



# Sampling

BY GREGORY T. VICTOROFF, ESQ.

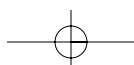
**A**t its best, sampling benefits society by creating valuable new contributions to modern music literature. At its worst, sampling is vandalism and stealing; chopping up and ripping off songs and recordings by other artists without permission or payment and fraudulently passing off the joint work as the work of a single artist, without giving credit to the sampled work or the unwilling collaborators. The practice is not new. In the 19th century, Rachmaninoff, Brahms and Liszt “borrowed” material from contemporary Niccolò Paganini’s Caprice No. 24 in A for use in their own compositions.

With the advent of digital technology and the increasing capabilities of cell phones and portable digital recording devices, more refined MIDI programs, affordable off-the-shelf sampling software and hardware and the almost universal use of personal computers, sampling sounds and manipulating them has become relatively easy. As a result, sampling has opened a Pandora’s box of old and new sound combinations, and with that, the necessity for new interpretations of the issues of copyright infringement, privacy rights and unfair competition.

## COPYRIGHT INFRINGEMENT

Copyright owners have the exclusive right to authorize the making of copies and derivative works based on the original work, whether a musical composition or a recording. Unauthorized sampling violates these rights.

The music publisher, by itself or together with the songwriter(s), usually owns the copyright in the song. Previously, under traditional recording contracts, the recording company owned the copyright in the sound recording. Today, as the quality and affordability of home recording and mixing equipment improves, many more artists, whether distributed by small independent labels or major music conglomerates, own and retain the copyrights in their recordings or “masters.” In December 1999, Congress amended section 101 of the Copyright Act to include *sound recordings* among the nine categories of works that may be owned by an employer or commission party as works made for hire. The amendment caused a firestorm of controversy from recording artists. Sheryl Crow and many other artists testified against the Amendment at Congressional Hearings and as a result, a year later Congress passed “The Work Made For Hire Copyright Correction Act of 2000” that repealed the 1999 Amendment. Today, sound recordings are not enumerated in section 101 of the U.S. Copyright Act as



qualifying as works made for hire. However, Congress specifically left undecided the issue of whether sound recordings could qualify as works made for hire.

## BREACHES OF CONTRACT

### Warranties

Copyright infringement from illegal sampling may breach warranty provisions in recording contracts. Provisions called “Warranties,” “Representations” and “Indemnifications” are almost always found in contracts between musicians and record companies; musicians and producers; producers and record companies; music publishers and record companies; songwriters and music publishers; record companies and distributors; and between distributors and record stores. According to these clauses, the person who provides the product (e.g., the songs, recordings, publishing rights, records, tapes, CDs) promises the person buying or licensing the product (the record company, Web site or record store) that the recordings do not infringe anyone’s copyrights or other rights.

If a lawsuit for illegal sampling is filed, it could result in lawsuits for “breach of warranty” between each person that sells the illegally sampled product. Claims apply from person to person along the record-making and marketing chain, creating a duty to indemnify each other person along the chain. Unless expressly disclaimed, the same chain of written and implied indemnities applies to transmissions of digital sound recordings via the Internet. Final legal responsibility may lie with the recording artist. The indemnification rights that exist between each person or company in the process trigger one another like a chain reaction. This can result in hundreds of thousands of dollars in liability to the artist that uses an unauthorized sample.

Indemnification provisions require the record distributor to pay the retailer’s damages and attorneys’ fees, the record company is required to pay the distributor’s fees and damages, the producer pays the record company’s fees and damages and the artist may be technically liable for everyone’s attorneys’ fees and damages.

### Unsatisfactory Masters

Another potential problem for musicians that sample is that most recording contracts give the record company the right to reject unsatisfactory masters. Masters that infringe copyrights of other sound recordings or musical compositions can be so rejected.

Artists are required to obtain copyright licenses (clearances) from the owners of sampled material or deliver substitute masters, which do not contain samples, to satisfy contract obligations to record companies.

Failure to comply with a record company’s master delivery requirements could result in the artist having to repay recording fund advances and defending legal claims for breach of contract.

### Fair Use Defense

The defense of fair use permits reasonable unauthorized copying from a copyrighted work, when the copying does not substantially impair present or potential value of the original work, and in some way advances the public benefit.

One rationale for the so-called fair use defense to copyright infringement is that only a small portion of the copyright work is copied. For many years there was a popular myth among musicians and producers that up to eight bars of a song was fair use and could be copied without constituting copyright infringement. This is not true. The rules determining which uses are fair uses, and not copyright infringement are not



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clear or simple. Many different economic and artistic factors go into determining whether or not a given use will be a productive and fair use. All of the circumstances of each case must be considered. The fair use standard for sound recordings is, however, generally stricter than for fair uses of musical compositions.

The reason for this difference is that U.S. copyright law only protects the expression of ideas, not the idea itself. Since there are a limited number of musical notes, copyright law treats single notes like ideas, and does not protect them. For this reason, it is safe to say that borrowing one note from a song will usually be a fair use of the copyright in the song, and not an actionable infringement. Borrowing more than one note, however, could be trouble. Lawsuits have involved copying as few as four notes from "I Love New York" and three words from "I Got Rhythm."

By selecting and arranging several notes in a particular sequence, composers create copyrightable musical compositions, or songs. Songs are the expression of the composer's creativity and are protected by copyright.

But different fair use standards apply to sound recordings. Since there is virtually an unlimited number of sounds that can be recorded, sound recordings are, by definition, comprised of pure, copyrightable expression.

For musicians, engineers and producers, the practical effect of the two different fair use standards is that sampling a small portion of a musical composition may sometimes be fair use because copying a small portion may borrow uncopyrightable single notes like uncopyrightable ideas. But recent court decisions have held that the owner of the sound recording copyright has an exclusive right to grant licenses to sample the recording, and any unauthorized use, no matter how small, constitutes an infringement. Thus, sampling even a fraction of a second of a sound recording is copying of pure, copyrightable expression, constituting copyright infringement.

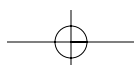
One way some producers and engineers that sample attempt to reduce the chances of a successful copyright infringement lawsuit is by electronically processing (camouflaging) portions of the sampled sounds beyond the point of their being easily recognizable. Filtering, synthesizing, or distorting recorded sounds can help conceal the sampled material while still retaining the essence of an instrumental lick or vocal phrase embodied in a few seconds of sound. Adding newly created sounds to the underlying sampling further dilutes the material. This is an attempt to change the sampled materials so that even though material was illegally *copied*, there is no substantial similarity, thus avoiding a suit for copyright infringement.

### UNFAIR COMPETITION

State and federal unfair competition laws apply when the record buying public is misled as to the source or true origin of recordings that contain sampled material.

The Lanham Act is a federal law that punishes deceptive trade practices that mislead consumers about what they are buying or who made the product.

If a consumer is confused by hearing sampled vocal tracks of James Brown, or sampled guitar licks by Eddie Van Halen, and mistakenly buys a record only to discover that he or she has bought a recording by a different artist, the consumer has been deceived by the sampling. Such confusion and deception is a form of unfair competition, which can give rise to legal claims for Lanham Act violations that can be brought in state or federal court, or unfair competition claims that may be brought in state court. All of the previous warnings about the costs of litigation apply here as well.



### LANDMARK LAWSUITS

In one of the most publicized sampling cases, the publisher of songwriter Gilbert O'Sullivan's song "Alone Again (Naturally)" successfully sued rap artist Biz Markie, Warner Brothers Records, and others for sampling three words and a small portion of music from O'Sullivan's song without permission for Markie's rap tune "Alone Again."

A lawsuit involving the unauthorized use of drumbeats sought strict enforcement of copyright laws against sampling. Tuff City Records sued Sony Music and Def Jam Records claiming that two singles by rap artist L. L. Cool J ("Around the Way Girl" and "Six Minutes of Pleasure") contained drum track samples from "Impeach the Presidents," a 1973 song by the Honeydrippers and that another Def Jam Record, "Give the People" included vocal samples from the same Honeydrippers song.

The case is important because the common practice of sampling drumbeats is often overlooked as a minor use, too insignificant to bother clearing. This lawsuit reinforces the rule that any sampling of a sound recording may lead to a lawsuit for copyright infringement. Courts have also found a particular harmony or the repetition of the word "uh-oh" in a distinctive rhythm sufficiently original to be protectable by copyright.

A lawsuit testing the limits of the fair use defense was brought by the Ireland-based rock group U2. The band, its recording company, Island Records, and music publisher Warner-Chappell Music sued the group Negativland for sampling a part of the U2 song, "I Still Haven't Found What I'm Looking For" without the group's permission. While attorneys for U2 claimed that the sampling was consumer fraud, Negativland maintained that the use was parody, satire and cultural criticism and was therefore protected under the fair use doctrine. The case was settled out of court. Negativland agreed to recall the single and return copies to Island Records for destruction.

*Jarvis v. A&M Records* was a lawsuit over the taking of eight words ("Ooh ooh ooh ooh...move...free your body") and a keyboard line. The sampling party argued that the amount of material taken was too insignificant to constitute copyright infringement. The federal district court in New Jersey disagreed and refused to dismiss the suit, ruling that even similarity of fragmented portions of the song could constitute infringement if the portions taken were qualitatively important.

Recently, in Tennessee, the publisher of the musical composition and the owner of the sound recording of "Get Up Off Your Ass and Jam" by George Clinton and the Funkadelics each sued the Miramax and Dimension film companies over the inclusion of a two-second sample from the guitar solo that was lowered in pitch, "looped" and extended to 16 beats lasting seven seconds in the composition "100 Miles" in the soundtrack of the film *I Got the Hookup*. After several interim rulings, the court's final decision was that the portion of the musical composition used (a three-note arpeggiated chord repeated several times) was insufficiently original to constitute infringement of the musical composition. However, the court applied an entirely different standard to the admitted use of the sound recording, holding that for a sound recording to be infringed, the two recordings need not be "substantially similar." Rather, the party bringing suit need only prove that the original sound recording was used without authorization.

### PRE-1972 SOUND RECORDINGS

Because U.S. copyrights in sound recordings were not recognized under federal law until February 15, 1972, in lieu of federal copyright protection, state common law copyright laws and state unfair competition statutes provide grounds to prosecute unauthorized samples of pre-1972 sound recordings.

### RIGHTS OF PRIVACY VIOLATIONS

When sampled material incorporates a person's voice, statutory, and common-law rights of privacy ("rights of publicity") may be violated. In California, Civil Code section 3344 establishes civil liability for the unauthorized commercial use of any living person's voice. Such a use would include sampling.

Although current federal moral rights legislation does not protect sound recordings or voices, such protection may be available in the future. Meanwhile, many state laws make unauthorized sampling of voices a violation of state right-of-publicity laws. Further, if the sampled voice was originally recorded without the vocalist's permission, sampling such an unauthorized recording may violate other state privacy laws as well.

### FEDERAL ANTIBOOTLEGGING STATUTES

Effective December 8, 1994 the adoption of the Uruguay Round Agreements Act by the U.S. Congress amended U.S. law by adding both civil and criminal penalties for the unauthorized recording or videotaping of live musical performances.

Any person who recorded or sampled in the past, or records or samples in the future, any part of any live musical performance without the performer's consent, can now be sued under the new federal law for the same statutory damages, actual damages and attorneys' fees that are available in a traditional copyright infringement suit.

Previously, unauthorized recording of live performances was prohibited only under certain state laws.

Federal copyright law (17 U.S.C. §1101 *et seq.*) currently contains provisions which apply to so-called bootleggers that secretly record or sample live musical performances, or copy such illegal recordings by including sampled portions in new recordings. This strict law also prohibits selling or even transporting bootlegged recordings.

Remarkably, the law is retroactive, protecting even pre-1994 recordings if they are currently being sold or distributed, and has no statute of limitations, so that arguably suit can be brought against bootleggers and sellers of bootlegged recordings 10, 20, even 100 years after the unauthorized recording was made, if the unauthorized recordings are sold or distributed after the effective date of the Act. Unlike copyrights, which usually only last for the life of the author plus 70 years, the new federal musical performance rights are perpetual, lasting forever. Moreover, the defense of fair use may not apply to such unauthorized recordings because the fair use defense in section 107 of the Copyright Act was not incorporated into the statute.

Recent court decisions have held the antibootlegging statute to be unconstitutional because live musical performances are not "fixed" and thus are not "writings" subject to copyright protection and because the protection afforded under the statute is perpetual and not limited in time.

Of even greater concern are criminal penalties (18 U.S.C. §2319A) of forfeiture, seizure, destruction, and up to ten years imprisonment for knowingly, for profit, making or distributing copies of illegally recorded performances, transmitting an illegally recorded performance, or distributing, selling, renting, or even transporting illegally

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recorded performances, even if the performance occurred outside the United States!

Notwithstanding the possible unconstitutionality of the antibootlegging statute, the serious ramifications of outlaw sampling are obvious. Sampling any part of a live performance, or any part of an unauthorized recording of a live musical performance triggers a minefield of federal civil and criminal penalties. Great care should be taken to avoid using such bootlegged recordings in any way.

### NO ELECTRONIC THEFT ACT

Both civil and criminal liability may result from sampling preexisting recordings or compositions acquired from unauthorized MP3-type files in electronic or digital form using the global computer network, commonly referred to as the Internet. In late 1999, Jeffrey Gerard Levy, a 22-year-old University of Oregon student was sentenced to two years probation after pleading guilty to illegally distributing copyrighted materials including MP3 files, movie clips, and software. As the first person convicted under the No Electronic Theft (NET) Act, Levy could have been sentenced to three years in prison and fined up to \$250,000.

### PENALTIES

Attorneys are always expensive. Entertainment attorneys usually charge \$100 to \$400 per hour. Those that are experienced in federal court copyright litigation often charge even more. Court costs and one side's attorneys' fees in a copyright trial average about \$350,000. If you lose the trial you will have to pay the judgment against you, which could be as high as \$100,000 for a single willful infringement (higher if there are substantial profits involved). An appeal of a judgment against you involves still more attorneys' fees and sometimes requires the posting of a bond.

In some cases a copyright infringer may have to pay the winning party's attorneys' fees. Copyright law also authorizes injunctions against the sale of CDs, tapes, and records containing illegally sampled material, seizure and destruction of infringing matter, and other criminal penalties.

In short, defending a copyright infringement lawsuit is a substantial expense and a risky proposition, exposing one to the possibility of hundreds of thousands of dollars in legal fees and costs.

Even if a particular sampling does not constitute copyright infringement, and is a fair use, it must still avoid violation of state and federal unfair competition laws.

### COPYRIGHT CLEARANCES

Obtaining advance permission, copyright licenses or clearances from owners of both the musical composition and the sound recording you want to sample is the best way to avoid the problems and expenses that can result from illegal sampling.

Many factors affect whether and when musicians should request and pay for clearances for samples. Although copyright laws and general music industry practices do not give rise to a lawsuit in every sampling situation, the enormous expenses of any sampling dispute should be avoided whenever possible.

In many cases, it is wise to clear samples early in the recording process even if, eventually, they are not used, because when the record is finished and the sample must be cleared, the artist will have little leverage in negotiating clearance fees.

In some cities, special music clearance firms routinely request, negotiate, prepare, and process clearances for sampled materials for a fee. They know reasonable rates for



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clearances and will prepare valid copyright licenses for less cost to the requesting party than will most music attorneys.

### Clearance Costs: Royalties

The cost of clearances is a major consideration in deciding whether to sample. Generally, record companies will not pay an artist more than the full statutory mechanical license fee for permission to sell recordings of the artist's composition. In 2006, the statutory rate was 9.1¢ per unit, for up to five minutes of a recording. However, most record companies and others typically negotiate mechanical license fees of only 50% to 75% of the statutory rate to record an entire composition. Out of that mechanical license fee, the sampling artist must pay the owners of any sampled material. If the clearance fees for the sampled material are too high, none of the mechanical license fee will be left for the sampling artist, and the sampled cut may end up costing the artist more than is earned by the entire composition.

Sampling royalty rates for musical compositions can range from 10% to 25% of the statutory rate. Sampling royalty rates for sound recordings range from .5¢ to 5¢ per unit sold.

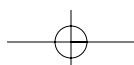
Clearance costs double or triple when more than one sampled track is included in a recording. Imagine, for example, a composition containing Phil Collins' snare drum sound, Jimi Hendrix's guitar sound, Phil Lesh's bass, and Little Richard's voice. In this case, combined sampling clearance fees could make the multitrack recording impossibly expensive.

Sampling clearance practices vary widely throughout the music industry. Fees are affected by both the quantity of material being sampled (a second or less is a "minor use," five seconds is a "major use") and the quality of the sampled material (i.e., a highly recognizable lyric sung by a famous artist would be more expensive than an anonymous bass drum track). Certain artists demand exorbitant fees to discourage sampling. On the other hand, some music publishers offer compositions in their catalogs and actively encourage sampling. Prices are affected by the popularity and prestige of the sampling artist and the uniqueness and value of the sampled sounds.

### Clearance Costs: Buyouts and Co-Ownership

A percentage of the mechanical license fee (royalty) is one type of clearance fee. Another is a one-time flat-fee payment (buyout) for the use of sampled material. Buyout fees range from \$250 to \$10,000, depending on the demands of the copyright owners. Up to \$50,000 or more may be charged for a major use of a famous artist's performance or song. An upper limit on the number of units embodying the sampled material that may be sold may be imposed by some licensors, requiring additional payment at a higher royalty rate or an entirely new license if the maximum is exceeded.

More frequently, music publishers and record companies demand to be co-owners of the new composition as a condition of granting permission to sample. The option of assigning a share of the publishing (i.e., the copyright) in the song containing the sampled material to a publisher or record company may be helpful to the sampling artist, particularly when a buyout of all rights is not possible. Assigning a portion of the copyright in lieu of a cash advance may be less of a financial burden on an artist, enabling a song to be released where the cost or unavailability of a license would otherwise preclude the record from being distributed legally. If you license the sample for a percentage of the statutory rate, and you later want to license your song with the sample in it for a



film, the film producer must obtain separate permission from the publisher who has granted the license. That publisher must always be consulted in new licensing situations. On the other hand, if you negotiate a buyout, you are free from any continuing obligation to the publisher. Similarly, if you negotiate income participation, which is to sell a percentage of your song in return for permission to sample, the publisher becomes a part owner of your song, and may or may not have approval rights in future licensing of the new work depending on the administration terms in the sampling license. Percentage of income participation ranges from 5% for a minimal use within the song to as much as 75% if the sample has been utilized throughout the song and is an integral part of the work.

### **GUIDANCE FOR NONFAMOUS ARTISTS THAT WANT TO NEGOTIATE SAMPLING RIGHTS FROM LARGE COMPANIES**

For the aspiring recording artist, the most efficient and least expensive way to include high-quality samples without risking a lawsuit or sacrificing royalties is to purchase commercially available sampling software. Various “precleared” or public domain instrumental sounds and effects are available for unrestricted use. These may be incorporated into recordings without payment of any royalty or fee beyond the initial cost of the program.

If you are determined to use a sample of a recording owned by a major label or publisher, the following suggestions may improve your chances of obtaining a sampling license at an affordable rate.

Send a written request for a sample license either to the publisher of the musical composition or to the record company. Publishers and record companies may be more willing to grant low-cost licenses to sample dormant catalog artists that are not currently enjoying significant sales, than for their hottest artists with records on the charts.

Include an explanation of how the intended sample will be used, the length of the proposed sample and other facts that would encourage the granting of the license. For example, if your most recent recording had good sales or positive reviews, this may be helpful. If you are not signed to a record company and the sampled recording will not be distributed commercially, for example, a demo tape or a soundtrack for a student film, this fact may convince the publisher or record company to issue a free or low-cost “festival” or “demo” license that permits the sample as long as the demo or film are not commercially distributed. If you later want to sell or distribute the film or demo or publicly perform it on radio or TV, you will have to return to the licensor and negotiate a license at current commercial rates.

### **AMERICAN FEDERATION OF MUSICIANS PAYMENTS**

Under certain circumstances, the American Federation of Musicians (AFM) collects fees for its member musicians when a record company uses a sample of a preexisting recording in a new recording. When a portion of a recording containing the performance of a “covered musician,” i.e., an AFM member, who is a “nonroyalty artist” (a musician who plays on the recording but does not receive record royalties) and is not a self-contained royalty group or symphonic musician, is sampled under the following AFM definition, the company owning the recording that is being sampled makes a one-time lump sum payment of \$400 for the first sample (regardless of how many times it is used in the new recording) and a one-time lump sum payment of \$250 for each additional sample from the same recording, plus 2% of the gross revenue received





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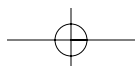
by the company in excess of \$25,000, less the lump sum payments that have already been made. These payments are made to the Sound Recording Special Payments Fund, which are then distributed to the musician members. The AFM's definition of a sample is "the encoding of a portion of a phonograph record containing the performance of a Covered Musician(s) into a digital sampler, computer, digital hard drive storage unit or any other device for subsequent playback on a digital synthesizer or other play-back device for use in another song; however, a re-mix or re-edit of the new song shall not be considered a sample for purposes hereunder." Note that the definition includes not only samples embodied in traditional tapes and CDs, but also includes samples embodied on synthesizers, samplers, and other playback devices.

### SOUNDTRACK SAMPLING

Occasionally, artists sample things other than music, such as audio bytes from feature films, television shows, or news footage. In these cases, permission must be obtained from the owner of the footage. Fees range from \$1000 to \$8000 per minute for buyouts, which must be negotiated directly with the representative for the actor whose voice is being sampled. The minimum fee for such use is the Screen Actors Guild's full day rate, which is currently \$737 in Los Angeles (subject to change yearly). Private licensing agents such as CMG in Indianapolis, Indiana may charge far more for permission to sample the voice of someone of the caliber of Elvis Presley or Marilyn Monroe. If a film or television program is used, payments may also be due to the writers' and directors' guilds and to the American Federation of Musicians.

### CONCLUSION

Throughout history, every new development in music has been greeted with suspicion by the music establishment of the day. Polyphony (playing harmonies) was considered demonic in medieval times, and was punishable by burning at the stake. As modern musicians explore innovative chord progressions, syncopated rhythms, and new electronic instruments, we all learn more about the musical landscape around us. Only time will tell whether samplers will be viewed as musical innovators or plagiarists.



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### SAMPLE USE AGREEMENTS

The Master Sample Use License Agreement and Mechanical License are short-form examples of licenses to incorporate or sample portions of a recording of a musical composition. Permission to sample the musical composition is granted by the music publisher(s) in the Mechanical License; permission to sample the recording of the musical composition is granted by the record company in the Master Sample Use License Agreement.

Fees for using the master and the musical composition are expressed as a one-time flat fee or buyout, and perpetual, worldwide rights are granted. As discussed above, such extensive rights may not always be granted. Limits on the term, territory or number of units that may be sold, co-ownership and coadministration of the recording and co-ownership of the musical composition embodying the sampled material, or statutory compulsory license fees on every copy sold, may be required by certain record companies and music publishers.

### MASTER SAMPLE USE LICENSE AGREEMENT

In consideration of either (the sum of \$ \_\_\_\_\_ which covers \_\_\_\_ % of the copyright) or (granting \_\_\_\_ % of the copyright and publishing right [and coadministration rights]) for the rights and license herein granted thereto, \_\_\_\_\_ (Record Company), hereinafter referred to as "Licensor," hereby grants to \_\_\_\_\_ (sampling Artist and/or recording company), hereinafter referred to as "Licensee," the nonexclusive, limited right, license, privilege and authority, but not the obligation, to use a portion of the Master Recording, defined below (hereinafter referred to as the "Master"), as embodied in the tape approved by Licensor, with no greater usage of the Master than is contained in the approved tape (the "Usage"), in the manufacture, distribution, and sale of any phonorecord (as that term is defined in Section 101 of the Copyright Act) entitled "\_\_\_\_\_" ("Album"), performed by \_\_\_\_\_ ("Artist") embodying the recording \_\_\_\_\_ ("Master") as performed by \_\_\_\_\_ ("Sample Artist"), and produced by \_\_\_\_\_ ("Producer"). Licensor additionally grants to Licensee the right to exploit, advertise, publicize, and promote such Master, as embodied in the phonorecord, in all media, markets, and formats now known or hereafter devised.

1. The term of this agreement ("Term") will begin on the date hereof and shall continue in perpetuity.
2. The territory covered by this agreement is \_\_\_\_\_.
3. It is expressly understood and agreed that any compensation to be paid herein to Licensor is wholly contingent upon the embodiment of the Master within the phonorecord and that nothing herein shall obligate or require Licensee to commit to such usage. However, such compensation shall in no way be reduced by a lesser use of the Recording than the Usage provided for herein.
4. Licensor warrants only that it has the legal right to grant the aforesaid master recording use rights subject to the terms, conditions, limitations, restrictions, and reservations herein contained, and that this license is given and accepted without any other warranty or recourse. In the event said warranty is breached, Licensor's total liability



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shall not exceed the lesser of the actual damages incurred by Licensee or the total consideration paid hereunder to Licensor.

5. Licensor reserves unto itself all rights and uses of every kind and nature whatsoever in and to the Master other than the limited rights specifically licensed hereunder, including the sole right to exercise and to authorize others to exercise such rights at any and all times and places without limitation.

6. This license is binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto.

7. This contract is entered into in the State of California and its validity, construction, interpretation, and legal effect shall be governed by the laws of the State of California applicable to contracts entered into and performed entirely therein.

8. This agreement contains the entire understanding of the parties relating to the subject matter herein contained.

IN WITNESS WHEREOF, the parties have caused the foregoing to be executed as of this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

**AGREED TO AND ACCEPTED:**

\_\_\_\_\_  
LICENSOR (COMPANY NAME)

\_\_\_\_\_  
LICENSEE (COMPANY NAME)

\_\_\_\_\_  
BY (SIGNATURE)

\_\_\_\_\_  
BY (SIGNATURE)

\_\_\_\_\_  
NAME AND TITLE (AN AUTHORIZED SIGNATORY)

\_\_\_\_\_  
NAME AND TITLE (AN AUTHORIZED SIGNATORY)

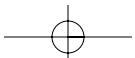
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**MECHANICAL LICENSE**

In consideration of the sum of \$ \_\_\_\_\_ which covers \_\_\_\_\_ % of the copyright and full payment for the rights and license herein granted thereto, \_\_\_\_\_ (“Licensor”) hereby grants to \_\_\_\_\_ (“Licensee”) the nonexclusive right, license, privilege, and authority to use, in whole or in part, the copyrighted musical composition known as \_\_\_\_\_ written by \_\_\_\_\_ and \_\_\_\_\_ (hereinafter referred to as the “Composition”):

1. In the recording, making, and distribution of phonorecords (as that term is defined in Section 101 of the Copyright Act) to be made and distributed throughout the world in accordance with the provisions of Section 115 of the Copyright Act of the United States (the “Act”), except it is agreed that: (1) Licensee need not serve or file the notices required under the Act; (2) consideration for such license shall be in the form of a one-time flat-fee buyout; (3) Licensee shall have the unlimited right to utilize the Composition, or any portion thereof, as embodied in the phonorecord, in any



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and all media now known or hereafter devised for the purpose of promoting the sale of the phonorecord which is the subject of this agreement; and (4) this license shall be worldwide.

2. This license permits the use of the Composition or any portion thereof, in the particular recordings made in connection with the sound recording \_\_\_\_\_ (“Album”) by \_\_\_\_\_ (“Artist”), and permits the use of such recording in any phonorecord in which the recording may be embodied in whatever form now known or hereafter devised. This license includes the privilege of making a musical arrangement of the Composition to the extent necessary to conform it to the style or manner of interpretation of the performance involved.

3. Licensor warrants and represents that it has the right to enter into this agreement and to grant to Licensee all of the rights granted herein, and that the exercise by Licensee of any and all of the rights granted to Licensee in this agreement will not violate or infringe upon any common-law or statutory rights of any person, firm, or corporation including, without limitation, contractual rights, copyrights, and rights of privacy.

4. This license is binding upon and shall inure to the benefit of the respective successors, assigns, and sublicensees of the parties hereto.

5. This agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, and may not be modified or amended except by written agreement executed by the parties.

6. This license may not be terminated for any reason, is entered into in the State of California, and its validity, construction, interpretation, and legal effect shall be governed by the laws of the State of California applicable to contracts entered into and performed entirely therein.

IN WITNESS WHEREOF, the parties have entered into this license agreement as of this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

AGREED TO AND ACCEPTED:

\_\_\_\_\_  
LICENSOR (COMPANY NAME)

\_\_\_\_\_  
LICENSEE (COMPANY NAME)

\_\_\_\_\_  
BY (SIGNATURE)

\_\_\_\_\_  
BY (SIGNATURE)

\_\_\_\_\_  
NAME AND TITLE (AN AUTHORIZED SIGNATORY)

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NAME AND TITLE (AN AUTHORIZED SIGNATORY)

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FEDERAL I.D./SS#

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FEDERAL I.D./SS#

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