

NOTES

DIGITAL SAMPLING AND THE RECORDING MUSICIAN: A PROPOSAL FOR LEGISLATIVE PROTECTION

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In this Note, Christopher Abramson argues that Congress should create a statutory property right for musicians whose work is sampled or reused by other recording artists. Abramson examines the technological changes and business arrangements within the recording industry that necessitate this protection. He discusses the inadequacy of existing remedies such as contract and copyright law. Abramson also shows how the existing collective bargaining agreement between the American Federation of Musicians and the record companies fails to address adequately the problems associated with digital sampling. He concludes by calling for the enactment of legislation requiring record companies to compensate musicians whose work is appropriated by sampling.

Musicians were not 'laborers'—they were 'artists.'¹

Art be damned, we are playing for money.²

INTRODUCTION

These quotations illustrate the dual nature of the musical profession, perceived from both the outside and within. For the professional musician, music is both a means to earn a living and an art form requiring a lifetime of dedication to master. Thus, musicians' motivations, concerns, and job characteristics may be different from those of other workers, especially prototypical unionized workers, such as miners or auto workers.³ While industrial workers often work for the

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¹ Vern Countryman, *The Organized Musicians*: I, 16 U. Chi. L. Rev. 56, 57 (1948).

² George Seltzer, *Music Matters* 16 (1989) (quoting member of National League of Musicians, nineteenth-century predecessor of American Federation of Musicians (AFM)).

³ See generally Countryman, *supra* note 1, at 57 (noting that members of early musicians union would not "have seen any similarity between its function and that of a labor union"). However, industrial workers are not the only useful comparison. For example, within the entertainment industry, the National Association of Broadcast Engineers and Technicians (NABET) faces technological job displacement and sporadic employment. See Lois S. Gray & Ronald L. Seeber, *The Industry and the Unions: An Overview*, in *Under the Stars* 15, 42-44 (Lois S. Gray & Ronald L. Seeber eds., 1996) (discussing technological displacement of NABET members); Virginia Antonelli, *Fighting the Freelance*

same corporation for a period of years, musicians are more likely to freelance. Other unionized workers are concerned with workplace safety and work hours, while musicians are concerned almost exclusively with wages and employment opportunities.⁴ Industrial workers work principally for the purpose of being compensated; musicians often perform even if they do not receive a penny.⁵

On the other hand, in some ways the plight of modern musicians is similar to that of prototypical unionized workers. Both are vulnerable to the threat of mechanization; robots and computers dislodge them from their jobs.⁶ Industrial workers and musicians fight against competition from cheaper foreign labor.⁷ And, like industrial workers, musicians have organized to advance their cause.

The American Federation of Musicians (AFM) represents instrumental musicians in the United States and Canada. It negotiates wage scales and working conditions for recording musicians through collec-

Blues: What Do You Do when Business Is in a Slump?, *Backstage*, Sept. 8, 1989, at 27 (noting sporadic nature of NABET members' work schedules). Outside the entertainment industry, construction and garment workers' unions face sporadic employment. See John Deklewa & Sons, 282 N.L.R.B. 1375, 1380 (1987) (noting that construction workers face sporadic employment); Barbara E. Koh, Note, Alterations Needed: A Study of the Disjunction Between the Legal Scheme and Chinatown Garment Workers, 36 *Stan. L. Rev.* 825, 843 (1984) (noting that garment workers face sporadic employment).

⁴ See Countryman, *supra* note 1, at 72; Christopher Milazzo, Note, A Swan Song for Live Music?: Problems Facing the American Federation of Musicians in the Technological Age, 13 *Hofstra Lab. L.J.* 557, 559 (1996).

⁵ See Countryman, *supra* note 1, at 75 (stating that AFM faces distinct problem in that "there are always a number of amateurs who are willing to perform without compensation"). In fact, some aspiring rock bands must "pay to play" in certain clubs. See Paul Verna, 'Pay-to-Play' Gambit Causing Int'l Controversy, *Billboard*, Mar. 21, 1992, at 5 (noting that 30 to 40% of Los Angeles rock clubs require bands to pay fee to play).

⁶ See Milazzo, *supra* note 4, at 578 (noting job displacement due to technological advances, including robotics, in agriculture, printing, and mining). However, mechanization replaces musicians in a unique way. The machines that replace musicians require a musician to create them, as in the case of phonograph records. See Seltzer, *supra* note 2, at 230 (noting that machines "that shrink the job market and put musicians out of work are made by the musicians themselves"); *id.* at 232-33 (describing effects of drum machines and synthesizers on professional musicians). However, modern electronic instruments require less skill to operate. Thus, they have an even greater displacing effect on musicians than did phonograph records because it is possible to create music without ever hiring a musician skilled on any particular instrument. See Suzanne Gordon, *The New Music Biz: Effects of Synthesizers on the Industry*, 90 *Tech. Rev.* 10, 10 (1987) (noting that "the drum machine[] corrects timing" and thus "can be operated by a person who has never played a drum"). This is the essence of the unique effects of sampling. See *infra* Part I.C.

⁷ See, e.g., Robert A. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, 37 *Sw. L.J.* 697, 731 (1983) (describing use of foreign musicians to record motion picture soundtracks overseas in 1950s); David Robb, *Union Sings Blues on Opus Composer: AFM Driving Producers to Look Overseas for Scores*, *Hollywood Rep.*, Mar. 12, 1996, at 6 (noting that many modern film scores, including that of *Mr. Holland's Opus*, have been recorded overseas in order to save money).

tive bargaining agreements with motion picture, television, and phonograph record companies. It also negotiates wage scales and working conditions for live performing musicians through collective bargaining agreements with orchestras and theater producers.⁸ With more than a century of experience fighting for the interests of instrumental musicians,⁹ the AFM is the most appropriate—and perhaps the only—organization capable of enabling musicians to lobby collectively for legislative action.

Digital sampling¹⁰ may be the greatest threat facing instrumental musicians today.¹¹ The production of music using samples taken from preexisting recordings in lieu of hiring live musicians is a unique problem. Unlike a synthesizer, a sample does not sound *like* a musician playing an instrument, it *is* a recording of a musician playing an instrument.¹² Unlike a phonograph record, a sample allows a musician's performance to be reused in a completely different piece of music. The *reuse* of the musician's work distinguishes his or her plight from that of the factory worker who is replaced by machines. Unlike factory workers, musicians *created* the product that replaces them.¹³

This Note argues that Congress should create a statutory property right for recording musicians in their recordings that are sampled and reused. This property right should cover both featured recording artists and nonfeatured musicians (NFM's), i.e., freelance musicians

⁸ See, e.g., Seltzer, *supra* note 2, at vii (noting wide range of musicians represented by AFM); Gorman, *supra* note 7, at 699 (noting that AFM negotiates contracts for "instrumental musicians working for the manufacturers of phonograph records, for the producers of television films, and for the producers of so-called theatrical motion pictures"); American Fed'n of Musicians, Benefits of Membership (visited Oct. 25, 1999) <<http://www.afm.org/about/benefits.htm>> (stating that AFM negotiates "agreements in many fields including studio and other recording, TV, films, jingles [television and radio commercial music], concerts, stage shows, symphony, opera, and ballet").

⁹ See, e.g., Seltzer, *supra* note 2, at 17-18 (describing late nineteenth-century effort to lobby Congress to restrict competition from military and foreign musicians).

¹⁰ See *infra* Part I.C.

¹¹ See Seltzer, *supra* note 2, at 233 (noting that sampling "poses the great threat for the acoustical instrument performer, the profession, and the [AFM]").

¹² See *infra* Part I.C.

¹³ James C. Petrillo, AFM president from 1940 to 1958, see Gorman, *supra* note 7, at 705, 763, made the following statement in 1955 regarding the job displacement caused by the broadcasting of phonograph records over the radio:

Nowhere else in this mechanical age does the workman create the machine which destroys him, but that's what happens to the musician when he plays for a recording. The iceman didn't create the refrigerator[;] the coachman didn't build the automobile. But the musician plays his music into a recorder and a short time later the radio station manager comes around and says, "Sorry, Joe, we've got all your stuff on records, so we don't need you any more." And Joe's out of a job.

Seltzer, *supra* note 2, at 40 (quoting Petrillo).

who are neither royalty artists¹⁴ nor copyright owners,¹⁵ and should require users of material sampled from commercially released records, tapes, or CDs to pay a statutorily determined fee into a fund that disburses proceeds to the musicians who played on the sampled material.¹⁶

Part I discusses some modern technological problems facing musicians in order to provide technological context to the digital sampling issue. Part II outlines the current treatment of digital sampling under copyright law, current music industry practice, and the AFM's collective bargaining agreement with the record companies. Part III argues that Congress should create a property right for musicians outside of copyright law in order to rectify an economic injustice caused by digital sampling and sets out the rationale for enacting such legislation.

I

MODERN TECHNOLOGICAL PROBLEMS

This Part discusses three relatively new technologies, digital audio tape (DAT), synthesizers, and digital sampling, each of which has caused job displacement of musicians in the areas of recording, musical theater (including ballet), and club dates.¹⁷ The increasing quality of audio tape, culminating in the advent of DAT, has made more feasible the practice of replacing live musicians in an orchestra pit with a recording of their performance, and similarly has led to the use of tape

¹⁴ Nonfeatured musicians (NFM's) generally are not royalty artists or members of stable recording groups—that is, they do not record pursuant to record contracts paying royalties. The AFM's current collective bargaining agreement with the record companies defines "royalty artist" as "a musician . . . who records pursuant to a phonograph record contract which provides for a royalty of at least 3% of the suggested retail list price of records sold." Phonograph Record Labor Agreement, at 30-31 (Feb. 1, 1996-Jan. 31, 1999) [hereinafter PRL Agreement] (on file with the *New York University Law Review*). A "self-contained royalty group" is defined as

[t]wo or more persons who perform together in fields other than phonograph records under a group name . . . and . . . record[] pursuant to a phonograph record contract which provides for a royalty payable with respect to the group at a basic rate of at least 3% of the suggested retail list price of records sold.

Id. Thus, Michael Jackson is a "royalty artist" and U2 is a "royalty group."

The PRL Agreement cited above and throughout this Note expired on January 31, 1999. The relevant terms, however, remain in effect in the current agreement, which is unpublished. See Telephone Interview with Patrick Varriale, Contract Administrator, AFM (Apr. 19, 1999).

¹⁵ See *infra* Part III (discussing reasons why NFM's generally are not copyright owners).

¹⁶ The extent of this proposed property right is discussed in detail *infra* Part III.A.

¹⁷ The AFM defines club dates as "single engagements." Seltzer, *supra* note 2, at 199. They are not only played in clubs, but also in "private homes, fraternal buildings, catering halls, hotels, country clubs, synagogues, churches, ballrooms, restaurants, and stores." Id. at 200.

to replace live musicians and vocalists on major concert tours.¹⁸ Synthesizers and digital sampling have displaced musicians in recording studios as well as in clubs and orchestra pits. Although phonograph records replaced live music on the radio, musicians were still required to play in the studio in order to record the music that was later broadcast or duplicated for sale. The instrument known as the synthesizer, and more recently the technology of digital sampling, has changed this. Today, a musical sound, such as a trumpet sound, can be produced without the need to hire a musician with a particular skill, for example, a trumpet player. Thus, in addition to displacing musicians in recording studios, synthesizers and digital sampling have decreased the need to hire a wide variety of musicians to produce live music in clubs and theaters.

A. *Digital Audio Tape*

Although recorded music began to displace live musicians long before the advent of DAT,¹⁹ the new digital medium presents a greater challenge to live music because of its increased quality. DAT recordings contain none of the tape "hiss" associated with analog tape and can be played repeatedly without degrading the sound quality.²⁰ As DAT technology becomes cheaper and more familiar, its use is becoming more widespread.²¹ It also is becoming more effective as a

¹⁸ See Chris Dafoe, *The Synching Sensations: Read My Lips*, *Toronto Star*, Aug. 4, 1990, at G3, available in Lexis, TSTAR file (noting that "both Depeche Mode and Madonna have admitted to using taped material in their concerts" and that other major acts are suspected of using tape).

¹⁹ Disc jockeys hired to play analog records and tapes at clubs, weddings, bar mitzvahs, and the like have long displaced musicians. See Seltzer, *supra* note 2, at 232 (describing competition from disc jockeys and resulting "'disco boom' of the 1970s"); Donald G. McNeil, Jr., *New Show Is First Not to Have to Pay Idle Musicians*, *N.Y. Times*, Feb. 8, 1995, at C13 (noting that musicians "are just being killed by D.J.'s with records and tapes" (quoting William D. Moriarity, president of AFM Local 802 in New York City)). Technology has forced "even concert virtuosos [to] resort to playing weddings and bar mitzvahs." Laurie Goodstein, *The Day the Music Died: Live Performers Compete with Canned Accompaniment*, *Wash. Post*, Oct. 15, 1989, at G1.

²⁰ See Seltzer, *supra* note 2, at 232 (noting that DAT "has created the means to reproduce indefinitely tapes with the same fidelity as the original").

²¹ See *id.* ("A further proof of the pervasiveness of music reproduction is the use of tapes to replace the traditional organist at major league baseball parks."); Deborah Caulfield, *Taped Music at Nureyev Show Protested by Union*, *L.A. Times*, Aug. 11, 1987, Calendar, at 5 (describing taped music used at ballet performance in apparent violation of AFM contract); Editorial, *Billboard*, June 6, 1992, at 6 (noting that "many touring acts rely on backing tapes for parts of their instrumentation and vocals"); Goodstein, *supra* note 19, at G1 ("From Washington to Los Angeles, from Las Vegas to Atlantic City, taped music is replacing the traditional live orchestra."); *id.* (noting that Atlantic City casinos "have unloaded at least half the musicians they had 10 years ago and replaced them with tapes and synthesizers"); Jeannie Wong, *Ballet May Turn to Taped Music*, *Sacramento Bee*, July 9,

method of preventing a musicians' strike from stopping a show.²² With its distinct sound quality advantage over analog tape, DAT can be used with less fear of audience dissatisfaction.²³

B. Synthesizers

Synthesizers are electronic musical instruments that produce tones that mimic acoustic instruments, sounds of nature, or unnatural sound effects. Usually, the electronics that produce the sounds are contained in an electronic keyboard. However, they also can be contained in a separate box and triggered remotely. This process, "musical instrument digital interface" (MIDI), is an industry-standard format that allows any triggering device, such as an electronic keyboard, drum pad, or computer,²⁴ to control the pitch, volume, duration, and modulation of sounds contained in a separate machine.²⁵ This flexibility allows multiple sounds to be played simultaneously in recording studios and live performances.²⁶

Synthesizers have caused profound displacement of musicians in recording studios, orchestra pits, clubs, and concert stages.²⁷ In addi-

1994, at B1 (noting that Sacramento Ballet would likely use taped music for most of 1994-1995 season).

The primary reason for using taped music is cost savings. See Mary T. Schmich, *Taped Tunes Put Musicians on Picket Lines in Vegas*, Chi. Trib., Aug. 21, 1989, at C5 (stating that decision to use taped music for Bally's Las Vegas *Jubilee!* show will save one million dollars annually).

²² See Amy Hersh, *Strike Continues by Musicians at Kennedy Center, Backstage*, Sept. 10, 1993, at 3 (describing use of taped music in road production of *The Phantom of the Opera* while musicians were on strike); Schmich, *supra* note 21, at C5 (describing use of taped music by Tropicana Hotel in Las Vegas in response to strike).

²³ See Dafoe, *supra* note 18, at G3 ("Fans of New Kids on the Block would rather see their heroes pull off their dance moves than struggle with the intricacies of staying in tune."); Goodstein, *supra* note 19, at G1 ("Audiences at Broadway musicals, Las Vegas extravaganzas, ballets and modern dance performances have so far proved willing to pay the same price for tickets whether they hear a 20-piece band or an amplified boom box."); Schmich, *supra* note 21, at C5 (stating that Las Vegas hotels using taped music "maintain that patrons at the revues don't care whether the music is live, and in some cases weren't ever aware that it was").

²⁴ A computer uses a program called a sequencer to record and play back via musical instrument digital interface (MIDI) the same information (pitch, volume, duration, etc.) that can be transmitted via a triggering device. See Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "CHEEZ-OID?"*, 42 Case W. Res. L. Rev. 1263, 1268 n.55 (1992) (describing sequencers).

²⁵ See *id.* at 1268 n.55 (describing MIDI).

²⁶ See *id.*

²⁷ See Seltzer, *supra* note 2, at 193 (stating that "the synthesizer is replacing many musicians in the recording studio and orchestra pit"); Jesse Hamlin, *Sounding Off over Synthesizers*, S.F. Chron., Nov. 11, 1989, at C3 (describing loss of jingle work and motion picture and television soundtrack work to synthesizers and noting loss of jobs in clubs and in large traveling acts due to synthesizers); Allan Jalon, *Synthesizers: Sour Sound to Musicians*,

tion, synthesizers obviate the need for expensive equipment and skilled recording engineers to record acoustic instruments properly. Increasingly, composers—who previously would have had to utilize expensive recording studios and expensive recording musicians to reduce their compositions to tape—are able to record in relatively inexpensive home recording studios.²⁸ Since producers can save money not only on musicians, but on studio time and engineers as well, they have a great incentive to use synthesizers.²⁹

C. *Digital Sampling*

Digital sampling is essentially the same process as DAT recording. Whereas DAT recording involves recording sound onto digital tape, sampling involves recording sound onto a memory chip. Once recorded, a digital sound can be transferred back and forth between a chip and tape with no loss of quality since only numbers are transferred. The advantage of storing a sampled sound on a chip is the ability to manipulate it: Samples can be edited very precisely using computers with digital editing programs.³⁰

It is important to distinguish between two easily confused kinds of sampling. The samples that function in the same way as synthesized sounds are usually relatively brief recordings of one note, such as a trumpet or snare drum, perhaps tuned to the chromatic musical scale and “looped” to produce a long sustained tone (in the case of the trumpet, for example). These samples can sound very much like synthesized sounds.³¹ Although the user of the sampling machine can

L.A. Times, Dec. 6, 1985, at A4 (noting that synthesizers increasingly replace musicians on records).

²⁸ See, e.g., Don Heckman, Solo Movement: The One-Man Band Formula Is Taking an Electronic, Highly Eclectic Turn for Composers, L.A. Times, Oct. 1, 1989, Calendar, at 86 (describing film and television composer's home recording studio).

²⁹ The composer is often the one responsible for recording the music for the television or motion picture producer, and one fee covers the composing and recording costs. The cheaper it is to record, the more money is left for the composer, thus leading to “an obvious temptation for a composer to do it all himself.” *Id.*

³⁰ See, e.g., Robert A. Gorman & Jane C. Ginsburg, Copyright for the Nineties 458 (4th ed. 1993) (describing process of digital sampling); Robert M. Szymanski, Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use, 3 UCLA Ent. L. Rev. 271, 275-77 (1996) (same); Randy S. Kravis, Comment, Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications, 43 Am. U. L. Rev. 231, 237-38 (1993) (same).

³¹ The job displacement caused by this type of sampling is similar to that caused by synthesizers. The principal difference is that samplers can produce more realistic simulations of live instruments. See E. Scott Johnson, Note, Protecting Distinctive Sounds: The Challenge of Digital Sampling, 2 J.L. & Tech. 273, 275 (1987) (stating that sampling replaces “unique” rather than “generic” musical expressions).

create original samples,³² most modern machines are sold with at least some samples provided by the manufacturer.³³ This type of sampling generally does not implicate the property right discussed in Part III.³⁴

The type of sampling of primary concern here is the sampling of sounds from commercially released records or CDs.³⁵ These samples can be one-note samples that are indistinguishable from samples of the same instrument recorded by the sampler himself. For example, a sample of a nondescript snare drum from a record could slip by without the listener's recognizing whether it was sampled from a record or from an instrument directly.³⁶ However, samples from records are often longer, multinote passages that are sometimes highly recognizable, even if they do not contain any melody.³⁷ Although the length and recognizability of the sample may be relevant for copyright purposes,³⁸ all samples from a record appropriate the work of the musicians who performed on that record. This enables the sampler to use a musical performance without hiring either the musician who origi-

³² See *id.* at 279 n.47 (noting that sampling machines allow users to create own samples).

³³ See *id.* at 279-80, 279 n.45 (describing keyboard manufacturer's process of creating piano samples for its products).

³⁴ To record a sample, one would simply play a note on an instrument and record it into the sampler. Alternatively, one could hire another musician to play the note. Ordinarily, this situation would be adequately handled by contract, assuming both parties knew the purpose of the recording session. However, musicians are sometimes hired to play notes into a microphone for the purpose of surreptitiously sampling their sounds to use at later recording sessions for which they are not paid. If the hiring party misrepresents the purpose of the recording session to the hired musician, then the musician could sue for fraud. See Jalon, *supra* note 27, at A4 (recounting one such incident after which musician stated he would not have accepted job had he known its purpose); see also Johnson, *supra* note 31, at 295 (describing incident in which percussionist's sounds were sampled without his permission and later turned up in *Miami Vice* theme).

³⁵ Since the sample is a copy of copyrighted material, this type of sampling also implicates copyright law. See *infra* Part II.A.

³⁶ This would tend to occur if the sampler significantly altered the sample after recording it. See Szymanski, *supra* note 30, at 276 (describing process of altering samples on computer). On the other hand, some single notes, such as the famous bass drum sound of Led Zeppelin drummer John Bonham, see Steven Dupler, Digital Sampling: Is It Theft? Technology Raises Copyright Question, *Billboard*, Aug. 2, 1986, at 74, or Phil Collins's distinctive snare drum, see Jon Pareles, Digital Technology Changing Music, *N.Y. Times*, Oct. 16, 1986, at C23, may be sufficiently distinctive to betray their origin and could be identified if not drastically altered.

³⁷ For instance, M.C. Hammer's hit song "U Can't Touch This" utilized an immediately recognizable two-bar sample of Rick James's hit song "Superfreak." Many rap songs have incorporated the drum beat from James Brown's "The Funky Drummer," which is recognizable to those familiar with the song. See Donald S. Passman, All You Need to Know About the Music Business 296 (1997); David Sanjek, "Don't Have to DJ No More": Sampling and the "Autonomous" Creator, 10 *Cardozo Arts & Ent. L.J.* 607, 613 (1992).

³⁸ See *infra* Part II.A.

nally played it or a different musician to play the music again.³⁹ Thus, sampling from records goes a step further than either synthesizers, one-note synthesizer-like sampling, or self-sampling. It allows a producer of music to save money (by not hiring a musician) without sacrificing the sound and phrasing of a live musician in the song.⁴⁰ This practice poses the greatest danger to the musical profession because the musician is being replaced with himself.⁴¹

II

THE CURRENT TREATMENT OF DIGITAL SAMPLING UNDER COPYRIGHT LAW, THE MUSIC INDUSTRY LICENSING SYSTEM, AND THE AFM COLLECTIVE BARGAINING AGREEMENT

The treatment of digital sampling by the law and in business has not fully developed because the technology is relatively new. Part II presents a snapshot of the current situation in order to show how the change proposed in Part III differs from the status quo. Part II.A discusses the treatment of digital sampling under copyright law. Part II.B describes the current licensing system that arose among the record companies and publishing companies in response to copyright law. Part II.C analyzes the payment scheme contained in the current col-

³⁹ See Johnson, *supra* note 31, at 274 (noting that sampling allows producer to use another musician's unique sounds to create new works).

⁴⁰ A single-note violin sample, which may sound only slightly more realistic than a synthesized violin, enables the sampler to have a real violin sound in her song without hiring a violinist. The notes, however, will still have to be played on a keyboard (or some other triggering device) that is incapable of precisely replicating the phrasing of a real violinist. A multinode violin sample, on the other hand, contains authentic violin phrasing in the sample itself, thus enabling the sampler to achieve authentic violin phrasing without hiring a single violinist. See Sandra L. Brown, Sound Recording Advances Call for Change in Law, N.Y. L.J., July 14, 1995, at 5 (noting that practice of using samples to achieve "desired sound" is "becoming increasingly popular" in order to save money). Nevertheless, this Note argues that even single-note sampling, which does not involve phrasing, taken from records or CDs without compensation constitutes the taking of a property right. See *infra* Part III.

⁴¹ See Seltzer, *supra* note 2, at 233 (noting that sampling "poses the great threat for the acoustical instrument performer, the profession, and the [AFM]"); Molly McGraw, Sound Sampling Protection and Infringement in Today's Music Industry, 4 High Tech. L.J. 147, 152 (1989) (noting that sampling threatens studio and concert employment because realistic sounds diminish need to hire musicians on individual instruments); Erick J. Bohlman, Comment, Squeezing the Square Peg of Digital Sound Sampling into the Round Hole of Copyright Law: Who Will Pay the Piper?, 5 Software L.J. 797, 819 (1992) ("[W]hen an artist samples a work, the skills of the musician who recorded the original will be less marketable, despite the fact that exposure of the sample in a new song will occasionally boost demand for the sampled work."); Brown, *supra* note 40, at 5 (noting that musicians worry that "the use of samples will completely eliminate the need for musicians in the recording studio or for concert performances").

lective bargaining agreement between the AFM and the record companies.

A. *Digital Sampling Under Copyright Law*

The Copyright Act of 1976⁴² protects eight distinct categories of works, including musical compositions and sound recordings.⁴³ The musical composition copyright protects the song itself, rather than a specific recording. For example, the Beatles's "Yesterday" is protected by the same musical composition copyright regardless of how many times it is recorded.⁴⁴ The musical composition copyright is usually held by the songwriter or an assignee, often a publishing company.⁴⁵

The sound recording copyright, on the other hand, protects one particular recording of a musical work. Therefore, each different recording of "Yesterday" is protected by a different sound recording copyright.⁴⁶ A sound recording can be copyrighted even if the underlying composition is not copyrighted—for example, a Mozart symphony in the public domain. The sound recording copyright is

⁴² 17 U.S.C. §§ 101-1332 (1994).

⁴³ The Act provides:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) 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 work.

Id. § 102.

⁴⁴ A musical composition is protected even if it is never recorded, as long as it is "fixed in any tangible medium of expression," e.g., sheet music. See *id.* § 102(a).

⁴⁵ See Passman, *supra* note 37, at 213 (noting that publishers pay songwriters for their musical composition rights); Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, N.Y. L.J., Mar. 16, 1992, at 1 (stating that publishing companies typically control musical composition rights).

⁴⁶ See, e.g., *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995) ("The distinction may be summed up as the difference between a copyright in a Cole Porter song and a copyright in Frank Sinatra's performance of that song.").

sometimes held by the artist, but is usually assigned to the record company.⁴⁷

Digital sampling potentially infringes the copyright in both the sound recording and the musical composition.⁴⁸ If the sample contains sufficient melodic content, it may infringe the musical composition copyright. Because a sample is always taken directly from a sound recording, it will always technically infringe the sound recording copyright as long as the sampled recording is copyrighted.⁴⁹ The few cases that have addressed sampling, however, provide scant analysis. *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*,⁵⁰ involving rapper Biz Markie's sampling of Gilbert O'Sullivan's 1972 song, "Alone Again (Naturally),"⁵¹ was the much-anticipated first decision to address digital sampling. The decision, however, is egregious in its lack of analysis. The first line of the court's decision was "Thou shalt not steal."⁵² This pithy bit of judicial reasoning having settled the infringement issue, the court proceeded to the issue of who owned the copyright in the infringed material.⁵³ The court granted the plaintiff's motion for a preliminary injunction and concluded by "respectfully referr[ing] [the case] to the United States Attorney" for criminal prosecution.⁵⁴ The parties settled shortly after the judge handed down his order.⁵⁵

⁴⁷ See, e.g., Robert A. Gorman & Jane C. Ginsburg, Copyright for the Nineties 82 (4th ed. Supp. 1998) [hereinafter Gorman & Ginsburg Supp. 1998] (referring to "owners of copyright in sound recordings, i.e., . . . royalty artists and companies"); Sidney Shemel & M. William Krasilovsky, This Business of Music 12-13 (6th ed. 1990) (noting that recording contracts usually assign sound recording copyright to record company); Neil Strauss, A Chance to Break the Pop Stranglehold, N.Y. Times, May 9, 1999, § 2 (Arts & Leisure), at 1 ("In all but the rarest cases, by signing a deal musicians forfeit their ownership of any music they make under that contract."); Sugarman & Salvo, *supra* note 45, at 1 (stating that record companies typically control sound recording rights).

⁴⁸ See Wallace Collins, Ruling Expands 'Sampling' Case Law, N.Y. L.J., July 10, 1998, at 5 ("When a new recording incorporates a digital sample of an existing recording, both copyrights are infringed . . .").

⁴⁹ Songs recorded before February 15, 1972, are not protected by a sound recording copyright. See 17 U.S.C. § 301(c) (1994); Susan Upton Douglass & Craig S. Mende, Deconstructing Music Sampling: Questions Arise as Practice Becomes Increasingly Common, N.Y. L.J., Nov. 3, 1997, at S3 ("There is no copyright protection for sound recordings published before Feb. 15, 1972."). Therefore, any claim of infringement of pre-1972 sound recordings must rely on various state law claims for relief. See *id.*

⁵⁰ 780 F. Supp. 182 (S.D.N.Y. 1991).

⁵¹ See *id.* at 183; see also Barbara Davies, Tuff City Sues Sony, Def Jam over Sample on Cool J Singles, *Billboard*, Jan. 11, 1992, at 71.

⁵² *Grand Upright*, 780 F. Supp. at 183.

⁵³ See *id.*

⁵⁴ *Id.* at 185.

⁵⁵ See Stan Soocher, As Sampling Suits Proliferate, Legal Guidelines Are Emerging, N.Y. L.J., May 1, 1992, at 5. Needless to say, defendants were reluctant to litigate after this decision. See Sugarman & Salvo, *supra* note 45, at 1 (noting that judge's referral of matter

In addition, the *Grand Upright* decision failed to discuss why the infringement was not excused as a "fair use," a doctrine under which certain uses of copyrighted material are held to be non-infringing.⁵⁶ The doctrine is vague, but tends to focus on use that is de minimis or produces some public benefit.⁵⁷ The application of the fair use doctrine in sampling cases remains hotly debated because *Grand Upright* failed to address it.⁵⁸

for criminal prosecution "sent shock waves through the music industry"). For criticism of *Grand Upright*, see, e.g., Danielle L. Gilmore & Kenneth L. Burry, *Healthy Sampling: Digital Music Sampling Creates High-Stakes Challenges to Existing Copyright Law for the Recording Industry*, L.A. Law., April 1997, at 40, 42; Douglass & Mende, *supra* note 49, at S3; Sugarman & Salvo, *supra* note 45, at 1.

⁵⁶ The Copyright Act provides, in relevant part:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching . . . , 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1994).

⁵⁷ See H.R. Rep. No. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678-79 (discussing examples of fair use).

⁵⁸ See Szymanski, *supra* note 30, at 303 (noting that "there remains significant controversy as to whether sampling as little as one or two notes of a work can constitute actionable infringement" of sound recording copyright). This debate raises many interesting issues beyond the scope of this Note.

Three other cases subsequent to *Grand Upright* have dealt with sampling. They too, however, provide scant analysis. The second case to address sampling was *Jarvis v. A&M Records*, 827 F. Supp. 282 (D.N.J. 1993). The case involved the sampling of portions of Boyd Jarvis's 1982 song, "The Music's Got Me," by producers Robert Clivilles and David Cole. See *id.* at 286. The court analyzed the infringement of the musical composition copyright, concluding that there was sufficient evidence of infringement to deny the defendants' motion for summary judgment. See *id.* at 292. However, the court did not reach the issue of infringement of the sound recording copyright because the plaintiff failed to establish ownership of that copyright. See *id.* at 292-93.

The third case to consider sampling was *Tin Pan Apple, Inc. v. Miller Brewing Co.*, No. 88 Civ. 4085, 1994 U.S. Dist. LEXIS 2178 (S.D.N.Y. Feb. 23, 1994). It involved samples taken from a song recorded by the rap group The Fat Boys. The samples were allegedly used in a television commercial for Miller beer starring Joe Piscopo as an obese rapper. The court discussed the musical composition claim at some length, see *id.* at *5-*11, concluding that summary judgment should be denied. See *id.* at *11. The court then discussed the sound recording claim, which it confusingly described as "copying." See *id.* The court discussed whether the defendants actually sampled the song and then summarily concluded that "[i]t is common ground that if defendants did sample plaintiffs' copyrighted

Regardless of where the actionable infringement line is drawn, however, a property right for recording musicians should exist whether or not copyright infringement is found. Infringement of the sound recording copyright is more likely to occur in a sample because the sound recording can be infringed even if the sample has no melody at all, for example, a single snare drum note.⁵⁹ But even if a court were to find that there is a fair use or de minimis defense for sound recording infringement, the result is the same for the musician. Even if the sampler is forced to pay the copyright owner, the performance is reused and the musician's job is displaced.⁶⁰

sound recording, they infringed that copyright, whatever may be said of the composition copyright." *Id.* at *13-*14. Amazingly, the court cited neither *Grand Upright* nor *Jarvis*, and never used the phrase "fair use" in the opinion.

The fourth case to consider sampling was *Tuff 'N' Rumble Management, Inc. v. Profile Records, Inc.*, No. 95 Civ. 0246, 1997 U.S. Dist. LEXIS 4186 (S.D.N.Y. Apr. 2, 1997), which involved the alleged sampling of The Honey Drippers' 1973 song, "Impeach the President," by rapper Dana Dane and the rap group Run DMC. See *id.* at *2-*3. However, the court did not distinguish between musical composition and sound recording copyright, and did not give serious attention to the merits. Throughout the decision, the court stated that the plaintiffs had presented no evidence to establish their allegations. In a subsequent order awarding the defendant attorneys' fees, the court excoriated the plaintiff for "consistently obstreperous conduct in its prosecution of this case," *Tuff 'N' Rumble Management, Inc. v. Profile Records, Inc.*, No. 95 Civ. 0246, 1997 U.S. Dist. LEXIS 12066, at *3 (S.D.N.Y. Aug. 14, 1997), and for its "failure to research properly the law or facts involved in its claims." *Id.* at *4. Therefore, perhaps it is not entirely the court's fault that it cited neither *Grand Upright*, *Jarvis*, nor *Tin Pan Apple*, and never mentioned fair use.

⁵⁹ See Michael Ashburne, *Sampling Issues in Record Industry*, N.Y. L.J., July 15, 1994, at 5 ("Some attorneys argue that there are situations where it is not necessary to obtain a license from the publisher even though it is necessary to obtain the consent of the owner of the sound recording."); Douglass & Mende, *supra* note 49, at S3 ("It should be possible—particularly where sounds are digitally copied—to take enough from the sound recording of a song to infringe the rights in the sound recording without necessarily infringing the underlying composition embodied in it."); Gilmore & Burry, *supra* note 55, at 68 (stating that "a short drum loop sample does not infringe the [musical composition] copyright," but does infringe sound recording copyright "because the actual tangible sound recording has been reproduced").

In 1952, before copyright law protected sound recordings, see 17 U.S.C. § 301(c) (1994), the Southern District of New York stated in dicta that rhythm could not be copyrighted. See *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952). The court seemed confused, however, about the meaning of rhythm, as it also stated that "[r]hythm is simply the tempo in which the composition is written." *Id.* The court was probably not contemplating a sophisticated rhythmic composition—for example, the musical *Stomp*—when it wrote this.

⁶⁰ See *infra* Part III for a more thorough discussion of the rationale behind the proposed property right.

B. *The Music Industry's Sample Licensing System*

Even before *Grand Upright* made users of samples more cautious, licensing⁶¹ was common practice.⁶² Some samplers, however, adopted a "'catch me if you can' attitude," preferring to bargain only after being caught.⁶³ While *Grand Upright* did not provide any guidelines,⁶⁴ it clearly signaled to the music industry that courts would presume that sampling constituted infringement.⁶⁵ It marked the "[e]nd of the days of casual sampling" and the beginning of widespread licensing of samples.⁶⁶

Attempts to formulate an industry-wide standard for licensing samples have failed, so they are licensed on an ad hoc basis.⁶⁷ The burden is most often placed on the recording artist⁶⁸ to license samples from the holder of both the musical composition and sound recording copyrights.⁶⁹ Typically, the artist enlists a sample clearance house to negotiate with the copyright owners.⁷⁰ The agreements usu-

⁶¹ A license is a contract allowing the licensee to do something that the licensor has the power to prevent, e.g., reproduce and sell copyrighted material. See Black's Law Dictionary 919-20 (6th ed. 1990).

⁶² See Sugarman & Salvo, *supra* note 45, at 1 (stating, in 1992, that licenses for samples containing melody or harmony had been "secured as a matter of practice for some time"). However, samples containing only drums were licensed less frequently because of the difficulty of determining whether a drumbeat was sampled from a record, or from which record it was sampled. See *id.* On the other hand, expert analysis can often detect copying. See David Goldberg & Robert J. Bernstein, *Reflections on Sampling*, N.Y. L.J., Jan. 15, 1993, at 3.

⁶³ Passman, *supra* note 37, at 296.

⁶⁴ See Sheila Rule, *Record Companies Are Challenging 'Sampling' in Rap*, N.Y. Times, Apr. 21, 1992, at C13 (noting, four months after *Grand Upright* was decided, that "[t]he law has not been helpful in setting clear boundaries" regarding what constitutes fair use in sampling).

⁶⁵ See Kravis, *supra* note 30, at 269 (noting that, after *Grand Upright*, use of unauthorized samples could result in criminal prosecution); Douglass & Mende, *supra* note 49, at S3 ("The assumption was that if any copying occurred, then there was infringement.").

⁶⁶ Passman, *supra* note 37, at 296.

⁶⁷ See Szymanski, *supra* note 30, at 289-90.

⁶⁸ See *id.* at 290-91. Record companies frequently structure their contracts so that the royalty artist must indemnify the record company if an unlicensed sample is used. See *id.* at 290 n.58; Gilmore & Burry, *supra* note 55, at 67.

⁶⁹ See Passman, *supra* note 37, at 296.

⁷⁰ A sample clearance house is an organization that, in exchange for a fee, acts as the artist's agent in negotiations with copyright owners. See Gilmore & Burry, *supra* note 55, at 68. The relevant factors in the negotiation include

the stature of the sampled artist, the stature of the sampling artist, the success of the sampled song, the duration of the sample, the content of the sample (e.g., is it a distinctive "hook" or merely a drum beat?), the context of the sample (e.g., is it essential to the new composition or is it merely atmospheric?), whether the sample will appear in a subsequent promotional video, and so on.

Szymanski, *supra* note 30, at 291.

ally take the form of a flat fee license, a royalty based on records sold, or a co-publishing deal (in the case of the musical composition copyright).⁷¹

C. *The AFM's Current Approach to Digital Sampling*

Although commentators proposed that the AFM address sampling in its contracts at least as early as 1987,⁷² the AFM did not do so until 1995 when it added a side-letter agreement (Agreement) to its collective bargaining agreement with the record companies.⁷³ The Agreement defines the record company that must pay a fee to the AFM as the company that (1) owns the sound recording copyright in the recording from which the sample is taken, and (2) receives a license fee as consideration for allowing its use by another company. For example, if company A owns Rick James's "Superfreak" recording, and company B releases M.C. Hammer's "U Can't Touch This," which contains a sample of "Superfreak,"⁷⁴ company B must pay a license fee to company A. Company A is the licensor and company B is the licensee. The Agreement calls for company A to pay the AFM⁷⁵ a lump sum payment of \$400 for the first sample from a record it owns and \$250 for each subsequent sample from the same record. Company B does not have to pay anything to the AFM for its use of the sample.⁷⁶ If company A releases a record containing a sample that company A itself owns (and therefore neither pays nor receives a license fee), it still must pay the applicable fee.⁷⁷

The Agreement exempts two types of samples.⁷⁸ First, it exempts samples containing only the performances of "royalty artists" or "roy-

⁷¹ See Szymanski, *supra* note 30, at 292-94 (discussing various arrangements for licensing musical composition and sound recording copyrights).

⁷² See Johnson, *supra* note 31, at 275-76 n.20 (suggesting that AFM "spell out minimum union scale payments for digital sampling re-uses of a musician's sounds").

⁷³ See Telephone Interview with Patrick Varriale, Contract Administrator, AFM (Jan. 18, 1999). The side-letter agreement (Agreement) is contained in the PRL Agreement, *supra* note 14, at 52, and incorporates certain terms of the PRL Agreement and the SPF Agreement, *infra* note 82, by reference.

⁷⁴ See Passman, *supra* note 37, at 296 (noting that M.C. Hammer's "U Can't Touch This" contains sample of Rick James's "Superfreak").

⁷⁵ The payments are not actually made to the AFM itself, but to an independently administered fund. See *infra* note 82 and accompanying text.

⁷⁶ See PRL Agreement, *supra* note 14, at 53-54. The Agreement also calls for payment of two percent of the license fee, less any lump sum payments already made, if such fee is greater than \$25,000.

⁷⁷ See *id.* at 54.

⁷⁸ The Agreement defines "sample" as "the encoding of a portion of a phonograph record . . . into a digital sampler . . . for use in another song; . . . a re-mix or re-edit of the new song shall not be considered a sample for purposes hereunder." However,

alty groups,"⁷⁹ defined as musicians who record pursuant to a record contract paying a royalty of at least three percent of retail price.⁸⁰ For example, if the sample contained only the performances of members of a royalty group such as U2 or REM, then the AFM would collect no fee. Second, the Agreement exempts symphonic samples.⁸¹ For example, if a sample contained only a New York Philharmonic performance, the AFM would collect no fee.

Technically, the Agreement calls for payments to be made not to the AFM itself, but to the "Phonograph Record Manufacturers' Special Payments Fund" (SPF).⁸² The primary purpose of the SPF is to collect residual payments from record companies and distribute them to recording musicians. It collects payments from the record companies based on a percentage of the retail price for all records sold,⁸³ and distributes the money to phonograph record recording musicians, whether or not they are AFM members,⁸⁴ based on the scale wages received by each musician for phonograph record recording work during the past five years.⁸⁵ It does not distinguish between musicians who performed on records that sold many copies and musicians who performed on records that sold very few copies or were never released. As long as the musician received scale wages for phonograph

the term sample shall not apply in any circumstance in which the material 'sampled' constitutes (i) the identical content, in its entirety or substantial entirety, of a master record or phonograph record, and/or (ii) any sample used in a master record, which master record is later re-edited . . . but which still embodies the sample in whole or in part

Id. at 53.

⁷⁹ See id. at 52.

⁸⁰ See supra note 14 for detailed definitions of "royalty artists" and "royalty groups."

⁸¹ See PRL Agreement, supra note 14, at 52. The Agreement states in a footnote, however, that the parties intend to negotiate a separate side letter for symphonic samples. See id. n.1.

⁸² See id. at 56. In order to comply with section 302(b) of the Labor Management Relations Act, 29 U.S.C. § 186(b) (1994), the Special Payments Fund (SPF) is not administered by the AFM. See Phonograph Record Manufacturers' Special Payments Fund Agreement 10 (Feb. 1, 1996-Jan. 31, 1999) [hereinafter SPF Agreement] (on file with the *New York University Law Review*). Rather, the administrator is appointed by the record companies jointly. See id. at 1.

The SPF Agreement cited above and throughout this Note expired on January 31, 1999. However, the relevant terms remain in effect in the current agreement, which is unpublished. See Telephone Interview with Patrick Varriale, Contract Administrator, AFM (Apr. 19, 1999).

⁸³ See Passman, supra note 37, at 159; SPF Agreement, supra note 82, at 12.

⁸⁴ The SPF Agreement defines "musician" according to its definition in the PRL Agreement, see SPF Agreement, supra note 82, at 3, which in turn defines "musician" as any person "employed as a Musician in the recording of phonograph records." See PRL Agreement, supra note 14, at 1.

⁸⁵ See SPF Agreement, supra note 82, at 3. The most recent year is weighted at 100%, the preceding year at 80%, and so on until the fifth year which is weighted at 20%. See id.

record recording, he or she is entitled to an SPF payment. Thus, the payments from licensors of samples are distributed without regard to who actually performed on the sample that generated the payment.⁸⁶

III

A PROPOSAL FOR LEGISLATIVE PROTECTION

To show why a legislative remedy outside copyright is the best remedy, it is necessary to explain why NFMs are not protected by copyright.⁸⁷ Under the Copyright Act's definition of "sound recording," the authors and initial copyright owners of the sound recording would appear to be those who produce the "fixation of . . . musical . . . sounds," i.e., the performers and recording engineers.⁸⁸ Nevertheless, NFMs rarely own the sound recording copyright for two reasons. First, in most cases the musicians hired to play on the recording will be "employees" of either the royalty artist⁸⁹ or the record company, and thus not copyright owners under the "work made for hire doctrine" of copyright law.⁹⁰ Second, the record company (or royalty artist) will obtain the assignment of any existing copyright interest of the musician as a matter of course.⁹¹ In either case, as a practical matter, NFMs do not hold a copyright in the sound recordings they help to create.⁹² This reality is recognized both by the AFM's collective bargaining agreement with the record companies and by Congress itself

⁸⁶ For a discussion of the problems with this arrangement, as well as a new proposal, see *infra* Part III.B.2.

⁸⁷ As previously discussed, royalty artists and groups are rarely owners of the sound recording copyrights in their recordings. See *supra* note 47 and accompanying text.

⁸⁸ 17 U.S.C. § 101 (1994) defines "sound recordings" as "works that result from the fixation of . . . musical, spoken, or other sounds, but not including sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." See also Gorman & Ginsburg, *supra* note 30, at 813 (noting that, under Copyright Act, authors of sound recording "would appear to be . . . the performers and the recording engineers").

⁸⁹ See *supra* note 14 for a definition of "royalty artist."

⁹⁰ See 17 U.S.C. § 201(b) (1994) (stating that "in the case of a work made for hire, the employer or other person for whom the work was prepared" is considered copyright owner); *id.* § 101 (defining "work made for hire" as "a work prepared by an employee within the scope of his or her employment"); H.R. Rep. No. 104-274, at 23-24 (1995) (stating that "the work made for hire doctrine often applies to recorded performances. Under this doctrine, upon creation of the sound recording, record companies are . . . the sole rightsholders."); Gorman & Ginsburg, *supra* note 30, at 813-14 (explaining that work made for hire rule operates to preclude performers from copyright ownership).

⁹¹ See Gorman & Ginsburg, *supra* note 30, at 813-14 (noting that "in many cases . . . the producer will have obtained assignments of copyright from the performers"). For an explanation of why the consideration for this assignment of rights (via the "work made for hire" doctrine or contract) is inadequate to prevent the injustice caused by digital sampling, see *infra* Part III.B.

⁹² See *supra* note 47.

in the Audio Home Recording Act of 1992⁹³ and Digital Performance Right in Sound Recordings Act of 1995 (DPRA).⁹⁴

A. *Proposed Legislation*

This Note argues that Congress should create a new intellectual property right for both NFMs and royalty artists and groups whose recorded works are sampled and reused.⁹⁵ Since NFMs, as well as royalty artists and groups, rarely hold sound recording copyrights, the property right must exist outside the scope of copyright. In essence, the legislation should, with a few changes, codify the payment scheme contained in the AFM's collective bargaining agreement with the rec-

⁹³ 17 U.S.C. §§ 1001-1010 (1994). This legislation was enacted because copyright owners and record companies believed that home digital audio taping (DAT) would displace record sales by allowing consumers to create tapes of the same quality as CDs purchased in record stores. Diminished record sales would decrease royalties to copyright owners. The Audio Home Recording Act of 1992 (AHRA) requires manufacturers of consumer DAT machines and tapes to pay a royalty to be distributed to owners of sound recording and musical composition copyrights, and "featured" royalty artists, who may or not be copyright owners. See *id.* §§ 1001-1006. 1.75% of the royalty payments goes to "nonfeatured musicians (whether or not members of the [AFM]) who have performed on sound recordings distributed in the United States." *Id.* § 1006(b)(1) (stating that 66 2/3% of royalty payments goes to "Sound Recordings Fund," of which 2 5/8% goes to NFMs); see also Gorman & Ginsburg, *supra* note 30, at 459-60 (discussing AHRA). Thus, by setting aside "nonfeatured musicians" as a category apart from copyright owners, Congress has acknowledged that such musicians do not generally own copyrights, since otherwise a separate allocation to them would be redundant. See H.R. Rep. No. 102-873(I), at 22 (1992), reprinted in 1992 U.S.C.A.N. 3578, 3592 (noting that owner of sound recording copyright "[t]ypically . . . will be a record company"). Congress has also implicitly acknowledged that these "nonfeatured musicians" deserve compensation along with copyright owners for loss of income caused by technology.

⁹⁴ Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 101, 106, 111, 114, 115, 119, 801-803 (Supp. I 1995)). The Digital Performance Right in Sound Recordings Act (DPRA) gives the owner of the sound recording copyright a limited right of public performance "by means of a digital audio transmission." 17 U.S.C. § 106(6). Owners of sound recording copyrights still have no general right of public performance, however. See *id.* § 114(a). Copyright owners feared that subscribers to online digital audio services would engage in home taping, thus diminishing record sales and royalties to copyright owners. See Gorman & Ginsburg *Supp.* 1998, *supra* note 47, at 83. The DPRA provides a very complex scheme for payments to copyright owners. It also has language nearly identical to that of the AHRA, requiring the owner of the right to digital public performance to pay 2.5% of receipts to "nonfeatured musicians (whether or not members of the [AFM]) who have performed on sound recordings." 17 U.S.C. § 114(g)(2)(A); see also 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.22[C][4], at 8-324 (1998) (stating that "the copyright owner of the digital transmission right" must allocate 2.5% of its statutory royalties to NFMs). Thus, as in the case of the AHRA, Congress has acknowledged that musicians do not generally own copyrights. Otherwise, a separate allocation to them would be redundant, especially since the payment comes from the owner of the sound recording copyright. See *infra* Part III.B.3 for a more detailed discussion of the DPRA.

⁹⁵ For the remainder of this Note, this proposed legislation is referred to as "the property right."

ord companies.⁹⁶ When a record company releases a record containing samples of a previously released recording, it should be required to pay a statutorily defined amount into an independently administered fund from which the musicians who played on the sample would be paid.⁹⁷ It should not matter whether the user of the sample pays a license fee to the owner of the sound recording copyright. Nor should the type of musicians who performed on the sample, i.e., NFMs, royalty artists, or symphonic musicians, affect the obligation to pay.⁹⁸ If the musicians who performed on the sample could not be identified,

⁹⁶ See *supra* Part II.C.

⁹⁷ This is in contrast to the AFM's current arrangement, which calls for the licensor to pay the fee. See PRL Agreement, *supra* note 14, at 53-54.

The amount of the fee could be determined in the manner by which the DPRA determines fee amounts: voluntary bargaining between the record companies and the AFM followed by arbitration if voluntary bargaining fails. See *infra* note 137 (describing DPRA rate setting system). If the fee were set initially at a rate identical to that contained in the current AFM collective bargaining agreement, then the increased cost to the record companies would not be great. For most samples, the user would have to pay \$400 to the independently administered fund in addition to paying a license fee to the copyright owners, if applicable. See PRL Agreement, *supra* note 14, at 53-54. This would differ from the status quo in two respects. First, as previously discussed, the fee would be paid by the sample user, not the sound recording copyright owner who licenses its use. Thus, the license fees demanded by copyright owners would no longer have to include the licensor's obligation to the AFM. Presumably, then, such fees would tend to be reduced by approximately \$400. Second, no samples would be exempt under the PRL Agreement. See *supra* note 14; see also *infra* notes 118-22 and accompanying text for a detailed discussion of these loopholes. The closure of these loopholes would lead to an increase in the amount of money paid by record companies to recording musicians because *all* samples would require a statutory fee.

The record companies likely would pass on this cost to recording artists. See Geoff Boucher, *What Will Be the Net Effect?*, L.A. Times, July 4, 1999, Calendar, at 7 ("Historically, every time there's a new technology, the artists have been worse off . . .") (quoting music attorney Donald S. Passman)); Strauss, *supra* note 47, at 1 (noting that most major record companies have reduced artists' royalties in response to Internet music distribution). However, since the amount of the fee is relatively low, and most samples currently require a fee under the PRL Agreement, see *supra* note 14, at 53-54, the amount of this increase probably will be insignificant. Therefore, although artists who sample heavily will often face higher costs to produce their music, the amount of the increase should not be high enough to stifle their expression.

⁹⁸ Since the proposal calls for royalty artists and groups, as well as NFMs, to be paid a statutorily determined amount when their work is sampled, the property right benefits royalty artists and groups as well. However, since the amount of any statutory fee is likely to be small (based on the current \$400 base fee in the current PRL Agreement), it will represent a very small source of royalty artists' income relative to the income derived from advances and record sale royalties. Thus, the primary beneficiaries of the property right would be NFMs whose work is sampled often. However, exempting royalty artists and groups, as the AFM's current sampling agreement does, see *supra* notes 79-80 and accompanying text, creates several problems. First, it creates a loophole that would encourage sampling of recordings containing only the performances of royalty artists and groups in order to avoid paying a fee. Second, it creates a problem of determining whether an NFM is accompanying a royalty group on a particular recording. See *infra* notes 120-22 and accompanying text.

however, the funds should be disbursed to musicians who perform on records generally.⁹⁹

The remaining sections of Part III outline the justification for this proposed legislation. Part III.B argues that contract is inadequate to prevent economic injustice and that government intervention is warranted. Part III.C discusses existing legislation that created new property rights outside the scope of copyright in order to prevent injustice and promote innovation. Part III.D discusses the possible effects on contemporary society of diminished opportunities for professional musicians.

B. Inadequacy of Contract

In contrast to NFMs, royalty artists and groups have, at best, a tenuous claim that their contractual arrangements with their respective record companies do not compensate them adequately for future sampling of their recordings. Although they may not have a great deal of bargaining power relative to the record companies, their negotiations for each particular recording are more expansive and involve more money than the negotiations for NFMs who perform on records. The AFM negotiates hourly rates and other terms of employment for all recording work done by NFMs, and individual non-union musicians negotiate to the extent they are able. Royalty artists and groups, on the other hand, negotiate sophisticated contracts involving, inter alia, advances, royalties based on record sales, and co-publishing arrangements.¹⁰⁰ Therefore, although some of the reasons that contract is inadequate to compensate NFMs apply to royalty artists and groups as well,¹⁰¹ this Note concedes the adequacy of contractual protection for the latter. Nevertheless, potent reasons for not exempting samples containing only royalty artists' and groups' performances remain. These include the job displacement caused by the exemption¹⁰² and

⁹⁹ Thus, the current SPF Agreement distribution scheme would be used if the musicians whose music was sampled could not be located. See *supra* notes 82-86 and accompanying text.

¹⁰⁰ See Passman, *supra* note 37, at 90-100 (discussing royalties); *id.* at 101-05 (discussing advances); *id.* at 270-76 (discussing co-publishing arrangements). The AFM cites this difference in scope as the rationale for exempting samples containing royalty artists and groups from the sampling agreement. See Telephone Interview with George H. Cohen, General Counsel, AFM (Apr. 7, 1999).

¹⁰¹ For example, royalty artists who entered into contracts before sampling became widespread would have had no reason to anticipate sampling-related income, see *infra* notes 105-11 and accompanying text, and many royalty artists lack bargaining strength. See *infra* note 114.

¹⁰² See *infra* notes 120-23 and accompanying text.

the difficulty of determining which musicians performed on a particular sample.¹⁰³ For NFMs, however, contract is inadequate.

There are three compelling arguments against any proposal for sui generis property right protection for NFMs. First, one could argue that their rights in the sound recording were dealt with by contract when the recording was made, and that they should not turn to the legislature to change the bargain. Section B.1 presents several reasons why contractual arrangements made at the time the sample was originally recorded are inadequate to compensate fairly the NFMs who originally recorded it. Second, one could argue that the current collective bargaining agreement between the AFM and the record companies, which calls for sample licensors to pay a fee to the AFM,¹⁰⁴ has remedied any unfairness. Section B.2 presents several reasons why the Agreement does not fairly compensate the NFMs who performed on the sample, and does not help to preserve jobs by raising the cost of sampling so that hiring live musicians becomes a more attractive alternative. This section argues further that the precarious state of the Agreement itself renders it an inadequate remedy. Third, one could argue that government intervention is not justified even if contracts are generally inadequate to protect NFMs' interests. Section B.3 counters this argument by showing that government intervention is justified to promote fair compensation to NFMs.

1. Why Contracts Made at the Time the Sample Was Originally Recorded Are Inadequate

Contracts between the NFM and the record company entered into at the time of the original recording are inadequate because the parties could not have anticipated the potential income that could be generated by licensing the sound recording for samples.¹⁰⁵ For instance, James Brown's "The Funky Drummer," a song popular among samplers, was recorded in 1971,¹⁰⁶ well before the widespread use of sampling in popular music.¹⁰⁷ In this case, the parties might have anticipated that the song would be used for some other purpose—for

¹⁰³ See *infra* note 122.

¹⁰⁴ See *supra* Part II.C.

¹⁰⁵ When a musician contracts to play on a phonograph record, the other party to the contract could also be the producer or the royalty artist. See Shemel & Krasilovsky, *supra* note 47, at 12 (noting that some royalty artists obtain funds from record company to produce albums themselves). In either case, however, the parties' knowledge of the possible uses of the sound recording to be produced would be the same.

¹⁰⁶ See Sanjek, *supra* note 37, at 613.

¹⁰⁷ Likewise, the sampling cases that have been decided involved the sampling of songs recorded well before the widespread use of sampling in popular music. See *supra* notes 51, 58.

example, in a film soundtrack, *in its entirety*¹⁰⁸—and the AFM contracted for reuse fees based on such secondary uses to the extent it had the bargaining power to do so.¹⁰⁹ The parties could not have been expected to contemplate sampling license fees, however, so this potential income did not factor into the bargain. As a result, when the owner of the sound recording receives a fee for licensing the recording to be sampled and incorporated into an *entirely different* song, the owner receives a windfall.¹¹⁰ The owner obtains more value from the NFM's services than could have been contemplated at the time the contract was made.¹¹¹

¹⁰⁸ The current AFM agreement with the record companies recognizes that the word "sample" does not mean "segment" in the sense that a 15-second segment excerpted from a song might be used in a television commercial, for example. See PRL Agreement, *supra* note 14, at 53. Rather, it refers to the practice of creating entirely new songs using snippets of old ones as the raw material. See *id.* (exempting from definition of "sample" any material that constitutes "the identical content, in its entirety or substantial entirety, of a master record").

¹⁰⁹ See Shemel & Krasilovsky, *supra* note 47, at 103 ("Under the union agreements with the [AFM] . . . , there are re-use fees to be paid by the record company if domestic phonograph recordings are utilized in different media, such as theatrical films, television films, or film commercials.").

¹¹⁰ The owner of the sound recording copyright does not actually have to receive a license fee in order to reap a windfall. This would occur if the company used the sample in one of its own records, in essence licensing the sample to itself. The AFM specifically provides for this scenario in its collective bargaining agreement. See PRL Agreement, *supra* note 14, at 54 (requiring payment if company uses sample from sound recording that company itself owns).

In fact, a windfall could result not only from the licensing fee, but also from increased exposure for the artist whose work is sampled. See Brown, *supra* note 40, at 5 ("Sampled music can sometimes revitalize a previous recording that was not successful."); Soocher, *supra* note 55, at 5 (noting that defendants in sampling infringement suits have claimed that sampled artist benefits from exposure, often citing James Brown as example).

¹¹¹ This situation is analogous to the contract law doctrine of mutual mistake. According to the Restatement (Second) of Contracts § 152(1) (1981),

[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

According to the Restatement (Second) of Contracts § 154 (1981),

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

If a musician (or union) and a recording company did not know the true value of the sound recording that was the subject of the contract (because they did not consider potential sampling-related future income), then they made a mutual mistake. However, it is unlikely that a court would void the contract. First, the potential value of any sound recording is uncertain because it could result in a hit song or may never be released. Thus, either party

However, from the mid-1980s (when the popularity of sampling began to grow)¹¹² through 1995 (when the AFM sampling agreement took effect),¹¹³ it is reasonable to presume that the parties knew or should have known of the potential income from sample licensing. During this period, it could be argued, the NFM, in agreeing to record, took into account the full value enjoyed by the record company in owning the sound recording, including potential sample license income. It is likely, however, that NFMs entered into these contracts under circumstances in which they had very little bargaining power. This certainly has been the case for many recording artists.¹¹⁴ Because of the decreasing demand for musicians due to technology (including sampling) in an already competitive job market, they were not in a position to bargain aggressively.¹¹⁵ That it took the AFM ten years to secure any kind of contractual arrangement at all attests to this fact.¹¹⁶ Therefore, Congress should determine what the parties would have bargained for if they (1) had known of the potential income from licensing samples, and (2) had sufficiently equal bargaining power to obtain a fair arrangement. One could argue, however, that the current collective bargaining agreement between the AFM and

may bear the risk of mistake under Restatement subsections 154(b) and (c). Second, a potential license fee for sampling the sound recording in the future is speculative and unlikely to be large relative to the total value of the sound recording. Thus, the mistake of failing to consider this potential income is unlikely to relate to a "basic assumption on which the contract was made," and is unlikely to have "a material effect on the agreed exchange of performances." Restatement (Second) of Contracts § 152(1); cf. *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887) (holding contract for sale of cow voidable where parties believed cow to be sterile, and thus worth \$80, when it was in fact fertile, and thus worth at least \$750).

In any individual contract, the mistake as to potential sampling-related income would not be sufficiently significant to warrant avoidance of the contract. This mistake, however, when considered in the aggregate of all contracts entered into before the advent of sampling, shows that these contracts were inadequate in providing to NFMs fair compensation for the value they provided.

¹¹² See Percifull, *supra* note 24, at 1281.

¹¹³ See *supra* text accompanying note 73.

¹¹⁴ See Passman, *supra* note 37, at 99 (stating that many "early pop stars . . . received little or nothing for their music"); *id.* (recounting story of early record executive who, after negotiations with royalty artist, reportedly said, "Okay, I'll tell you what. We'll put 8% in the contract. But I'm gonna pay you 5%."). Today, royalty artists' and groups' bargaining power remains limited. See Boucher, *supra* note 97, at 7 (stating that royalty calculations in modern recording contracts "cannot [be broken] with a wrecking ball" (quoting music attorney Donald S. Passman)); Sarah Luck Pearson, *The Suit: An Anonymous Executive Talks*, L.A. Weekly, Mar. 26, 1999, at 32 (noting that "record contracts tend to be onerous to everyone *except* the record companies"); Strauss, *supra* note 47, at 1 (stating that record contracts are "absolutely unconscionable" (quoting manager of singer-songwriter Michelle Shocked)).

¹¹⁵ See Seltzer, *supra* note 2, at 197 (noting that "there are many more capable and qualified musicians than there are jobs in the studios").

¹¹⁶ See *supra* text accompanying notes 112-13.

the record companies is the result of precisely these conditions. The next subsection explains why this agreement is inadequate.

2. *Why the Current Agreement Between the AFM and Record Companies Is Inadequate*

The current agreement between the AFM and the record companies¹¹⁷ is inadequate in several respects. First, it does not adequately compensate the NFMs who performed on the original recording from which the sample is taken. Second, it does not preserve jobs because it fails to raise the cost of sampling to make the hiring of live musicians a more attractive alternative. Third, the Agreement can only hope to alleviate the above problems to the extent it continues to exist and is enforced. The AFM's tenuous bargaining position and history of marginalizing recording musicians make the current Agreement a precarious one, and thus at risk of disappearing altogether.

According to the current SPF Agreement, if the NFMs who performed on the recording from which the sample was taken have not received any scale wages for phonograph recording work in the past five years, they receive nothing. The SPF Agreement allocates phonograph record payments based on scale wages received over the five years prior to the year of the payment. The most recent year is weighted at 100%, the preceding year at 80%, and so on until the fifth year which is weighted at 20%.¹¹⁸ Therefore, the musicians who are most successful *currently* receive payments based on the work of musicians who may have been at the height of their careers twenty years ago. On one hand, this compensates musicians who are actively working and presumably suffering job displacement from sampling. On the other hand, to the extent that the sound of the older musicians is in demand by sampling artists, the older musicians actually may be suffering more job displacement. Alternatively, if the older musicians are on the margins of the profession today, they may lose more work to sampling. In any event, it is their work being reused and they who should be compensated. On balance, in the interest of fairness, the NFMs who performed on the actual sample that generated the revenue should be compensated to the extent feasible.¹¹⁹

The problem described in the preceding paragraph, that the current payment scheme may compensate the wrong people, creates an inequity among musicians, but at least some compensation is required.

¹¹⁷ See *supra* Part II.C.

¹¹⁸ See SPF Agreement, *supra* note 82, at 3.

¹¹⁹ If these NFMs cannot be identified with reasonable effort, then an allocation based on the current SPF Agreement scheme would be reasonable.

The remaining problems are more destructive because they result in no payment at all. This has the dual effect of depriving musicians of compensation and failing to raise the cost of sampling in order to make hiring live musicians more attractive economically, thus preserving jobs.

First, the Agreement exempts certain types of samples. Samples that contain only the performances of "royalty artists" or "royalty groups" do not require payment to the SPF,¹²⁰ even though they would usually require a license fee to the owner of the sound recording copyright. For example, use of a post-1972 Led Zeppelin drum beat would almost certainly require a payment to the owner of the sound recording copyright.¹²¹ The owner, however, would not owe anything to the SPF.¹²² Similarly, the Agreement exempts samples containing only the performances of symphonic musicians.¹²³ In both cases, the job displacement is no less significant than if the sample had contained nonexempt musicians. In the case of royalty artist samples, the demand for either their services or other musicians' services is diminished. In the case of symphonic samples, the demand for symphonic musicians in general is diminished. By allowing both the sample user and copyright owner to escape payment, the Agreement forces musicians to compete with a much cheaper product.

A second problem arises because the Agreement requires the licensor, i.e., the company that owns the copyright in the sound record-

¹²⁰ See PRL Agreement, *supra* note 14, at 52 (exempting samples containing only performances of "royalty artists" or "royalty groups"). See *supra* note 14 for definitions of "royalty artist" and "royalty group."

¹²¹ If the sample were taken from a pre-1972 recording, then it is uncertain whether a license fee would be paid. On one hand, there would be no copyright protection. See *supra* note 49. On the other hand, a license fee might be paid simply to avoid litigation involving other theories, for example, state antipiracy statutes. See *Goldstein v. California*, 412 U.S. 546, 571 (1973) (allowing prosecution for record piracy under California antipiracy statute and holding that statute was not preempted by federal copyright law).

¹²² An interesting problem could arise in these "royalty artist" exemption cases. For instance, if one sampled a song containing only the performances of the Beatles, then the sample would be exempt. But if the Beatles hired a percussionist to play tambourine on the song, and the sample contained the tambourine performance, then the sample would not be exempt because it would contain the performance of a nonroyalty artist. Even more perplexing, under the PRL Agreement, a sample is not exempt if the services of a nonroyalty artist "are contained on or *were rendered in connection with* [the] sample." PRL Agreement, *supra* note 14, at 52 (emphasis added). Technically, then, even if the sample itself did not contain the tambourine, the sample would not be exempt if the percussionist played at some point in the song, thus rendering the performance "in connection with" the sample. It is unclear whether the Agreement has been interpreted in this way. Nonetheless, requiring payment regardless of the type of musician performing on the sampled recording avoids this problem.

¹²³ See *id.*

ing from which the sample is taken, to pay the SPF.¹²⁴ This creates several loopholes that relieve samplers of any obligation to pay compensation. For instance, if the licensor were a record company or individual who is not a signatory to the Agreement, then no payment would be made. This could occur if the licensor were an old record company that no longer produces new music, but merely licenses its recordings. Such a company would have no need to hire musicians, and therefore no reason to sign the Agreement. If the sound recording from which the sample is taken were in the public domain or made prior to February 15, 1972 (in which case it would not be protected by copyright), then no payment would be made since no license would be required.¹²⁵ Likewise, if industry custom evolved to exempt some types of samples from requiring licenses, then no payment would be made. Or, if the copyright holder refused to assert its copyright interest and therefore did not demand a license fee, then no payment would be made. This might occur if the licensor believed that it could not demand from the licensee an amount greater than the amount it would have to pay the SPF if it received a license fee. (If the licensor received less, of course, it would lose money.) All of these loopholes could be closed if the sampler, rather than the licensor, were required to pay the fee regardless of the arrangement worked out with other copyright holders.

Although the Agreement is inadequate to compensate musicians fully and raise the cost of sampling, it is better than nothing. The current Agreement is precarious, however, and at risk of disappearing.¹²⁶ As stated previously, the fact that the AFM took so long to address sampling in its collective bargaining agreements is testament to its weak position. In 1987, the AFM president remarked, "We're constantly getting complaints on loss of employment [from sampling] The problem is that we don't have enough clout to do anything about it."¹²⁷ The rapid advance of technology in the form of digital tape, synthesizers, and samplers has caused significant job displacement.¹²⁸ Additionally, non-union musicians and union musicians willing to work for less than scale wages are always available to record.¹²⁹ The

¹²⁴ See *id.* (requiring payment only if sample is in fact "licensed" by sound recording copyright owner, i.e., licensor).

¹²⁵ See *supra* note 49.

¹²⁶ See Telephone Interview with George H. Cohen, *supra* note 100.

¹²⁷ Howard Reich, *Send in the Clones: The Brave New Art of Stealing Musical Sounds*, *Chi. Trib.*, Feb. 15, 1987, § 13, at 8.

¹²⁸ See *supra* Part I.

¹²⁹ See Shemel & Krasilovsky, *supra* note 47, at 68 (noting that AFM recognizes that non-union musicians and union musicians willing to work for less than scale wages threaten maintenance of minimum union pay rates).

resulting disparity between supply and demand diminishes the AFM's bargaining power. With technology and foreign musicians available to replace entire film scoring orchestras, the prospect of a strike is not very threatening today. Furthermore, the AFM has shown in the past that it is willing to subordinate the interests of recording musicians to the interests of the broader membership.¹³⁰ All these factors suggest that the current Agreement is not written in stone. If the record companies demand an end to it, the AFM may be either powerless or unwilling to resist.

Another potential source of diminished bargaining strength for the AFM may result from a trend toward smaller independent record companies fueled by the Internet. If the Internet continues to become a more common means of distributing music, smaller companies and even individuals may become better able to distribute music without the involvement of a major record company that feels pressure to bargain with the AFM.¹³¹ Because these smaller companies and individuals will have no need to hire musicians in large numbers, they will have no need to sign the AFM Agreement, and thus no obligation to pay a fee.¹³² The AFM currently requires the licensor to pay the fee because the owners of oft-sampled sound recordings, i.e., the licensors, tend to be larger and more stable than the companies that distribute music containing samples, and thus more amenable to signing the Agreement.¹³³ If sampling from newer recordings increases with the passage of time, however, the copyright owners will more often be smaller independent companies that are able to avoid bargaining with

¹³⁰ For example, the AFM negotiated with record companies to create an entity known as the Music Performance Trust Fund (MPTF) to which record companies contribute a small percentage of revenues from record sales. See Gorman, *supra* note 7, at 780-81 (describing operations of MPTF). The purpose of the MPTF is to fund live performances in order "to promote the appreciation and knowledge of good live music." Seltzer, *supra* note 2, at 56 (internal quotation marks omitted). The economic effect of the MPTF is to allow nonrecording musicians, who compose the vast majority of the AFM membership, to share in the profits of commercial recording. The recording musicians, of course, would rather keep this revenue for themselves. See Seltzer, *supra* note 2, at 57 (noting that record companies "would prefer to eliminate the MPTF and pay more to the performers who actually make the music—and that sentiment has been shared by the small minority of AFM members who actually do make the music"); Gorman, *supra* note 7, at 699 (noting that AFM has in past focused its bargaining goals on protecting interests of majority of membership who do not record for living).

¹³¹ See Boucher, *supra* note 97, at 7 ("In five years, 10 years, whenever, is an established artist going to need a [major record company]?" (quoting Marc Geiger, president of ArtistDirect, company allowing artists to sell their records directly to consumers over Internet)); Strauss, *supra* note 47, at 1 (discussing methods of selling music on Internet without involvement of major record companies).

¹³² See Telephone Interview with George H. Cohen, *supra* note 100.

¹³³ See *id.*

the AFM. Therefore, whether the AFM elects to deal with the licensors or licensees, its bargaining strength will likely decrease in the future.

3. *Why Government Intervention Is Warranted*

Even if one concedes that the contracts between NFMs and record companies are inadequate to provide NFMs a fair share of sampling license income, it is still not clear that the government should effect an ex post modification of these contracts by creating a new property right for NFMs, and royalty artists and groups as well. Since governmental interference in existing contractual relationships creates uncertainty and thereby raises the cost of contracting for everyone, there must be a compelling reason to do so. Rapidly advancing technology sometimes necessitates the creation of new property rights, even at the expense of altering existing contracts, when new uses for intellectual property alter the economic balance among parties who contracted for the creation and transfer of such intellectual property. The imbalance may result in economic injustice to the disadvantaged parties and insufficient incentive for innovation. Congress has recognized this rationale in the DPRA.¹³⁴

The DPRA creates a new right for owners of sound recording copyrights. Though there is still no general right of public performance for sound recording copyright owners,¹³⁵ the DPRA grants them a limited right to transmit their recordings digitally. The statute sets out a very complex classification scheme for types of digital transmissions, but three relatively broad classes are relevant.

First, the DPRA exempts nonsubscription broadcast transmissions, i.e., over-the-air broadcasts geared to the public at large rather than individual subscribers. An ordinary television or radio broadcast, even if in a digital format, would fall into this category.¹³⁶

Second, the statute provides for mandatory licensing for two types of transmissions: (1) noninteractive subscription transmissions, i.e., transmissions (a) for which subscribers pay a fee, but cannot select particular songs to be transmitted, and (b) about which the transmitter

¹³⁴ Portions of the DPRA were altered by the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.). This Note refers to the original and amended portions of the statute as the DPRA.

¹³⁵ See 17 U.S.C. § 114(a) (Supp. I 1995).

¹³⁶ See *id.* § 114(d)(1)(A) (exempting nonsubscription broadcast transmissions); 17 U.S.C.A. § 114(j)(3) (West Supp. 1999) (defining broadcast transmission as "a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission"); S. Rep. No. 104-128, at 18-19 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 365-66 (discussing exemption for public digital broadcasts); 2 Nimmer, *supra* note 94, § 8.22[B][1][a], at 8-306 (same).

may not publish in advance the selections it intends to transmit; and (2) certain noninteractive nonsubscription transmissions, i.e., transmissions (a) consisting of music accompanying advertising related in some way to the music, and (b) about which the transmitter may not publish in advance the selections it intends to transmit.¹³⁷ For the sake of simplicity, this Note will refer to transmissions subject to statutory licenses as "statutory transmissions."

Third, for digital transmissions that are neither exempt nor subject to a statutory license, the DPRA provides to the sound recording copyright owner a limited property right to license or refuse to license the sound recording.¹³⁸ This category primarily consists of interactive services, i.e., services enabling the subscriber to select a particular song for transmission to the subscriber, thus enabling home record-

¹³⁷ "A 'subscription' transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission . . ." 17 U.S.C.A. § 114(j)(14) (West Supp. 1999).

An "eligible nonsubscription transmission" is a noninteractive transmission of music for which the primary purpose "is to provide to the public such audio or other entertainment programming, . . . [but] not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events." *Id.* § 114(j)(6).

The DPRA applies several other complex restrictions that are beyond the scope of this Note. See *id.* § 114(d)(2) (providing mandatory licensing for subscription transmissions and eligible nonsubscription transmissions under certain conditions); H.R. Conf. Rep. No. 105-796, at 80-84 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 656-60 (discussing mandatory licensing for subscription transmissions and eligible nonsubscription transmissions under certain conditions).

The DPRA does not specify licensing rates. Rather, it states that "the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments" for subscription transmissions and eligible nonsubscription transmissions. 17 U.S.C.A. § 114(f)(1)(A), (2)(A) (West Supp. 1999). In the absence of agreements under § 114(f)(1)(A) and (2)(A), a "copyright arbitration royalty panel [will] determine . . . a schedule of rates and terms . . ." *Id.* § 114(f)(1)(B), (2)(B). However, voluntary agreements will be given effect in lieu of the rates and terms determined by the arbitration panel. See *id.* § 114(f)(3); see also H.R. Conf. Rep. No. 105-796, at 84-86, reprinted in 1998 U.S.C.C.A.N. at 660-62 (discussing DPRA's mechanism for establishing statutory licensing rates and terms).

¹³⁸ 17 U.S.C. § 106(6) (Supp. I 1995) grants the digital performance right generally, and § 114(d) places limitations on it. For interactive services, the right is not absolute because the DPRA places some complex restrictions on exclusive licensing, i.e., the sound recording copyright owner's licensing a sound recording to only one interactive transmission service. See *id.* § 114(d)(3) (placing limitations on granting of exclusive licenses); S. Rep. No. 104-128, at 25-26, reprinted in 1995 U.S.C.C.A.N. at 372-73 (discussing limitations on exclusive licenses); 2 Nimmer, *supra* note 94, § 8.22[D][1], at 8-326 (same).

ing.¹³⁹ In essence, this arrangement approximates a home digital record store.¹⁴⁰

The provisions discussed in the preceding three paragraphs regulate the relationship between users of sound recordings and owners of sound recording copyrights. The DPRA, however, also regulates the relationship between the owners of sound recording copyrights and the musicians hired to create sound recordings.¹⁴¹ Since interactive services approximate record stores, the DPRA states that a sound recording copyright owner who receives income from licensing a sound recording to interactive service providers must pay both featured and nonfeatured musicians who performed on such recordings according to their contracts or collective bargaining agreements.¹⁴² This provision recognizes that both featured and nonfeatured musicians contemplated at the time of contracting that a great deal of the value of the sound recording being created would be derived from record sales. Since interactive services may be seen as "virtual" record stores, sound recording copyright owners are obligated merely to pay musicians royalties based on record sales pursuant to their contracts.¹⁴³

¹³⁹ See 2 Nimmer, *supra* note 94, § 8.22[D], at 8-325 (noting that DPRA provides limited property right for licensing sound recordings to interactive services). An "interactive service" is

one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive

17 U.S.C.A. § 114(j)(7) (West Supp. 1999). An interactive service "would include such services commonly referred to as 'audio-on-demand,' 'pay-per-listen' or 'celestial jukebox' services. The term also would apply to an on-line service that transmits recordings on demand, regardless of whether there is a charge for the service or for any transmission." S. Rep. No. 104-128, at 33, reprinted in 1995 U.S.C.A.N. at 380.

¹⁴⁰ See S. Rep. No. 104-128, at 24, reprinted in 1995 U.S.C.A.N. at 371 (noting that interactive services "pose the greatest threat to traditional record sales, as to which sound recording copyright owners currently enjoy full exclusive rights"); Gorman & Ginsburg Supp. 1998, *supra* note 47, at 83 (noting that copyright owners feared that subscribers to online digital audio services would engage in home taping, thus diminishing record sales and royalties to copyright owners based thereon); 2 Nimmer, *supra* note 94, § 8.21[A], at 8-286 to -287 (noting that Internet allows electronic distribution of phonorecords).

¹⁴¹ The owner of the sound recording copyright will often be the record company that hired the musicians to make the sound recording. However, this would not be the case if the current sound recording copyright owner purchased the copyright from the original owner, i.e., the company that hired the musicians to create it.

¹⁴² See 17 U.S.C.A. § 114(g)(1) (West Supp. 1999); 2 Nimmer, *supra* note 94, § 8.22[D][4], at 8-334 (noting that 17 U.S.C.A. § 114(g)(1) primarily applies to interactive services).

¹⁴³ Neither Nimmer nor the legislative history discusses this rationale. It flows, however, from the structure of the statute.

For statutory transmissions, however, the sound recording copyright owner receives income not likely contemplated at the time of contracting between the copyright owner and the musicians.¹⁴⁴ Therefore, the DPRA ignores whatever the contract may state about this income (if it states anything), and instead imposes a mandatory schedule for distribution of fees from sound recording copyright owners to both featured and nonfeatured musicians. The sound recording copyright owner must allocate income derived from statutory licenses as follows: 45% to the artist or artists featured on the sound recording;¹⁴⁵ 2.5% to a fund to be administered by a trustee jointly appointed by copyright owners and the AFM and to be distributed to NFMs (whether or not AFM members) who perform on sound recordings;¹⁴⁶ and 2.5% to be distributed in a parallel fashion to nonfeatured vocalists.¹⁴⁷ This mandatory distribution scheme is not limited to recordings made before 1995.¹⁴⁸ It applies to all sound recordings, including those made when the parties reasonably could be expected to know about potential income from statutory license fees for use of the sound recording in statutory transmissions. The effect of this provision is to force copyright owners to pay musicians whom they are not obligated to pay under the terms of any contract.

Congress's stated rationale for the DPRA is twofold. As new technology allowed for new uses of sound recordings,¹⁴⁹ Congress wanted (1) to protect performers and producers of sound recordings

¹⁴⁴ The effect of granting a limited property right to sound recording copyright owners for the purpose of licensing their sound recordings to interactive services is to make clear that such services approximate distribution of copies of records. See S. Rep. No. 104-128, at 17, reprinted in 1995 U.S.C.C.A.N. at 364 (noting that it is unclear "under current law that a transmission can constitute a distribution of copies or phonorecords of a work" (citation omitted)); *id.* at 10, reprinted in 1995 U.S.C.C.A.N. at 357 (noting that one purpose of DPRA is to clarify "the application of the existing reproduction and distribution rights of . . . sound recording copyright owners in the context of certain digital transmissions"). Thus, providers of such services *must* obtain licenses from sound recording copyright owners. See *supra* notes 138-40 and accompanying text. Statutory transmissions, on the other hand, which do not approximate distribution of phonograph records, constitute an entirely "new" right of public performance. See S. Rep. No. 104-128, at 16, reprinted in 1995 U.S.C.C.A.N. at 363 (stating that DPRA creates "a new limited performance right in sound recordings"). Therefore, parties contracting for the production of sound recordings prior to 1995 would not have contemplated this source of income.

¹⁴⁵ See 17 U.S.C. § 114(g)(2)(C) (Supp. I 1995).

¹⁴⁶ See *id.* § 114(g)(2)(A).

¹⁴⁷ See *id.* § 114(g)(2)(B). In the case of nonfeatured vocalists, the administrator of the fund is to be jointly appointed by the sound recording copyright owners and the American Federation of Television and Radio Artists (the union representing vocalists). See *id.*

¹⁴⁸ See 17 U.S.C.A. § 114(d)(2) (West Supp. 1999).

¹⁴⁹ See S. Rep. No. 104-128, at 15, reprinted in 1995 U.S.C.C.A.N. at 362 (noting that "this legislation reflects changed circumstances").

in the interest of fairness and justice,¹⁵⁰ and (2) to maintain sufficient incentives for the creation of new sound recordings and musical works.¹⁵¹ These ends justified *ex post* interference with contractual relationships when the right created was new, as in the case of statutory transmissions.¹⁵² Income from statutory transmissions could not have been contemplated by parties contracting before 1995. Likewise, income from sampling could not have been contemplated by parties contracting before the advent of sampling. And even when the parties could have contemplated potential sampling income, a variety of fac-

¹⁵⁰ See *id.* at 10, reprinted in 1995 U.S.C.C.A.N. at 357 ("The purpose of [the DPRA] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used."); *id.* at 13, reprinted in 1995 U.S.C.C.A.N. at 360 ("Justice requires that performers and producers of sound recordings be accorded a public performance right." (quoting Register of Copyrights Marybeth Peters))).

¹⁵¹ See *id.* at 14, reprinted in 1995 U.S.C.C.A.N. at 361 (noting that "in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged").

¹⁵² Interestingly, the legislative history of the DPRA suggests that Congress wanted to preserve the contractual relationships between record companies and both featured and nonfeatured musicians. See *id.* at 13, reprinted in 1995 U.S.C.C.A.N. at 360 (stating that Congress desired to avoid "upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers"). This makes sense for royalty distributions of income derived from licensing sound recordings to interactive services, which are to be distributed according to the terms of musicians' contracts or collective bargaining agreements. This rationale, however, does not appear to explain royalty distributions for income from statutory licenses, which are to be distributed according to a set schedule *regardless* of how any individual contract or collective bargaining agreement may address such income. This apparent contradiction may be reconciled by examining the history of the mandatory distribution scheme as it was adopted in the AHRA.

The AHRA compels manufacturers of DAT recorders to install copy protection devices on their nonprofessional models, see 17 U.S.C. § 1002(a) (1994) (compelling installation of systems to prevent unauthorized copying); *id.* § 1001(3)(A) (exempting professional models), and compels manufacturers of DAT recorders and tapes to pay a royalty based on each unit manufactured or imported. See *id.* §§ 1003(a), 1004(a). These royalties are then distributed according to a scheme similar to that mandated by the DPRA for statutory transmissions, with 1.75% of the royalties "placed in an escrow account managed by an independent administrator jointly appointed by the [record companies] and the [AFM] to be distributed to nonfeatured musicians (whether or not members of the [AFM]) who have performed on sound recordings distributed in the United States." *Id.* § 1006(b)(1). This language parallels that of the DPRA. See *id.* § 114(g)(2)(A) (Supp. I 1995). According to the legislative history of the AHRA, this royalty distribution scheme was adopted from a preexisting voluntary agreement among the record companies, hardware manufacturers, and others. See H.R. Rep. No. 102-873(I), at 12-13 (1992), reprinted in 1992 U.S.C.C.A.N. 3578, 3582-83. The AHRA "preserves the essentials of the agreement." *Id.* at 13, reprinted in 1992 U.S.C.C.A.N. at 3583. Therefore, although the mandatory royalty distribution schemes contained in the DPRA and AHRA operate regardless of provisions of contracts or collective bargaining agreements between musicians and record companies, they do preserve contractual relations in the sense that they were adopted from a preexisting voluntary agreement.

tors limited NFM's ability to bargain for a portion of this added value.¹⁵³

Since Congress deemed voluntary contracts inadequate to compensate recording musicians for the licensing of recordings for statutory transmissions, it should also recognize that such contracts are inadequate to compensate NFM's fairly for the licensing of recordings for use in samples, and should impose a similar statutory licensing scheme. The rationale is the same: to promote fairness in the face of new sources of income from new uses for sound recordings occasioned by rapidly advancing technology.

C. *Protections of Intellectual Property Outside Copyright*

The DPRA is a statute that operates within the framework of copyright, regulating the relationship between users of copyrighted material and copyright owners, and between copyright owners and the musicians who created the copyrighted material. The users pay the copyright owners, and the copyright owners pay the musicians. The property right proposed in this Note, however, does not require that users of samples pay copyright owners, who must in turn pay musicians. Rather, the user of sampled material must pay the musicians who created the sampled material *regardless of the copyright status of that material*. The property right in the sampled material cannot be coextensive with the sound recording copyright interest in the sampled material, and thus must be outside the scope of copyright.

The protection of intellectual property interests outside of copyright, patent, and trademark law is not unprecedented. The Semiconductor Chip Protection Act of 1984 (SCPA)¹⁵⁴ serves as a useful example of the protection of intellectual property rights outside the framework of patent, copyright, and trademark.¹⁵⁵ Before the SCPA, United States intellectual property law provided "little, if any, protection to semiconductor chips."¹⁵⁶ The SCPA's purpose was to fill this

¹⁵³ See *supra* Part III.B.1-2.

¹⁵⁴ 17 U.S.C. §§ 901-914 (1994).

¹⁵⁵ Although the Act was inserted as chapter 9 of the Copyright Act, it "neither amends the preceding chapters nor constitutes any part of the Copyright Act. Instead, it stands alone as a new and *sui generis* form of intellectual property." 2 Nimmer, *supra* note 94, § 8A.01, at 8A-4. The protection provided by the Semiconductor Chip Protection Act of 1984 (SCPA) "is a hybrid of patent and copyright protection, although the resemblance to copyright is stronger." Gorman & Ginsburg, *supra* note 30, at 778. Its constitutional basis is in the "Copyright-Patent Clause of the Constitution [U.S. Const. art. I, § 8, cl. 8]," 2 Nimmer, *supra* note 94, § 8A.02[B], at 8A-7, although it also appeals to the Commerce Clause for its constitutional legitimacy. See *id.* at 8A-8 (stating that SCPA "intended to invoke the Commerce Clause as an alternative constitutional base").

¹⁵⁶ H.R. Rep. No. 98-781, at 3 (1984), reprinted in 1984 U.S.C.C.A.N. 5750, 5752.

gap in protection in order to encourage innovation, creativity, and investment in the semiconductor industry.¹⁵⁷ Congress believed that copyright law was an inappropriate legal framework for this purpose because the protected chip design was not quite the work of an “author,” but rather a “part of the manufacturing process.”¹⁵⁸ Therefore, in order to avoid altering “fundamental copyright principles to suit the unusual nature of chip design,” Congress concluded that “a new body of statutory and decisional law should be developed.”¹⁵⁹ Congress noted that this new law could be based on copyright principles as well as “other intellectual property concepts” and should analogize to existing statutory and case law “to the extent clearly applicable to . . . semiconductor chip protection.”¹⁶⁰ The new law should not, however, “be restricted by the limitations of existing copyright law.”¹⁶¹ Thus, with the SCPA, Congress clearly evinced a willingness to fashion *sui generis* intellectual property rights to address problems created by modern technology.¹⁶²

¹⁵⁷ See *id.* at 1, reprinted in 1984 U.S.C.C.A.N. at 5750 (noting that SCPA’s purpose is to “reward creativity, [and] encourage innovation, research and investment in the semiconductor chip industry”).

¹⁵⁸ *Id.* at 6, reprinted in 1984 U.S.C.C.A.N. at 5759. This distinction is problematic because the Copyright Act explicitly states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, [or] method of operation.” 17 U.S.C. § 102(b) (1994).

¹⁵⁹ H.R. Rep. No. 98-781, at 10, reprinted in 1984 U.S.C.C.A.N. at 5759.

¹⁶⁰ *Id.* at 10-11, reprinted in 1984 U.S.C.C.A.N. at 5759-60.

¹⁶¹ *Id.* at 11, reprinted in 1984 U.S.C.C.A.N. at 5760.

¹⁶² The largely European doctrine of moral rights, also known as “*droit moral*,” see, e.g., Jimmy A. Frazier, Comment, On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law, 70 Tul. L. Rev. 313, 335 (1995), is another example of intellectual property right protection outside copyright, patent, and trademark. Moral rights, although not precisely defined, protect rights of authors independent of the economic rights that form the foundation of copyright law. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896, Article 6*bis*, in 3, 4 Peaslee 513, 516 [hereinafter Berne Convention] (introducing moral rights sections with phrase, “Independently of the author’s economic rights”); 3 Nimmer, *supra* note 94, § 8D.01[A], at 8D-4 (noting that moral rights are “viable separate and apart from the economic aspect of copyright”); Gerald Dworkin, The Moral Right of the Author: Moral Rights and the Common Law Countries, 19 Colum.-VLA J.L. & Arts 229, 230 (1995) (“As yet, there is no commonly accepted agreement as to the full range of moral rights.”); Frazier, *supra*, at 315 (“American copyright law focuses overwhelmingly, if not exclusively, on economic rights.”). Protected is the author’s “right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Berne Convention, Article 6*bis*, in 3, 4 Peaslee, *supra*, at 516. Although U.S. copyright law provides some indirect protection of these rights, see 17 U.S.C. § 106A (1994) (providing limited moral rights to authors of works of visual art, including right to prevent “distortion, mutilation, or other modification”), they are separate from, and played little if any part in, the development of American copyright law. See Dworkin, *supra*, at 230 (“It is certainly true, however, that the concept of moral rights played little,

D. Effect on Contemporary Society

A diminished incentive for innovation is an uncertain result of job displacement caused by sampling. On one hand, as technology improves, the number and quality of opportunities for careers in professional music decrease.¹⁶³ There is a legitimate fear that steadily diminishing professional opportunities will dampen the quality and vigor of the musical art form by discouraging young prodigies from studying music seriously and entering the profession.¹⁶⁴ The fewer young talents who make the commitment to become professional musicians, the smaller the talent pool from which to draw the few "musical geniuses who make an art."¹⁶⁵ If "[i]t takes 1,000 journeymen to make one genius,"¹⁶⁶ then each thousand careers lost removes one of the innovators or virtuosos that all art forms need to remain vital.

On the other hand, some argue that despite the declining job opportunities and resulting oversupply of musicians, the few "very talented individuals" who will rise to the top of the profession and perhaps advance the musical art "will always gravitate to music."¹⁶⁷ There is also a good argument to be made that the new virtuosos and innovators in music need not be instrumental musicians or vocalists at all, but producers and writers who use samples, synthesizers, and computers to create collages of sound unlike anything heard before. If

and some may argue no, role in the subsequent development of copyright in common law countries.").

By taking snippets of performances, rearranging them in new songs, and possibly altering them with a computer, the sampler is essentially "distorti[ng], mutilati[ng], or . . . modifi[ng]" the work of the musicians who performed on the sampled material. Berne Convention, Article 6bis, 3, 4 Peaslee, *supra*, at 516. One could argue persuasively, however, that moral rights are designed to protect authors such as writers, painters, and film directors, who would also be entitled to copyright protection in their capacity as *authors*. Therefore, it is important to emphasize that moral rights law is *not* direct legal support for protecting recording musicians outside the law of copyright and contract, and was not formulated to address it. Rather, moral rights law embodies the notion that an artist has a right *beyond copyright* to preserve his or her work, within limits, in the form in which he or she created it, and to otherwise preserve the artist's "honor or reputation." *Id.* In the case of musicians' performing on samples, however, their "honor or reputation" will rarely (if ever) be at stake. Therefore, moral rights law is by no means a perfect fit for the problem at issue. Moral rights law does, however, reflect a widespread belief that artists have a legitimate interest in exercising some control over their work, and that this control is *not necessarily* protected by copyright.

¹⁶³ See *supra* Part I.

¹⁶⁴ See Gordon, *supra* note 6, at 11 ("Many musicians feel the entire culture of music is in danger."); Goodstein, *supra* note 19, at G1 ("As even concert virtuosos resort to playing weddings and bar mitzvahs, some musicians say the shrinking market for live music will discourage promising young prodigies from entering the field.").

¹⁶⁵ Gordon, *supra* note 6, at 11 (quoting former AFM Local 802 president John Glazel).

¹⁶⁶ Hamlin, *supra* note 27, at C3 (internal quotation marks omitted).

¹⁶⁷ Seltzer, *supra* note 2, at 227.

this is the case, then music may be as healthy and robust as ever—perhaps more so. Thus, the technological displacement of recording musicians could be viewed as a type of natural selection, the old musicians giving way to the new in the name of progress.¹⁶⁸

One aspect of the job displacement caused by sampling, however, makes it especially unfair, more so than technological job displacement in other areas. In the case of job displacement of a musician by a sample, the worker is not just replaced by a machine, but by a machine playing a recording of himself, *created* by himself,¹⁶⁹ for which he has not been fairly compensated.¹⁷⁰ Therefore, if sampling is to succeed on its own merits, it must bear its true cost in fairness to those musicians who helped create it.

CONCLUSION

Congress should recognize—and the AFM should lobby for—a property right for recording musicians in their recordings that are sampled and reused. Digital sampling causes job displacement in a unique way, combining the worst elements (from the musicians' perspective) of synthesizers and DAT. The fact that the musicians whose works are sampled created the material that replaces them promotes an economic injustice and distinguishes this instance of technological job displacement from that afflicting other workers. Furthermore, contract is inadequate to compensate NFMs for the reuse of their work in samples, and *sui generis* intellectual property protection is not unprecedented. For all these reasons, Congress should create a new intellectual property right for musicians whose work is sampled. Music containing digital samples has blossomed into a complex form of creative expression that brings profits to companies that sell it. These companies should bear the true cost of sampling by fairly compensating the musicians who created the raw materials.

¹⁶⁸ Even if this is the case, however, it is unlikely that the increased cost of using samples that would result from the new property right would be sufficiently high to stifle the artistic expression of artists who sample heavily. See *supra* note 97.

¹⁶⁹ See *supra* note 13 and accompanying text.

¹⁷⁰ See *supra* Part III.B.1-2.