2d 831, 835 (6th Cir. 1983). This was a right of publicity action. The case's name speaks for itself.

[324]A recent TV commercial for Johnny Walker whisky featured a song with the refrain "go Johnny" and music sounding similar to Chuck Berry's *Johnny B Goode*. The refrain was not exactly copied, and indeed may have been insufficiently original to receive protection. Likewise the music was not precisely copied. However, the song's singer performed Chuck Berry's distinctive stage struts and guitar gyrations in the commercial. These elements collectively would make an association between the product and Chuck Berry, which if the advertisement was not licensed, may amount to passing off that the courts would recognise.

While the status of the "business connections" misrepresentation in New Zealand may currently be uncertain, Fisher J's obiter comments suggest that a borrower may be unwise to test the scope of the passing off tort.[325]

> Few would dispute that *real* persons have the right to prevent the unauthorised promotional use of their persona. There may be a case for going beyond existing causes of action... to North American causes of action for appropriation of personality and/or breach of rights of privacy and publicity.

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[325] *Tot Toys*, above n 304, 363 (emphasis added).

X CONCLUSION

Artistic borrowing has a role to play in musical development. Modern styles of music are well disposed to the customisation of standardised music industry products. This paper has argued that the Copyright Act 1962 permits artists to build upon the work of others, but will restrain borrowing that impinges on the market for the original work. Market impinging will occur when too much is taken, or the excerpt remains in context and thereby supersedes the objects of the original work. This paper has also argued that the right of integrity should not restrict otherwise non-infringing use, as artistic development would then be limited by subjective impressions of the new work's worth.

The music industry needs to protect its marketing investments in artists. The Copyright Act 1962 does protect this interest. However, flagrant attempts to free-ride off another artist's popularity may come within conduct addressed by the tort of passing off.

From a practical perspective it would be sensible to seek clearance for any readily detectable borrowing. The outcome of copyright litigation will usually be unpredictable. A record company may be reluctant to release recordings containing borrowings for fear of legal action. If permission is sought, more substantial excerpts could be used. However if musicians are bent on borrowing without permission, plagiarism is safer than sampling, as detection is less likely and infringement is harder to prove.

APPENDIX A - The Fair Trading Act 1986

Section 9 of the Fair Trading Act 1986 ("the Act") makes it an offence for any person in trade to "engage in conduct that is misleading or deceptive or is likely to mislead or deceive".[1] Publishers and record companies may bring Fair Trading claims against borrowers to gain leverage for exacting payment. The absence of attribution may be deceptive as the original artist's contribution to the new work is unacknowledged. It is assumed that the "origin" of parts of the work is material to the consumer.[2] A rival trader, rather than a consumer, may bring an action under the Act,[3] but the essence of a section 9 claim is that the consumer has been misled, or is likely to be misled or deceived.[4] Damage need not be proved.

Is it likely that purchasers of recordings containing borrowed excerpts would be deceived? The objective evaluation of whether conduct is likely to be deceptive involves identifying the relevant section of the public[5] and considering its composition.[6] In *Tailor Bros* McGechan J noted that "those misled or deceived must

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[1]This does not require a misrepresentation, but only misleading or deceptive conduct. See *Prudential Building and Investment Society of Canterbury* v *The Prudential Assurance Company of New Zealand Ltd* [1988] 2 NZLR 653, 658 (CA). A misrepresentation is a false statement about a present or past fact. The Full Federal Court of Australia has held that their equivalent of section 9 (s 52 of the Trade Practices Act 1974) requires a misrepresentation. *Taco Company of Australia Inc* v *Taco Bell Pty Ltd* (1982) 4 ATPR para 40-303, 43,751. Australian courts have interpreted "misrepresentation" generously however. See Y van Roy *Guidebook to New Zealand Competition Laws* (CCH New Zealand Ltd, Auckland, 1991) 358. The conduct complained of in music plagiarism and sampling if established would fall within "misrepresentation" in any case.

[2]Without attribution, consumers would be "deceived" even if permission was granted for the use of excerpts. The fact then that competitors are the only likely complainants suggests that the motivation for Fair Trading claims is really unjust enrichment rather than consumer deception.

[3]*Tailor Bros Ltd* v *Taylors Group Ltd* [1988] 2 NZLR 1 , 39.

[4]An action under section 9 has advantages "as it is broader than the common law action for passing off. It is not confined to names or other indicia indicative of trade connections. It is directed to all conduct in trade that is likely to mislead or deceive". See *Bleiman* v *News Media Auckland Ltd* Unrep 13 May 1994, Court of Appeal, CA 70/94, 12.

[5]*Taco Company of Australia*, above n 1, 43,752.

comprise some significant section of the consumer public; and that their standards of perception and analysis may be mixed".[7] Furthermore, the risk of confusion of deception must be sufficiently serious to warrant a remedy.[8] "A robust approach is called for when determining whether commercial statements... are misleading or deceptive".[9]

Purchasers of rap or dance recordings may be largely aware of sampling and plagiarism in these musical forms. What they are purchasing is an artist's interpretation of this earlier material. Short of appropriation that would lead to copyright liability, a work will be the result of the Borrower's labours, even though some aspects of the work may be traced to other sources. The consumer is not paying for a random collection of excerpts after all, but a coherent musical composition. If enough of a work has been used to lead to copyright liability (such as an entire melody) then the position may be different, but Fair Trading Act arguments are irrelevant where copyright is breached as appropriate terms can then be imposed by the copyright holder.

Even if some consumers are unaware of musical borrowing practices, it is not enough "that the conduct causes a state of wonder or doubt...".[10] Consideration must also be given to the "nature of the product and the circumstances of trade through which the product passes".[11] "The nature of the goods and the price give rise to considerations as

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[6]The consideration must include "the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations". See *Puxu Pty Ltd* v *Parkdale Custom Built Furniture Pty Ltd* (1980) ATPR para 40-171, 42,360, 149 CLR 191, cited with approval in *Taylor Bros*, above n 3, 29.

[7]*Taylor Bros*, above n 3 (HC), 31.

[8]*Levi Strauss & Co* v *Kimbyr Investments* [1994] 1 NZLR 332, 378. In *Levi Strauss* the defendants had incorporated a coloured tab on the back pocket of their jeans design. The tab was marked with the defendant's name. Williams J did not think that customers reading the notice on labels would be deceived into thinking the jeans were made by the plaintiff.

[9]*Levi Strauss*, above n 8, 378 citing *Trust Bank Auckland Ltd* v *ASB Bank Ltd* [1989] 3 NZLR 385, 389 and *Stuart Alexander & Co (Interstate) Pty Ltd* v *Blenders Pty Ltd* (1981) ATPR 40-244, 43,204.

[10]*Taylor Bros*, above n 3 (CA), 39.

to whether purchasing is likely to be careless or deliberate".[12] Some inspection of CD cover notes is possible at the point of sale. Detailed credits often accompany recordings for all variety of production contributions, which may include musical "influences". In these circumstances the absence of credit for excerpts used may lead some consumers to believe that all the musical material and "sound" was the work of the credited artists.

Ultimately the question of misleading or deceptive conduct is one of fact, but unless the excerpt has been transformed beyond recognition, it may well be prudent for a borrower to give credit for samples used, as now seems to be common practice.[13]

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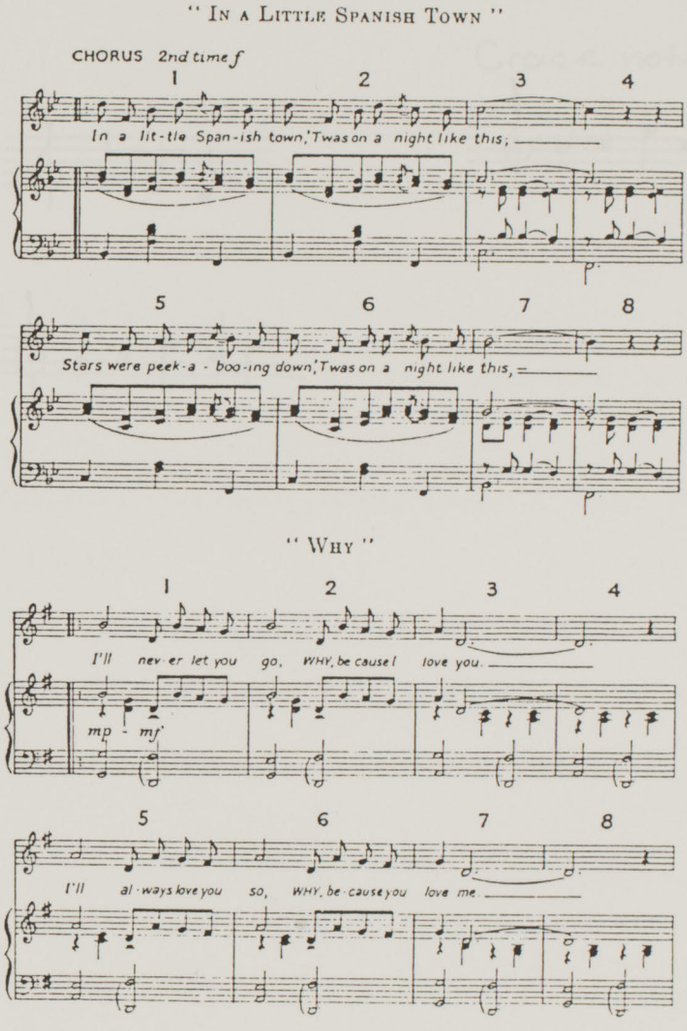
[11] *Allied Liquor Merchants Ltd* v *Independent Liquor (NZ) Ltd* (1989) 3 TCLR 328, 334.

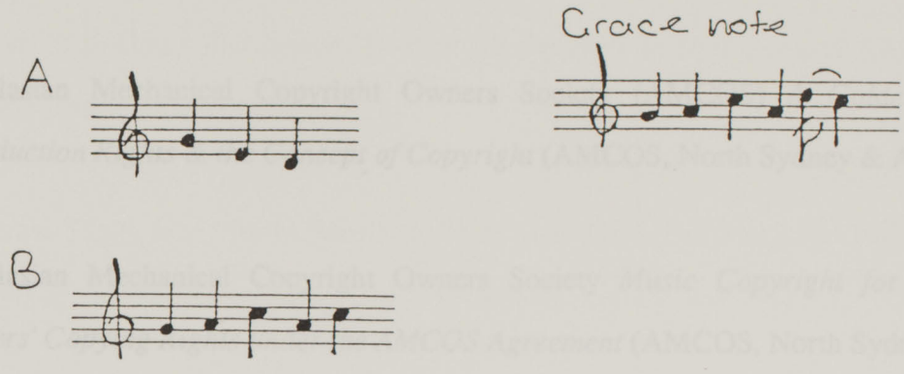
[12] *Allied Liquor Merchants*, above n 11, 334.

[13] Rick James received a writer's credit on MC Hammer's album "Please Hammer Don't Hurt 'Em" (1990 Capitol Records Inc) for the use of samples from *Super Freak* in Hammer's hit *U Can't Tough This*; US 3's album "Hand On The Torch" (1993 Capitol Records Inc) features extensive sampling from Blue Note jazz recordings. All samples are acknowledged, writer' credits given, and also performer's credits for the musicians that performed the original works; Publishers are beginning to insist that their compositions are credited when sampled. See Brown, 1987 at n 290. This is consistent with a general trend to give more prominence to songwriters in general. See *Billboard*, January 29, 1994, "Songwriter Credits Should be Listed More Prominently".

APPENDIX B - Extract from *Francis Day & Hunter Ltd* v *Bron* [1963] 1 Ch 587, 591.



APPENDIX C - Extract from *Bright Tunes Music Corp* v *Harrisongs Music Ltd* 420 F Supp 177, 178.



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