Tuning up the Copyright Act: Substantial Similarity and Sound Recording Protections

Linda Benjamin

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Recommended Citation
Benjamin, Linda, "Tuning up the Copyright Act: Substantial Similarity and Sound Recording Protections" (1989). Minnesota Law Review. 1832.
https://scholarship.law.umn.edu/mlr/1832

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Tuning Up The Copyright Act: Substantial Similarity And Sound Recording Protections

INTRODUCTION

Sacrificial days devoted to ... creative activities deserve rewards commensurate with the services rendered.¹

The Copyright Act of 1976² grants the copyright owner rights in certain works fixed in a tangible medium.³ In the case of music, rights attach both to written score⁴ and sound recording.⁵ The Copyright Act affords less protection to sound recordings, however, than to written musical works and other kinds of copyrighted works. Musical score copyright owners have the exclusive right to perform and reproduce their work.⁶ Sound recording copyright owners hold no corresponding right of exclusive performance.⁷ Similarly, sound recording copyright holders’ exclusive right of reproduction is narrower than the corresponding right granted to musical score copyright holders.⁸

The narrower right of reproduction for sound recording copyright holders inadequately protects recording artists against simulations of their work. The Act deems an imitation of a sound recording to violate the exclusive rights of reproduction only when the imitation directly recaptures the actual sounds fixed in the sound recording,⁹ as in mechanical reproduction by a duplicating machine. Other recording artists’ attempts to play or sing even a meticulous imitation of the protected sound recording do not violate the right of reprodu-

---

3. 17 U.S.C. § 106 (1982). Although ownership of a copyright is granted on fixation of the work in a tangible form, id. § 102, the right to obtain judicial relief for infringement is subject to registration and notice requirements, id. §§ 401-411. The exclusive rights of ownership, listed in § 106, are further restricted by id. §§ 107-118.
5. Id. § 102(a)(7).
6. Id. § 106(4).
7. See id. § 106.
8. Id. § 114.
9. Id. § 114(b).
This absence of protection against nonmechanical imitation allows imitators to profit unfairly from the unique creative contributions of original recording artists. The performer faces the judicial maxim that "imitation alone does not give rise to a cause of action."

Although the Copyright Act offers no protection against close imitations, some courts have responded to performers' demands by extending the protection of tort law. This Note argues that these state law causes of action do not adequately protect recording artists, and suggests that Congress amend the Copyright Act to provide protection against substantially similar imitations of a copyrighted sound recording. Part I of the Note reviews copyright law and other legal doctrines that protect recording artists. Part II explains the inadequacies of these protections as they pertain to sound recordings. Part III concludes that amending the Copyright Act to protect against sound recording imitations is the best solution to the weak protection afforded by elusive and inconsistent state and common-law doctrines.

I. STATE AND FEDERAL PROTECTION FOR RECORDING ARTISTS

A. THE POLICY EMBODIED BY COPYRIGHT LAW

Copyright, an intangible form of property, grants the owner exclusive control over the literary, musical, graphic, or artistic expression of an idea. Congressional authority over copyright originates with article I of the United States Consti-
tion, empowering Congress "...[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\textsuperscript{15} This limited monopoly encourages the creation of intellectual property that enriches society, while taking into account the authors' need for incentive and remuneration for their creative works.\textsuperscript{16}

16. REPORT OF THE REGISTER, supra note 14, at 5. While preparing the enactment of the Copyright Act of 1909, Congress stated:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings ....

In enacting a copyright law Congress must consider ... how much will the legislation stimulate the producer ... [and] how much will the monopoly granted be detrimental to the public?\textsuperscript{Id.} (quoting H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909)).

Copyright law balances competing goals. Congress's grant of exclusivity to an artist limits public access to the artist's work, while the copyright statute limits the artist's rights to control a work of intellectual property. The law's balance of artist's rights against public benefit has fluctuated with time. Since the enactment of the 1909 statute, authors' rights have taken on greater importance, demonstrated by subsequent expanded copyright protection for the artist. Marke, \textit{United States Copyright Revision and its Legislative History}, 70 LAW LIBR. J. 121, 122 (1977).


B. PROTECTIONS FOR MUSICAL WORKS

The Copyright Act of 1976 attaches certain proprietary rights to works fixed in a tangible medium. The Act treats written music, such as sheet music or a written score, separately from sound recording. A "sound recording" is defined as a work fixed onto a "phonorecord." Thus, the sound recording is only the recorded performance, and the phonorecord is the material object—disk, tape, or album—onto which the sound recording becomes fixed. A "musical work," on the other hand, encompasses the written composition and accompanying lyrics.

The holder of a written musical work copyright possesses the exclusive rights enumerated in section 106 of the Act: the rights to reproduce, distribute, perform, and prepare derivative works from the protected work. Section 114 of the Act, however, limits the section 106 rights available to holders of sound recording copyright. The owner's exclusive right to reproduction includes only the right to duplicate the sound recording by directly recapturing the actual sounds fixed in the recording. This limitation leaves the owner unprotected against other


18. Id. § 101. The Copyright Act of 1976 defines a sound recording as the fixation of a series of sounds, other than the sounds accompanying a motion picture or other visual work. Id. The Act defines fixation as sound put into a "tangible medium of expression" that can be "perceived, reproduced, or otherwise communicated for a period of more than transitory duration," such as the sound embodied in a phonorecord. Id.
20. Id. § 106.
21. Id. § 114, entitled "Scope of Exclusive Rights in sound recordings," provides in relevant part:
(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords . . . that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.
Id. (emphasis added).
sound recordings that consist of independently fixed sounds, even those that imitate or simulate the copyrighted sound recording. 23

Section 114 thus prohibits mechanical duplication of a recording, such as making a cassette duplication of a record. The section also prohibits making a derivative work 24 in which the actual sounds in a protected recording are rearranged, remixed, or otherwise altered in sequence or quality, such as by electronically lifting a passage off another artist’s record and incorporating it into a separate work. 25 Section 114 does not, however, prohibit a music producer from hiring musicians and vocalists to record the closest possible imitation of another artist’s sound recording, so long as the new production does not mechanically reproduce the original recording’s actual sound. 26 Such an effort at human—as opposed to mechanical—reproduction of a sound recording constitutes an “independent fixation” allowed by section 114. 27 Such a producer would have to buy a license in the underlying musical composition, but the Act compels the owner to sell that license for a set fee. 28

This rule that only an actual reproduction 29 of a sound recording violates the exclusive right of reproduction departs

23. Id. § 114(b).
24. Id. §§ 106(2), 114(a). Derivative work is defined as a work “based upon one or more preexisting works, such as a ... musical arrangement, ... sound recording, ... or any other form in which a work may be recast, transformed, or adapted.” Id. § 101.

To claim copyright protection independent of the composition on which it is based, a derivative sound recording must contain some originality. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.10[A][2], at 2-143 (1988). Originality in a sound recording may proceed from the performer’s unique contribution, the record producer’s involvement, or both. H.R. REP. No. 1476, 94th Cong., 2d Sess. 56, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5669; see also H. REP. No. 487, 92d Cong., 1st Sess. 5, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1570 (copyrightable elements of sound recording usually include authorship by performer and producer).


26. Not only may another group of musicians and vocalists attempt to imitate the sound recording as closely as possible, they also may mimic the performer’s individually created style of publicly presenting that copyrighted sound recording.

28. See id. § 115 (delineating guidelines and regulations for purchase of compulsory licenses in sound recordings).
29. As used in this Note, actual reproduction means the mechanical reproduction of a previous sound recording that generates a “copy” of the original recording.
markedly from the rules protecting against reproduction of other kinds of artistic works under section 106. In the case of literary, dramatic, choreographic, audiovisual, and other musical works, a "substantial similarity" test applies to potentially infringing reproductions and simulations. For example, a dramatic work in which sequences of events and character developments are substantially similar to those in a copyrighted work violates the copyright owner's exclusive right of reproduction if a plaintiff can show that the defendant had access to the copyrighted work. Expert testimony helps guide jury determinations of substantial similarity.

The use of an "actual reproduction" test instead of the usual "substantial similarity" test for the infringement of sound recording suggests that all originality in a musical work lies in its written score. A musical producer who has purchased a license in a written score may record whatever rendition he

30. Other types of works covered by copyright law are more stringently protected. "[D]epartures or variations from the copyrighted work would still be an infringement as long as the author's expression rather than merely the author's 'ideas' are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114." H.R. REP. No. 1476, 94th Cong., 2d Sess. 61, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5675.


32. See, e.g., Hoehling v. Universal City Studios, 618 F.2d 972, 977-80 (2d Cir.) (assessing substantial similarity of book to determine infringement), cert. denied, 449 U.S. 841 (1980); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977) (holding that infringement may be shown by "circumstantial evidence of access to the copyrighted work and substantial similarity between the copyrighted work and defendant's work"); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (holding that substantial similarity, together with evidence of access, makes out prima facie case of infringement in absence of defendant's admission of copying); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-23 (2d Cir. 1930) (discussing copyright protection of plaintiff's play against play that used same underlying abstract plot), cert. denied, 282 U.S. 902 (1931).

33. Compare Nichols, 45 F.2d at 121-22 (determining that one play cannot infringe copyright of another merely by using same theme and similar stock characters, despite substantial similarity) with Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54-56 (2d Cir.) (holding film infringed play to which film makers had access, and film bore striking similarity), cert. denied, 298 U.S. 669 (1936).

34. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), introduced the classic, two-tiered approach to determining substantial similarity. Expert testimony is admitted to dissect and analyze the similarities of the two works at issue. If the expert establishes copying, the jury determines whether the copying rises to the level of unlawful infringement, generally applying "lay listeners" standard. Id. at 473.
likes, including a note-for-note, identically phrased imitation of another artist's rendition. The result suggests that any one recording artist's rendition of a musical work is not a unique creative contribution worthy of copyright protection. Because this suggestion seems unfair to recording artists, many state courts have used state law doctrines to protect a recording artist's rendition of a musical work in a sound recording. These doctrines include unfair competition, misappropriation, and the right of publicity.

C. Unfair Competition

The common-law doctrine of unfair competition\(^{35}\) prevents one producer from deceiving the public into thinking that its goods are those of another. This deception, known as "passing off,"\(^{36}\) gives rise to a claim of unfair competition only if the two producers are in competition.\(^{37}\) The ultimate potential for deception, rather than the second producer's intent to deceive, governs findings of unfair competition.\(^{38}\) The law of unfair competition thus may bar the simulation of sound recordings\(^{39}\) when the simulation deceives the audience into identifying the

---

\(^{35}\) Because this doctrine eludes precise definition, Congress and several states have supplemented the common law with statutes. 1 R. Callmann, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 2.09 (L. Altman rev. 4th ed. 1981). Such statutes regulate unfair methods of competition, false advertising, and deceptive trade practices. Id. Most of this statutory supplementation of common-law unfair competition occurred after a 1958 American Bar Association study concluded that state unfair competition laws were either inadequate or ambiguous and archaic. Id. § 2.09, at 34. (citing Lundsford, UNFAIR COMPETITION, 1958 A.B.A. SEC. PAT. TRADEMARK COPYRIGHT L. REP. 79; see also The United States Trademark Association, State Trademark and Unfair Competition Law (1989) (listing each state's related statutory and common-law authority).

\(^{36}\) W. Prosser, HANDBOOK OF THE LAW OF TORTS § 130, at 1015 (W. Kerr 5th ed. 1984). Passing off "deceiv[es] the ordinary consumer acting with the caution usually exercised in such transactions, so that he may mistake one for the other." Id. § 130, at 1016.

\(^{37}\) 1 R. Callmann, supra note 35, § 2.09.

\(^{38}\) Id.

replication as the original.  

A recording artist used unfair competition law to attack a producer who made a substantially similar sound recording of the plaintiff’s work in Shaw v. Time-Life Records. Plaintiff Artie Shaw, a prominent jazz artist of the 1940s, claimed that Time-Life’s “Swing Era” recordings unfairly competed with his actual recordings. The recordings simulated Shaw’s work and were labeled as “Artie Shaw” versions. The court held that the recordings’ potential for consumer deception supported a denial of the defendant’s motion for summary judgment in Shaw’s unfair competition claim.

Federal unfair competition law also has restricted substantially similar reproductions of a sound recording when deception was possible. In In re Magnetic Video Corp., the Federal Trade Commission (“FTC”) brought an action against Magnetic Video Corporation for marketing “sound-alike” recordings of popular songs. For example, the defendant labeled its phonorecords as “The Sounds of Neil Diamond,” and “Grammy Hits of 1973.” The FTC found that Magnetic’s pro-

40. See Note, supra note 11, at 582 (suggesting unfair competition doctrine applies to actions for deceptive imitation of general performance style).

42. Id. at 203, 341 N.E.2d at 818, 379 N.Y.S.2d at 392.
43. Id. at 207, 341 N.E.2d at 819, 379 N.Y.S.2d at 394. The court stated, however, that Shaw had no “property interest in the Artie Shaw 'sound.'” Id. at 205, 341 N.E.2d at 820, 379 N.Y.S.2d at 394.
45. 86 F.T.C. 1515 (1975).
46. Id. at 1516. The FTC alleged that Magnetic Video Corporation had violated section five of the F.T.C.A. Id. at 1519.
47. Id. at 1517. The FTC complaint alleged that Magnetic’s record packaging bore likenesses of the original artist or depictions similar to those accompanying the original releases. Id.
motional and labeling practices may have deceived the public into believing that its products were original artists' recordings, and ordered "clear and conspicuous disclosure" in all Magnetic's future dealings. Although the case turned on federal rather than state unfair competition law, it resulted in the protection of a sound recording against a substantially similar reproduction.

Not all courts have been willing to supplement the Copyright Act's protection of sound recordings with unfair competition law. In Sinatra v. Goodyear Tire & Rubber Co., the Ninth Circuit found that the copyright law preempted unfair competition law as applied to sound recordings. In Sinatra, Goodyear obtained a license to use a song popularized by Nancy Sinatra, "These Boots are Made for Walkin'," for a "Wide Boots" tire commercial. Goodyear deliberately selected a singer for her ability to imitate Sinatra's voice, and when moving for summary judgment, "candidly admitted . . . that the vocal rendition was an imitation of plaintiff's recorded performance." Sinatra alleged that although the defendant bought a license to use her song, its imitation of her performance constituted consumer deception. The court denied Sinatra relief on the grounds that no actual competition existed between Sinatra and Goodyear and that the Copyright Act preempted Sinatra's claim. The court explained that protecting Sinatra's renditions conflicted with Congress's affirmative de-

48. Id. at 1519.
49. Id. at 1520. The court ordered that the company include the bold face legend "THIS IS NOT AN ORIGINAL ARTIST RECORDING" on tape and record products, and specified other mandatory disclosure practices, such as oral disclosure on all radio and television promotions. Id. at 1520-22.
50. 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971).
51. Goodyear gained its license to use the song in compliance with the Copyright Act, thereby precluding a cause of action under federal copyright law. Id. at 713 & n.2. The court noted that beyond the licensing provisions, nothing in the Copyright Act of 1909 grants "a performer's right, per se." Id. at 714 (footnote omitted).
52. Id. at 713.
53. Id. at 712. Sinatra also alleged that her unique performance was intimately associated with the song and gave it "secondary meaning." Id. Secondary meaning often arises as an issue in unfair competition cases, and refers to an association in the minds of members of the public that links an individual product with a certain source. See BLACK'S LAW DICTIONARY 1212-13 (5th ed. 1979). Prosser defines as secondary meaning that which attaches to a name or design when it is used in such a way that the public identifies products bearing the name or design with the plaintiff. W. PROSSER, supra note 36, § 130, at 1017. The issue of secondary meaning lies outside the scope of this Note.
54. Sinatra, 435 F.2d at 716.
nial of protection for performance rights in a sound recording.55

D. MISAPPROPRIATION

A cause of action for misappropriation resembles an unfair competition action in that it involves imitation. A misappropriation plaintiff, however, need not satisfy unfair competition's requirements of "passing off" and market competition between the parties.56 The basic elements of misappropriation are: (1) the plaintiff invested substantial time, effort, and money creating a product; (2) the defendant wrongfully appropriated the creation, "reaping where it has not sown;" and (3) defendant injured plaintiff by the misappropriation.57 The essence of the

55. The court wrote that "to allow unfair competition protection where Congress has not given federal protection is in effect granting state copyright benefits without the federal limitations." Id. at 718.

Much discussion has focused on whether federal copyright law preempts any state protection for performance style. Early Supreme Court rulings in Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964), and Sears Roebuck & Co. v. Stiftel Co., 376 U.S. 225 (1964), established that works unprotected by federal patent law were also ineligible for state-law protection. Compco, 376 U.S. at 237-38; Sears Roebuck, 376 U.S. at 232. The Supreme Court later reinterpreted the preemption rulings and held that state-law may control where no concurrent or conflicting federal law exists. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479-80, 492-93 (1974) (holding state trade secrets law valid where no conflicting federal law existed); Goldstein v. California, 412 U.S. 546, 561-70 (1973) (upholding state law action against sound recording piracy).

The Copyright Act of 1976 deals specifically with preemption, stating:

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression.


57. 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 10:25 (2d ed. 1984). Courts have relied on the doctrine of misappropriation as ancillary to the law of copyright and unfair competition since the doctrine's appearance in 1918. See International News Serv. v. Associated Press, 248 U.S. 215 (1918); see generally 1 R. CALLMANN, supra note 35, §§ 4.63, 15.01-02 (summarizing
cause of action lies in the defendant's use of the plaintiff's product, into which the plaintiff invested time, skill, and money.58

In Midler v. Ford Motor Co.,59 the Ninth Circuit recently

controversy over and commenting on misappropriation); Baird, Common Law Intellectual Property and the Legacy of International News Service v. Associated Press, 50 U. Chi. L. Rev. 411, 412-23 (1983) (discussing probable impact and potential snags with holding of title case); Fetter, Copyright Revision and the Preemption of State "Misappropriation" Law: A Study in Judicial and Congressional Interaction, 27 COPYRIGHT L. SYMP. (ASCAP) 1, 19-33 (1982) (discussing recently emerging difficulties with preemption doctrine and debate over impact of copyright revision on law of misappropriation and preemption); Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 UCLA L. REV. 1107, 1121 (1977) (noting judiciary's distinction between copying and misappropriation and suggesting that misappropriation claims are not preempted); Comment, The Misappropriation Doctrine After the Copyright Revision Act of 1976, 81 DICK. L. REV. 469, 493 (1977) (arguing that copyright revision of 1976 clearly defined boundaries of misappropriation law, permitting doctrine to apply to competitive situation so long as its protection is not equivalent to that provided by Copyright Act).

58. See Mercury Record Prods., Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 175, 218 N.W.2d 705, 710 (1974), cert. denied, appeal dismissed, 420 U.S. 914 (1975). Another decision involved the alleged misappropriation of a race car driver's name, likeness, and personality. See Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974). Motschenbacher, an internationally-known driver, customized his car over a period of years. The defendants produced a television commercial featuring the car. Id. at 822. In reversing a summary judgment for the defendants, the court stated that "where the identity appropriated has a commercial value, the injury may be ... economic." Id. at 824. Regardless of the nature of the injury, however, the issue of whether the defendants wrongfully appropriated Motschenbacher's "uniquely distinguishing features" was a question to be answered on remand. Id. at 827.


Nimmer questioned the practical significance of differentiating reproduction and misappropriation. "It is true that in the case of record piracy such reproduction is accomplished by mechanical means rather than via the human hand or ear, but why is that significant? Could any greater state law liability attach to the photographic reproduction of a Rembrandt ... than would be true in the case of free hand copying?" 1 M. NIMMER & D. NIMMER, supra note 24, § 1.01[B], at 1-20.5. Nimmer concluded that misappropriation in the sound recording context merely-proscribes nonmechanical reproduction, and thus is preempted by the Copyright Act. Id. § 1.01[B], at 1-20.5 to 1-20.6.

59. 849 F.2d 460 (9th Cir. 1988).
invoked misappropriation law in reversing summary judgment against a recording artist who claimed that an advertising agency wrongfully appropriated her song by using a "sound-alike" singer to record an imitation. After singer Bette Midler rejected Ford's offer to sing her 1973 hit "Do You Want to Dance?" for a Ford commercial, Ford sought and hired one of Midler's former backup singers to imitate Midler's rendition. In reviewing the scope of protection available to Midler, the court emphasized that voices are not entitled to copyright protection. The court nevertheless noted that California law allowed recovery in tort for the appropriation of one's identity, and concluded that imitation of a person's voice violates a personal property right. The court thus held that Midler made a prima facie showing that the defendants unlawfully appropri-
ated her identity for commercial gain. The newest player in the performer protection game is the "right of publicity." The doctrine provides individuals with exclusive rights in their own names, likenesses, or personal characteristics. Unauthorized portrayals of these characteristics for commercial gain violate this right. Because state statutes or common law govern the publicity right, substantial variation in the level and scope of protection occurs among jurisdictions. A New York statute, for example, limits protec-

64. Id. at 463. The court narrowed its holding, however, by stating that it "need not" hold that every imitation for advertising purposes gives rise to tortious liability. Id. The court did not explain this restriction, which creates uncertainty as to the scope and precedential value of the holding.


66. Felcher & Rubin, supra note 61, at 1589. Many individuals asserting this right are performers who claim they have been denied the benefits produced by unauthorized publicity. Id. at 1588; see, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 569 (1977) (agreeing that in media portrayals, right of publicity is a person's "control over commercial display and exploitation of his personality and exercising of his talents."); Topps, 202 F.2d at 867 (coining phrase "right of publicity" to allow baseball players exclusive rights to use of their photographs).

Felcher and Rubin imply that copyright law may protect simulations of a performer's work when the simulations are "verbatim presentations" of the performances. Felcher & Rubin, supra note 61, at 1578 n.11. Broader protection against the unauthorized use of a performer's name, likeness, characteristics, and life history, however, may exceed "the constitutional limits of the copyright clause." Id.; see also 1 M. Nimmer & D. Nimmer, supra note 24, § 1.08[C] (Congress extended copyright protection to work that has not become writing, concept that may be held unconstitutional).

67. Felcher & Rubin, supra note 61, at 1589. The courts do not approach the right of publicity consistently, however, because no universally recognized test of the scope of this right exists. Id. at 1590.

68. One major difference among state laws concerns the descendibility of the right of publicity. See, e.g., Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir. 1980) (ruling that right of publicity does not descend under Tennessee law); see also Felcher & Rubin, The Descendibility of the Right of Publicity: Is there Commercial Life After Death?, 89 YALE L.J. 1125, 1127-32 (1980) (drawing analogy between right of publicity and rights of privacy, defamation, property, and copyright to determine proper scope of right).

California recognizes a common-law right of publicity. Elements of a claim for appropriation of the right of publicity include the defendant's use of plaintiff's identity, the defendant's appropriation of the plaintiff's name or likeness, the plaintiff's lack of consent, and resulting injury. THE UNITED STATES TRADEMARK ASSOCIATION, STATE TRADEMARK AND UNFAIR COMPETITION LAW at CA-17 (1988); see, e.g., Eastwood v. Superior Court, 149 Cal. App. 3d 409, 411-21, 198 Cal. Rptr. 342, 348-49 (1983) (applying elements of appropri-
tion to a person’s “name, portrait or picture.” In contrast, a California statute prohibits only unauthorized use of another’s actual voice for advertising purposes.

Although no court has applied right of publicity doctrine to protect against the substantially similar reproduction of a sound recording, courts have invoked the doctrine in other related contexts to prevent simulation of a performer’s style. In Estate of Presley v. Russen, the court enjoined an Elvis Presley imitator’s stage performance entitled “The Big El Show.” The court reasoned that the show exploited Elvis Presley for commercial gain, without contributing artistic or educational value to society.

But cf. Uhlaender v. Henricksen, 316 F. Supp. 1277, 1280 (D. Minn. 1970) (separating actions for invasion of privacy from actions for misappropriation of personal property right, such as name, likeness, or personality).

69. N.Y. Civ. RTS. LAW § 51 (McKinney 1976 & Supp. 1989) (providing cause of action for use of another’s name, portrait, or picture for advertising purposes); see also MASS. GEN. L. ch. 214 § 3A (1986) (prohibiting unauthorized use of another’s name, portrait, or picture for advertising or trade purposes); VA. CODE ANN. § 8.01-40 (1984) (prohibiting unauthorized use of another’s name or picture). But cf. Onassis v. Christian Dior—New York, Inc., 122 Misc. 2d 603, 609, 472 N.Y.S.2d 254, 259 (Sup. Ct. 1984) (commenting that statute’s lack of voice protection may be result of oversight, because possibility of reproducing and disseminating vocal sound was not contemplated when §§ 50 and 51 of New York Civil Rights Law were enacted).

70. See CAL. CIV. CODE § 3344 (West Supp. 1989) (providing for damages to person injured by another’s use of person’s voice, signature, photograph, or likeness).


72. Id. at 1382-83.

73. Id. at 1359. This policy-based analysis parallels the “fair use” doctrine of copyright by allowing reproduction for comment and education—uses deemed valuable to the public. See 17 U.S.C. § 107 (1982). As codified, the doctrine states:

Notwithstanding the provisions of section 106 [granting exclusive rights to copyright owners], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . 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 right of publicity doctrine also protected "Mr. New Year's Eve," Guy Lombardo, in a suit involving television advertising.\footnote{74} In \textit{Lombardo v. Doyle, Dane \& Bernbach, Inc.},\footnote{75} the defendant's television commercial featured a New Year's Eve party, including a band leader who looked and acted like Lombardo and who conducted music popularized by Lombardo.\footnote{76} The court held that a celebrity has a proprietary interest in his public persona and may protect it from exploitation.\footnote{77} The court also held that if the commercial exploited Lombardo's personal style, Lombardo had a claim for public deception.\footnote{78} Based on cases such as \textit{Presley} and \textit{Lombardo}, recording artists could argue that they have the right to exclusive

\textit{Id.}

\footnote{74} Lombardo v. Doyle, Dane \& Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (App. Div. 1977). The defendant appealed the lower court's denial of its motion to dismiss Lombardo's claims for invasion of privacy and invasion of public personality. \textit{Id.} at 620, 396 N.Y.S.2d at 663. Thus, the court assumed the truth of Lombardo's assertions in reversing the lower court on the first action and affirming it on the second. \textit{Id.}

\footnote{75} \textit{Id.}, 396 N.Y.S.2d 661.

\footnote{76} \textit{Id.} at 622-23, 396 N.Y.S.2d at 665.

\footnote{77} \textit{Id.} at 622, 396 N.Y.S.2d at 664.

\footnote{78} \textit{Id.} at 622, 396 N.Y.S.2d at 664-65. The court, however, dismissed Lombardo's claim based on N.Y. Civ. Rts. §§ 50-51 (Mckinney 1976), which allows individuals to enjoin and sue for damages any person using the individual's "name, portrait, or picture" without consent. The court construed the statute narrowly, holding that name meant full name and that picture did not prohibit "the portrayal of an individual's personality or style." \textit{Id.}, 396 N.Y.S.2d at 664-65. The concurrence disagreed, citing \textit{Binns v. Vitograph Co.}, 210 N.Y. 51, 103 N.E. 1108, 1110 (1913).

A picture within the meaning of the statute is not necessarily a photograph of a living person, but includes any representation of such person . . . . The defendant is in no position to say that the picture does not represent the plaintiff or that it was an actual picture of a person made up to look like and impersonate the plaintiff. 


Despite the existence of \textit{Lombardo} and previous judicial formulations of the right of publicity, the New York Court of Appeals recently held that no common-law right of publicity existed in New York. In \textit{Stephano v. News Group Publications, Inc.}, 64 N.Y.2d 174, 474 N.E.2d 510, 485 N.Y.S.2d 220 (1984), the court ruled that New York's statute prohibiting unauthorized use of a person's likeness for advertising preempted any common-law right of publicity. \textit{Id.} at 183, 474 N.E.2d at 514, 485 N.Y.S.2d at 224. The holding contradicted a string of decisions since the doctrine's introduction in \textit{Haelen Laboratories, Inc., v. Topps Chewing Gum, Inc.}, 202 F.2d 866, 868 (2d Cir.), \textit{cert. denied}, 346 U.S. 816 (1953), and apparently overruled Lombardo. The court expressly refused to consider, however, whether the statute also controlled assignment, transfer, or descent of publicity rights. Evidence of \textit{Stephano}'s potential long-term effect on decisions regarding the appropriation of identity for commercial purposes has yet to arise. See Halpern, \textit{The Right of
use of their singing voices or instrumental talents and that un-
authorized portrayal of their singing or playing wrongfully in-
trudes on their exclusive right to publicize the identifying
elements of their performing styles.

By applying these doctrines to protect recording artists
against close imitations of their work, courts recognize that re-
cording artists make a unique and valuable contribution to a
song through their rendition of it. The vocal styles of Nancy Si-
natra and Bette Midler, for example, made their songs attrac-
tive to the public. The advertising companies' attempts to hire
not merely well-trained singers with good voices, but singers
who could imitate the famous renditions, demonstrated the
value of these performers' particular styles.

Musicians, as well as singers, contribute valuable elements
of style to sound recordings. In an age of electronic and impro-
visational music, musicians regularly develop and popularize
new "sounds." Other musicians easily profit by simulating
these unique and popular sounds. 79

II. FLAWS IN STATE LAW DOCTRINES AND THE
NEEDED EXPANSION IN COPYRIGHT
PROTECTION FOR RECORDING
ARTISTS

Recording artists have resorted to a variety of state-law
doctrines to find a cause of action against substantially similar

Publicity: Commercial Exploitation of the Associative Value of Personality,

79. Digital sound sampling, for instance, has reduced sound imitation to
an exact science. The technique involves recording a sound and breaking
down its sound waves into binary digital numbers read by computer. Once
stored in the computer, the tone can be altered electronically. Note, Digital
Sound Sampling, Copyright and Publicity: Protecting Against the Electronic
Appropriation of Sounds, 87 COLUM. L. REV. 1723, 1724-25 (1987). Because the
tonal qualities of a voice or instrument then can be manipulated to do virtually
anything, imitators can create an entire song using a single "sample." Id.
Thus, a sample of Luciano Pavarotti's voice could be used to create a recording
of Pavarotti apparently "singing" a song, when, in fact, a computer keyboard
produced the entire recording.

Courts have not yet addressed digital sound sampling. Some question ex-
ists whether the process would be considered "dubbing," and therefore subject
to § 114 of the Copyright Act, or "independent fixation," permitted by the Act.
See 17 U.S.C. § 114 (1982) (governing copyright protection for sound record-
ings). One commentator contends that the concepts of dubbing and substantial
similarity may be interpreted to protect copyright holders from digitally-crea-
ted reproductions of their existing sound recordings. See Note, supra, at 1745.
reproductions of their sound recordings, because the Copyright Act expressly allows independent fixations that simulate but do not actually reproduce a copyrighted sound recording. Although state courts grant relief in some cases, jurisdictions differ widely in the elements they require to establish a cause of action under each doctrine, in the scope of protection that each doctrine affords, and even over the validity of the doctrines themselves.

Variations in the right of publicity doctrine illustrate the inconsistencies among the states. Many states allow relief only from the appropriation of a person’s name or likeness. These states thus exclude relief from appropriation of a musical performance. Other states extend the right of publicity to a person’s “distinguishing characteristic,” and the courts of these states might consider a singing style to be a distinguishing characteristic. Still other jurisdictions ignore the right of publicity completely. The application of the unfair competition and misappropriation doctrines also varies from state to state.

80. See supra notes 35-78 and accompanying text.
84. See, e.g., THE UNITED STATES TRADEMARK ASSOCIATION, STATE TRADEMARK AND UNFAIR COMPETITION LAW (Illinois state section) (1988) (noting that although no Illinois court has yet considered right of publicity, state courts have recognized cause of action for unauthorized appropriation of another’s name or likeness under privacy doctrine); see also supra notes 35-64 and accompanying text (discussing unfair competition law and misappropriation).
85. Both the unfair competition and misappropriation doctrines vary among jurisdictions. For a comprehensive discussion of each of the 50 states’ unfair competition laws, see THE UNITED STATES TRADEMARK ASSOCIATION, STATE TRADEMARK AND UNFAIR COMPETITION LAW (1988).

The doctrines also vary depending on whether protection is sought under statute or common law. See generally THE UNITED STATES TRADEMARK ASSOCIATION, STATE TRADEMARK AND UNFAIR COMPETITION LAW (1988) (cataloging all 50 states’ protections available under both statute and common law). Many states have codified the common-law cause of action for unfair competition with slight modifications, or have combined it with other unfair trade method legislation while allowing the common-law cause of action continued existence. Id. Other states have adopted the Uniform Deceptive Trade Practices Act while retaining common-law avenues of protection. See, e.g., People v.
Consequently, no uniformly recognized legal framework protects recording artists against others who seek to profit merely by producing recordings substantially similar to the artist’s originals.86

This legal patchwork creates obstacles for recording artists. The recording industry spans the country. In the case of a nationally distributed commercial, as in Midler, the plaintiff may be forced to bring suit in all fifty states to obtain full relief. Moreover, the great diversity among the states’ approaches to these doctrines gives a plaintiff’s choice of forum too great a role in the outcome of a suit.87

Not only are the state doctrines inconsistent, but the Copyright Act arguably preempts them. By stepping in to protect against substantially similar reproductions of recording artists’ sound recordings, a state protects an element of the sound recording that Congress deliberately chose to leave unprotected.88 Three circuits have decided, however, that preemption is not an obstacle to a misappropriation claim.89 In Midler, for example,
although preemption doctrine precluded a cause of action for misappropriation of a sound recording, the court allowed an action for appropriation of identity.\textsuperscript{90} In contrast, a federal district court decided recently that the Copyright Act preempted an unfair competition claim based on California law because the state law qualitatively duplicated copyright protection.\textsuperscript{91} Because these and other courts disagree on the scope of preemption, recording artists cannot rely on state protections. Amendment of the Copyright Act would create uniform federal protection and ease this lingering doubt over the scope of preemption.\textsuperscript{92}

A further problem with the state-law doctrines is that when they do provide protection for sound recordings, the protection is permanent. The Constitution, in contrast, specifically provides for only a temporary monopoly on intellectual property.\textsuperscript{93} Granting recording artists copyright protection against substantially similar reproductions of their work would allow these artists generous time in which to exploit commercially their own recordings, until the works lapse into the public domain for the public benefit as Congress and the Constitution intended.

In addition to concerns of inconsistency, preemption, and the permanence of these protections, further criticisms\textsuperscript{94} apply...
to each doctrine. Unfair competition, for example, requires the existence of actual competition between the parties before a court can grant relief.\textsuperscript{95} This requirement creates an undue hardship, because the imitated party rarely competes directly with the imitator. In \textit{Sinatra v. Goodyear Tire & Rubber Co.,}\textsuperscript{96} a tire company simulated Nancy Sinatra's song.\textsuperscript{97} The imitation arguably cut into Sinatra's market for selling her performances, but the court rejected her unfair competition claim because she failed to prove that her recording competed with the tire company.\textsuperscript{98}

Unfair competition theory also requires a showing of "passing off," a false implication to the public that the defendant's work is that of the plaintiff.\textsuperscript{99} According to the FTC in \textit{In re Magnetic Video Corp.},\textsuperscript{100} a company can defeat a claim of passing off and continue to sell simulated recordings so long as it places a disclaimer on the album jacket.\textsuperscript{101} With the courts and the FTC implicitly sanctioning such deceptive practices, record-tacks the very basis of copyright, suggesting that a cause of action may be based on the \textit{natural} right of the artist to the fruits of his labor. Baird, \textit{supra} note 57, at 417 (citing \textit{Cheney Bros. v. Doris Silk Corp.}, 35 F.2d 279, 280 (2d Cir. 1929), \textit{cert. denied}, 281 U.S. 728 (1930)). Baird provides the counterargument that statutory provisions often are no more clear than judicial decisions, and frequently merely codify common-law principles. Baird further suggests that common law may be better suited to reform and improve the law incrementally as such changes are needed. \textit{Id.} at 417-18.


\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.; see also} \textit{Booth v. Colgate-Palmolive Co.}, 362 F. Supp. 343, 349 (S.D.N.Y. 1973) (denying Booth, an actress, protection under Lanham Act because she was not in competition with Colgate's products).

As one commentator wrote:

\begin{quote}
Artistic creativity is appropriate for federal statutory copyright, which protects creativity \textit{per se}, whether the defendant is a competitor or not. Diligent application, however, is better suited to common law misappropriation, which assesses the unfairness of the defendant's behavior in the light of the competitive relationship he has to the plaintiff, or at least in the light of the impact upon plaintiff's legitimate expectations of business advantage accruing from his efforts.
\end{quote}

1 R. CALLMANN, \textit{supra} note 35, \S 4.64, at 4-116.

\textsuperscript{99} See \textit{Sinatra}, 435 F.2d at 714; \textit{Davis v. Trans World Airlines}, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969); 1 M. NIMMER & D. NIMMER, \textit{supra} note 24, \S 2.12 n.25; \textit{PROSSER, supra} note 36, \S 130, at 1015-17.

\textsuperscript{100} 86 F.T.C. 1515, 1519 (1975); see \textit{supra} notes 45-49 and accompanying text.

\textsuperscript{101} 86 F.T.C. at 1520. The distributors also were enjoined from using any likeness of the original artist or illustrations similar to those on the original artist's album cover. \textit{Id.}
ing artists bear the heavy burden of showing actual consumer deception. Copyright protection against substantially similar imitations of a sound recording would require no showing of actual competition or passing off, but only a showing that a defendant produced an unauthorized, substantially similar reproduction. As a last resort, many commentators champion the right of publicity as the cure for theft of performance style. This right, however, does not adequately protect against the simulation of the actual sound recordings; it extends protection only to a publicly developed persona.102

A. CONGRESSIONAL MOTIVATION

State courts’ willingness to protect recording artists against substantially similar reproductions of their work demonstrates the perceived need for such protection. The inadequacies of state-law safeguards indicate the desirability of federal copyright protection.

The legislative history is unclear as to why Congress chose to prohibit only the actual mechanical reproduction of sound recordings, while extending copyright protection against substantially similar simulations to other artistic works. The record conclusively shows only that, in drafting the sound recording amendment, Congress sought the elimination of widespread record piracy.103

102. Felcher and Rubin, supra note 61, at 1625. In addition, the extension of such a continuing right poses practical difficulties in limiting such a right; and with its ephemeral, personal nature, the extension of protection may be inappropriate. Copyright expires automatically 50 years after the author’s death, and the right attaches to works fixed in tangible media—not to the ephemeral persona.


Before 1971, federal copyright in musical works protected only the musical score, and not the recording itself. Unauthorized use included any use of a copyrighted work that conflicted with any of the owner’s exclusive rights, such as the right of reproduction, distribution, or performance. 17 U.S.C. § 107 (1982). The terms reproduction and copy are distinguished in this Note in accordance with usage in the Copyright Act, which defines copies as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated.” Id. § 101 (emphasis added). Consequently, unauthorized reproduction of records and tapes became an enormously successful industry. Congress cited authority as estimating the
Section 114 of the Act prohibits record piracy by banning actual reproduction of a sound recording.\textsuperscript{104} Congress could have eliminated record piracy without section 114 simply by allowing the section 106 rights applicable to other kinds of copyrightable works to apply to sound recordings as well. Section 106 prohibits unauthorized reproduction of copyrighted works other than sound recordings.\textsuperscript{105} A substantially similar, unauthorized reproduction violates this exclusive right of reproduction.\textsuperscript{106} If section 106 governed reproduction of sound recordings, they too would be judged by the substantial similarity standard; a pirate copy would be substantially similar to an original and therefore prohibited.\textsuperscript{107}

Congress’s decision to subject sound recordings to the “actual reproduction” standard of infringement under section 114 could have stemmed from a desire to encourage multiple renditions of a musical composition, thereby generating royalties for the song’s writer.\textsuperscript{108} The “actual reproduction” requirement encourages multiple renditions by freeing those making later piracy industry’s sales at more than $100 million annually, approximately one-fourth of all sound recording sales. H.R. Rep. No. 487, 92d Cong., 1st Sess. 2, reprinted in 1971 U.S. Code Cong. & Admin. News 1566, 1567. State common-law and anti-piracy statutes afforded only limited and inadequate protection. Congress responded in 1971 with a restricted copyright for sound recordings, and revised the statute further in the Copyright Act of 1976. See 17 U.S.C. §§ 101-810 (1982).

\textsuperscript{104} 17 U.S.C. § 114(b).
\textsuperscript{105} Id. § 106; see also supra notes 1-7 and accompanying text (setting forth § 106 rights).
\textsuperscript{106} See infra notes 117-20 and accompanying text.
\textsuperscript{107} In addition to eliminating piracy, a substantial similarity test also would prohibit reproduction through independent fixation, arguably prohibiting the simulation involved in cases like Midler and Magnetic Video. See supra notes 45-49, 59-64 and accompanying text.
\textsuperscript{108} See generally H.R. Rep. No. 83, 90th Cong., 1st Sess. 66, reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5679 (discussing policies for and against compulsory licensing of musical compositions); see also Note, supra note 79, at 1733 (discussing whether sound sampling should be considered dubbing).

Congress also manifested a desire to encourage multiple renditions of a song by subjecting all copyrighted musical compositions to a compulsory licensing scheme. See 17 U.S.C. § 115 (1982). This provision allowed the Ford Company automatically to obtain the rights to make its own rendition of Midler’s song by paying a fee. The “actual reproduction” rule then allowed Ford to record its near-perfect imitation of Midler’s previous rendition. Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).

Congress’s goal thus arguably would be defeated by limiting the number of subsequent renditions to those that could be recorded in a manner sufficiently different from the original to avoid liability. See 17 U.S.C. § 106 (1982) (assigning exclusive rights of copyright according to subject matter); Note,
recordings from onerous fears of infringement. This reasoning, however, ignores the importance of the performer’s artistically expressive role in recording, implicitly placing it lower in the hierarchy of public merit than works of the fine artist or author. The painter’s brush thus becomes a worthier tool than the singer’s voice; the author’s rendition of a folk story more valuable than a pianist’s interpretation of Mozart.

By rewarding only the composer of the song, and not the recording artist, the Copyright Act suggests that all musical creativity originates with the composer’s sheet music. The recording artist, then, is viewed as a machine that reads the music and mechanically transforms the music back to aural form, like a player piano reading a piano roll. This suggestion errs in differing degrees according to the situation. Each of two symphony orchestras recording a Beethoven symphony infuses its own creativity; each plays the same written notes, but approaches the score differently. Yet while the musicians infuse creativity, perhaps the lion’s share of the creativity for this type of work lies with Beethoven.

In the case of improvisational music such as jazz, electronic music, and popular music, in contrast, a written score only minimally describes those elements of a song that make it popular. With these kinds of works, a new improvisational idea or style, an electronic sound, or an unusual vocal delivery often forms the basis for a song’s success. A competing recording artist who

supra note 79, at 1733 (concluding that market for particular song once recorded might decline).

Other commentators raise first amendment concerns regarding further expansion of the rights to sound recordings. This concern is directed primarily at proposed legislative protection of an exclusive performance right. See Note, State “Copyright” Protection for Performers: The First Amendment Question, 1978 DUKE L.J. 1198, 1221 (1978).

109. In Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937), the Pennsylvania Supreme Court acknowledged this role by noting that the performer recasts the musical composition into a sound recording. Because of this creative and intellectual contribution, the performer gains an intellectual property right in the performance. Id. at 440-41, 194 A. at 635; cf. Lang, Performance and the Right of the Performing Artist, 21 COPYRIGHT L. SYMP. (ASCAP) 69 (1974) (arguing that copyright for performer’s style cannot be analogized to copyright for art). According to Lang, however, if style is protected “Picasso might then have sole use of ‘synthetic Cubism’—or must he share the style with Braque, Max Jacob ... and the others who ... were responsible for the formation of Cubism?” Id. at 95. Lang stretched the analogy by contending that protection of a sound recording amounts to protection of the song style itself. See Note, supra note 11, at 567 (criticizing Lang’s argument).

110. See supra note 19 and accompanying text.
buys a license to use a written score of such a song has not bought what is most valuable about the song. For the minimal fee with which they buy the score, competing artists receive license to imitate those elements of style and sound that have made the song valuable.

The failure to protect the recording artist's contribution to a sound recording, then, presents disincentives to creativity. By simulating a sound recording for commercial advantage, the appropriator receives the benefit of the original sound recording's investment of time, creativity, and financial outlay; the original performer and producer, the "creators," get nothing. In addition, the prospect of litigating rights in multiple jurisdictions increases the cost of seeking judicial protection. Because the framers of copyright law sought to induce creative work for the public good through guarantees of ownership and financial remuneration for the creator, the law must protect the rights of those responsible for creating a commercially successful recording. Economic harm also occurs when the ap-

111. That such imitation can cause the original artist to lose potential compensation is illustrated by such cases as Midler, 849 F.2d at 463, and Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 620, 396 N.Y.S.2d 661, 664 (App. Div. 1977). See also Note, supra note 87, at 1193 (discussing similar financially-oriented policy concerns regarding right of publicity statutes).

112. Beyond mere economic harm, creativity is discouraged when the performer "is denied the right to choose when, how, and under what circumstances his creative expression style is used." Note, supra note 11, at 593. As seen in cases such as Midler, 849 F.2d at 464, and Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 715 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971), in which the simulated sounds were used for advertising, the performer's opportunities for future commercial endorsement considerably decrease. The advertiser gets the benefit of the original performer at less cost so long as the advertiser may simulate recordings without fear of sanction.

113. See supra notes 14-16 and accompanying text.

114. Non-economic concerns also support fuller protection for sound recordings. Although the 1976 Copyright Act moved toward alignment with foreign copyright protections, the United States still refuses to grant "moral rights" to creators. See Abelman & Berkowitz, International Copyright Law, 22 N.Y.L. SCH. L. Rev. 619, 649-55 (1977) (providing summary of past and present state of international copyright protections). Such moral rights safeguard the artist's reputation. HENN, COPYRIGHT LAW: A PRACTITIONER'S GUIDE 176 (2d ed. 1988). They also include the right to be known as the author and to prevent others from using a work in such a manner as to reflect on the author's professional reputation. Id.; see Treece, American Law Analogies of the Author's "Moral Right," 16 AM. J. COMP. L. 487, 494 (1968); Note, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 HARV. L. Rev. 553, 558-74 (1940). Moreover, moral rights include the right to object to "distortion, mutilation, or other alteration" of a creative work. Abelman & Berkowitz, supra, at 629.

Foreign laws generally accord greater significance to the artist's rights
propriator usurps the original artist’s commercial advantage, interfering with the artist’s potential economic return. The imitator injures the original artist’s earning potential by precluding certain commercial endorsements, by overexposing the product and the original artist, by associating the artist with an inferior product, and by interfering with the artist’s “right to enjoy the fruits of his own industry.”

III. CALL FOR CONGRESSIONAL ACTION

The sound recording, classified as a derivative work of the underlying musical composition, should receive federal copyright protection against simulation through independent fixation. To achieve this result, section 114(b) of the Copyright Act provides that the sound recording is subject to copyright protection if it is fixed in tangible form in the United States. Section 114(b) requires that the sound recording be fixed in tangible form in the United States, and this requirement is satisfied if the sound recording is fixed in the United States. The sound recording, classified as a derivative work of the underlying musical composition, should receive federal copyright protection against simulation through independent fixation.

than do those of the United States. Baird, supra note 57, at 416. For instance, under French law, the artist’s name must be associated with his work whenever it is published or displayed. Id.; cf. Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 AM. J. COMP. L. 465, 478-80 (1968) (explaining that this right is justified out of respect for artist’s labors, not on economic incentive theory). Moreover, the laws of many foreign countries provide protection for the performer in particular recorded renditions and for the record producer in sound recordings per se. Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 17 (House Committee Print 1961).

115. Note, supra note 55, at 147 (citing Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970)); see also Halpern, supra note 78, at 1239 (noting potential for great economic harm in appropriation of another’s creation). This type of economic harm occurred in Lahr v. Adell Chemical Co., 300 F.2d 256, 258 (1st Cir. 1962), in which the court found the plaintiff’s market saturated by the defendant’s actions. Such situations also give rise to consumer deception claims, as seen in Midler, 849 F.2d at 461-63 (claiming audience deception), Sinatra, 435 F.2d at 712 (claiming consumer deception due to simulation of sound recording), and In re Magnetic Video Corp., 86 F.T.C. 1515, 1519 (1975) (alleging that consumers confused sound-alikes with recordings by the original artist).

116. See 2 M. NIMMER & D. NIMMER, supra note 24, § 8.01[G], at 8-21. A work allegedly infringing on an article fully protected by copyright is actionable whether it is a “facsimile [sic] reproduction, or is otherwise ‘duplicated, transcribed, imitated, or simulated.’” Id. (quoting H.R. REP. No. 98, 90th Cong., 1st Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5559, 5574). Further support for the separate copyright of a particular rendition of a musical work, and hence the applicability of the substantial similarity test, appears in Performance Royalty: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, U.S. Senate, 94th Cong., 1st Sess. 49 (1975).

As William Cannon stated: “There are many factors in the total popularity of a record, and the song itself is many times of minor importance. The most important factors . . . are the artist (singer, instrumentalist, or group) . . .; the song or tune, but never in its original state; the arrangement . . .; the engineers . . .; and the very important
Act should be repealed, making sound recordings subject to the same standards as other artistic works. In the absence of direct proof of intentional and successful simulation, courts would determine copyright infringement by the "substantial similarity" of a defendant's work and proof of the defendant's access to the original work. A plaintiff would have to prove either that the defendant actually copied the first work, or that the defendant had access to the plaintiff's work and that the two works were substantially similar. The degree of similarity courts should require for actionable infringement of a sound recording would depend on the type of work and the degree to which the recording artist, rather than the composer, was the primary creative source. For example, a jazz improvisation would be infringed, assuming proof of access, by a recording fairly close to the original. In contrast, a classical orchestral work would not be infringed without virtually exact duplication. This continuum thus properly protects recordings of those works subject to multitudinous expression as well as those having narrower potential for expression, and corresponds with the application of that test in other media. Expert testimony and

area of exposure and promotion to the public." The highly talented jazz musician's original interpretation of a musical composition is often far removed from the original tune set down in lines of notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece.

Id.

The Director of the Boston Symphony Orchestra stated: "If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first?" *Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on The Judiciary, U.S. Senate, 86th Cong., 2d Sess. 821 (1967)* (statement of Erich Leinsdorf, then-Musical Director of the Boston Symphony Orchestra).

117. One court defined the required level of similarity as similar enough to be "recognizable as the same performance" as that of the plaintiff. United States v. Taxe, 380 F. Supp. 1010, 1017 (C.D. Cal. 1974), *aff'd in part, vacated in part*, 540 F.2d 961, 965 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

118. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); *Note*, supra note 79, at 1731.

119. *See Krofft*, 562 F.2d at 1162.

120. One commentator surmised that a major obstacle to protection under common-law theories has been the difficulty of defining *style*. *Note*, supra note 55, at 139; *see generally* *Note*, supra note 11, at 593 (advocating protections for creations of *style*). This problem becomes moot, however, when style is viewed not as an independent principle but as synonymous with the sound recording itself. By preventing unauthorized simulation of the entire work, the performer obtains protection for *style*, but only within the context of the particular sound recording.

121. In the literary field, for example, a strict standard of similarity is used
jury determination would fulfill fact-finding roles.\textsuperscript{122}

Changing the actual reproduction rule to the substantial similarity threshold for infringement shifts the existing policy balance between protecting performers and encouraging multiple renditions more in favor of the former than under the current Copyright Act. This shift in the balance struck by Congress is justified by the need to eliminate the unfair exploitation and creative discouragement that the current balance imposes on recording artists.

CONCLUSION

Performers and producers demand protection for their creative efforts in a sound recording. State-law doctrines provide some relief, but their attempts to protect such artists' contributions are incomplete and unreliable. Moreover, extreme variability among jurisdictions and persistent debate as to federal preemption of state safeguards underscore the inadequacies of existing law.

The performer's interpretation of a musical composition plays a major role in the recording, which is a unique product of the performer's talents, energy, time, effort, and expense.\textsuperscript{123}

---

\textsuperscript{122} One consequence of the policy in favor of free use of ideas is that the degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it. Some ideas can be expressed in myriad ways, while others allow only a narrow range of expression.

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), cert. denied, 469 U.S. 1037 (1984) (citation omitted) (delineating limits of infringement test for nonfiction literary works). The copyright owner of a recording of a Mozart string quartet thus would have to prove the virtual identity of a second recording, and that defendant did not arrive at the expression independently, to obtain relief.

There is little merit to the argument that more exacting styles of music would not be infringed under this standard. If every recording were exactly the same as the previous, there would be no reason for continued recording. As Learned Hand wrote, "[t]he performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation' of the score itself." Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J., dissenting). Few orchestral conductors would agree that their contributions to interpretation are merely trivial.

\textsuperscript{123} One prominent copyright expert described the so-called "free-rider" problem as follows:

If the product or service is one that requires substantial investment,
Yet the Copyright Act fails to protect this creative element of recorded music without any redeeming reason. The Act distinguishes sound recording reproduction from the reproduction of art, literature, and other copyrighted works. With the exception of sound recordings, the right of reproduction is infringed through duplication of a work by simulation. This disparate treatment results in the inequitable denial of relief to original artists. The mechanical reproduction of a sound recording has the same potential effect on both performers and audiences as does a conscientious simulation, yet the two are treated differently. Congress should correct this anomaly of the Copyright Act by eliminating the infringement exemption in section 114 for independent fixations, resulting in the application of the

---

whether of capital or talent, the investment may not be made if the prospect of profit, cloudy at best, is made more risky by the likelihood that competitors will enter, drive prices down to their marginal costs, and leave the originator with no return on her sunk costs, and with no hope of profits that will balance the risk of failure.


124. See 2 M. NIMMER & D. NIMMER, supra note 24, § 8.01[c] (distinguishing between copying from artist's work and from common source). Justice Holmes commented on this principle in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903): "The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy." *Id.* at 249.

Holmes's statement does not stand for the proposition that only reproductions fall under copyright protection while the original does not, but refers to the original subject matter. Applying this argument to sound recordings, one could make an authorized derivative work of a musical composition, but could not make a purposeful imitation of another derivative work of the same composition. 2 M. NIMMER & D. NIMMER, supra note 24, § 8.01[c], at 8-16.

125. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 61, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5674. The House Report further states that imitation of a recording is not a copyright infringement, even when intentionally performed exactly as the original was. *Id.* at 106.

126. The constitutionality of such an amendment poses no difficulty, because the courts already have disposed of this issue. Works produced by "sound recording firms . . . satisfy the requirements of authorship found in the copyright clause." Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972) (per curiam); see also Goldstein v. California, 412 U.S. 546, 561 (1973) (construing writings of authors as any "fruits of creative intellectual or aesthetic labor" by any originator); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 660 (2d Cir. 1955) ("There can be no doubt that, under the Constitution, Congress could give . . . the exclusive right to make and vend phonograph records of that rendition."). But cf. Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 HARV. L. REV. 409, 413 (1956) (noting argument that musical rendition may not be copyrighted because performer is not an author (citing *Hearings Before Subcomm. on Patents, Trade-marks, and Copy-
substantial similarity test to alleged infringers. Artists like Bette Midler, Nancy Sinatra, and Artie Shaw then would have the opportunity to argue that the simulators misappropriated their original contribution, a contribution worthy of protection under the Copyright Act.

Linda Benjamin