LEGAL UPDATE

CLAIMING INFRINGEMENT OVER THREE NOTES IS NOT PREACHING TO THE "CHOIR": *NEWTON V. DIAMOND* AND A POTENTIAL NEW STANDARD IN COPYRIGHT LAW

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I. INTRODUCTION

Recording artists have utilized music sampling techniques for more than twenty years.[1] In the new technological era, digital music sampling has emerged and become a standard technique for many artists, especially in rap and hip-hop music. In the absence of the proper licenses, artists who practice digital sampling raise serious issues of copyright infringement. Courts have generally showed little sympathy toward unlicensed sampling, even recommending criminal charges in one case.[2] However, a recent Ninth Circuit decision involving the rap group, the Beastie Boys, might signal a change of course in the way digital sampling contests are analyzed in copyright infringement claims.[3] In *Newton v. Diamond*, the Ninth Circuit held that in evaluating such cases, a court should consider not only the similarity, but also the artistic "significance of the copied portion in relation to the plaintiff's work as a whole."[4] The court affirmed a district court decision that the sampled portion of flutist James Newton's song "Choir" was not significant when compared to his entire original composition, and held that the Beastie Boys did not infringe his copyright.[5] The court classified the use as "*de minimis*" and

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[1] Tyrone McKenna, *Where Digital Music Technology and Law Collide-Contemporary Issues of Digital Sampling, Appropriation and Copyright Law*, 1 The Journal of Info., Law and Tech. 6326 (July 2000).

[2] Grand Upright v. Warner Bros., 780 F.Supp. 182, 185 (S.D.N.Y. 1991) (holding that rapper Marcel Hall, a.k.a. Biz Markie, willfully infringed music owner's copyright).

[3] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003).

[4] *Id.* at 596.

[5] *Id.* at 597.

one which an average listening audience would not recognize as part of Newton's composition, emphasizing the fact that only three notes were sampled.[6] That aspect of the controversy might serve to distinguish future cases. Alternatively, the court's decision could transfer a significant portion of the evidentiary burden onto plaintiffs asserting copyright infringement resulting from digital sampling.

II. CASE HISTORY: BEASTIE BOYS AND NEWTON

James Newton is an accomplished jazz flutist who recorded the song "Choir" in 1978.[7] Inspired by watching four women singing in a church as a child, Newton wrote the song in an effort to blend African-American gospel music with other musical art forms.[8] In 1981, Newton licensed all rights to the sound recording to ECM records for $5,000.[9] Under U.S. Copyright law, a recorded musical work contains both a sound recording copyright[10] and a compositional copyright.[11] A musical group performing another artist's copyrighted work must obtain a license for both copyrights.[12] Newton retained the compositional rights which were not included in the ECM license.[13] In 1992, the rap group Beastie Boys ("Beasties") used a six second segment of "Choir" in their song "Pass the Mic."[14] ECM licensed portions of the sound recording to the Beasties for a flat fee of $1,000, but the Beasties did not license the underlying compositional copyright from Newton.[15] The Beasties' song became a hit and their album entitled "Check Your Head," went multi-

[6] *Id.* at 598.

[7] *Id.* at 592.

[8] *Id.* ("[Newton] intended to incorporate elements of African-American gospel music, Japanese ceremonial court music, traditional African music, and classical music, among others.").

[9] *Id.*

[10] *See* 17 U.S.C. § 102(a)(7) (2003).

[11] *See* 17 U.S.C. § 102(a)(2) (2003); *See also* BTE v. Bonnecaze, 43 F. Supp. 2d 619, 628 (E.D. La. 1999) ("Sound recordings and the underlying musical compositions are separate works with their own copyrights."); T. B. Harms Company v. JEM Records, 655 F. Supp. 1575, 1577 (D.N.J. 1987) ("When a copyrighted song is recorded on a phonorecord, there are two separate copyrights: one on the musical composition and the other in the sound recording . . . . A copyright in the recording and in the song are separate and distinct and by statute are treated differently.").

[12] BTE, 43 F. Supp. 2d at 628 ("[T]he rights of an owner of a copyright in a sound recording do not extend to the song itself.") (citing N. Boorstyn, Copyright Law § 5:11 n. 54 (1981 & Supp.1986)).

[13] *See Newton*, 349 F.3d at 592; *see also* 17 U.S.C. §201(d) (2003).

[14] *Id.*

[15] *Id.*

platinum.[16] The Beasties also performed the song live in concert and as part of a 2002 DVD.[17] Newton, a senior professor of Music at California State University, Los Angeles,[18] did not realize "Choir" had been sampled until a student asked him about his association with the Beastie Boys.[19] Newton subsequently discovered "Pass the Mic" had been featured in MTV's show "Beavis and Butthead," further increasing his displeasure.[20] Newton then filed suit in the United States District Court for the Central District of California, claiming copyright infringement.[21] The district court granted summary judgment for the Beasties holding that the sampled portion was not qualitatively or quantitatively significant to the "Choir" composition, and that the Beasties' use of the sample was *de minimis*.[22] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's holding.[23]

III. DIGITAL SAMPLING AND COPYRIGHT LAW

A dictionary definition of sampling defines it as "a small separated part of something illustrating the qualities of the mass."[24] Musicians who utilize sampling generally mix the sampled portion with their own original musical sounds to create a new work. An artist sampling another composition may take just a few notes or capture an entire instrument line.[25] In the mid 1970s, hip-hop DJs would use analog turntables and mixers to infuse small segments of sampled music into new compositions.[26] As technology advanced, so did the frequency and complexity of sampling. With the arrival of digital technology in the 1980's, artists could easily separate unique sounds from an original work and incorporate them into new music.[27] Digital sampling

[16] Teresa Wiltz, *The Flute Case That Fell Apart: Ruling on Sampling Has Composers Rattled*, Washington Post, August 22, 2002 at C1.

[17] *Id.*

[18] *See Support The James Newton Legal Defense Fund*, meetthecomposer.org, *at* http://www.meetthecomposer.org/newton.html (last visited Jan. 14, 2004).

[19] *See* Wiltz, *supra* note 16.

[20] *Id.*

[21] *See generally* Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D.C.A. 2002).

[22] *Id.* at 45-47.

[23] *Newton*, 349 F.3d at 598.

[24] *See Copyright Law & the Ethics of Sampling*, *at* http://www.low-life.fsnet.co.uk/copyright (last visited Jan. 9, 2004) (quoting the definition of "sampling" from the Concise Oxford Dictionary of Current English, 1940).

[25] *See* McKenna, *supra* note 1 ("[S]ometimes, a few bars of an original recording are sampled, other times the whole bass or drum line from the original recording is sampled.").

[26] *See Newton*, 349 F.3d at 593 (citing Robert M. Szmanski, *Audio Pasitiche: Digital Sampling, Intermediate Copying, Fair Use,* 3 U.C.L.A. Ent. L. Rev. 271, 277 (Spring 1996)).

[27] *Id.*

involves

> "the conversion of analog sound waves into a digital code. The digital code that describes the sampled music . . . can then be reused, manipulated or combined with other digitalized or recorded sounds using a machine with digital data processing capabilities, such as a . . . computerized synthesizer."[28]

Artists today can easily manipulate and alter the sampled portions because of the transformation into digital binary code.[29] The sampled portion may even become so integrated into the new work that a listener hearing the resulting "hybrid" compositions might not recognize or distinguish the original composition providing the sample.[30] Contemporary artists frequently employ these digital sampling techniques, especially in the rap and hip-hop world.[31] Their widespread use of samples has led to concern among some of the original composers and many lawsuits asserting copyright infringement.[32]

Under United States Copyright law, an artist composing and recording a musical work holds two copyrights: one in the sound recording and another in the composition itself.[33] Other artists who wish to sample a portion of the copyrighted work are normally required to obtain a license for both copyrights. Artists who sample musical compositions without permission can subject themselves to a variety of penalties. A copyright owner who is successful proving infringement can receive actual damages as well as profits. [34] As an alternative, the copyright owner my elect to receive statutory damages ranging

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[28] Jarvis v. A & M Records, 827 F. Supp. 282, 286 (D.N.J. 1993) (quoting Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, 207 N.Y.L.J. 7, n.3 (May 22, 1992)).

[29] *Id*. ("Digital audio recording uses samples, which are numerical representations of ones and zeros . . . [T]ens of thousands of samples are taken for each second of sound . . . Once captured, this sound can be morphed, reversed, spliced into sections, re-spliced, equali[s]ed and effects added to varying degrees, depending on the nature of the users wishes.").

[30] *Id.*

[31] *See Newton*, 204 F. Supp. 2d at 1246 (C.D.C.A. 2002) ("The practice of sampling portions of pre-existing recordings and compositions into new songs is apparently common among performers of the genre known as rap. . . .") (quoting Williams v. Broadus, 2001 U.S. Dist. LEXIS 12894 at *1 n.1 (S.D.N.Y. Aug. 27, 2001).

[32] Note: most of these lawsuits settled out of court (examples cited by *Copyright Law & the Ethics of Sampling, supra* note 24: in 1989, *De La Soul* settled with the *Turtles* over the unlicensed sampling of '*You Showed Me*', in the 1990's *MC Hammer* settled with *Rick James* over the use of James' '*Superfreak*', and *Vanilla Ice* settled with *David Bowie* and *Queen* over his use of their song '*Under Pressure*').

[33] T. B. Harms Company v. JEM Records, 655 F. Supp. 1575, 1577 (D.N.J. 1987).

[34] 17 U.S.C. § 504(b) (2003).

from $750 to $30,000 for a single act of copyright infringement.[35] The intent of the infringer plays a significant role in the assessment of statutory damages. If the infringing artist did not believe and had no reasonable basis to believe he was committing an act of copyright infringement, the court may reduce damages down to $200.[36] By contrast, in a case where the artist willfully infringed, the court may increase the damages up to a sum of $150,000[37] and recommend criminal infringement charges.[38] Copyright owners may receive an injunction against any further infringement,[39] and the court may additionally order the impounding and destruction of existing infringing musical copies.[40] In cases where the court convicts a defendant of criminal infringement, the statute mandates the forfeiture and destruction of all infringing articles.[41] Lastly, the court may assess costs and attorney's fees against either party in a copyright infringement proceeding.[42]

In the United States, agencies such as the American Society of Composers (ASCAP) and Broadcast Music, Inc. (BMI) normally hold the copyrights to most sound recordings. Artists wishing to sample tracks usually do not have trouble obtaining sound recording licenses from those agencies, which then pay the original artists royalties.[43] However, samplers need additional permission from the owner of the compositional copyright, which is often the original artist. The courts have not looked kindly upon sampling artists who circumvent part of this process. The opinion for the 1991 case against rapper Marcel Hall (a.k.a. Biz Markie) opened with the often cited quote "[t]hou shalt not steal."[44] In that case, the Southern District Court of New York held that the fact that Hall had originally attempted to obtain a license for the compositional copyright represented irrefutable evidence that he had willingly infringed after using the sample without such a license.[45] The court considered these actions so egregious as to warrant criminal prosecution in addition to the preliminary injunction sought by the plaintiffs.[46]

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[35] *Id.* § 504(c)(1).

[36] *Id.* § 504(c)(2).

[37] *Id.*

[38] *Id.* § 506 .

[39] *Id.* § 502.

[40] 17 U.S.C. § 503 (2003).

[41] *Id.* § 506(b).

[42] *Id.* § 505.

[43] *See* McKenna, *supra* note 1.

[44] *Grand Upright Music*, 780 F. Supp. at 183.

[45] *Id.* at 184-185 ("In writing this letter, counsel for Biz Markie admittedly was seeking 'terms' for the use of the material. One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!").

[46] *Id*. at 185 ("[I]t is clear that the defendants knew that they were violating the plaintiff's rights as well as the rights of others. . . . This callous disregard for the law

In *Jarvis v. A & M Records*, the court struck down the defendant's motions for summary judgment for compositional copyright infringement and resulting damages.[47] The court declared that "there can be no more brazen stealing of music than digital sampling."[48] The court moved away from a strict test of first looking for a substantial similarity between the two works in question, and then determining whether or not a lay audience would recognize that similarity.[49] The standard similarity test became a non-issue because of the digital copying.[50] Since the defendant copied a portion verbatim, "fragmented literal similarity"[51] existed and the applied test was whether or not the portion appropriated contained original elements.[52] The court determined that the material in question was not insignificant to the plaintiff's work as a matter of law and that the defendant's profits might need an apportionment at a future trial.[53]

One recent case favoring the defendant in a sampling-related controversy was *Campbell v. Acuff-Rose Music*.[54] There the rap group "2-Live Crew" had appropriated portions of the Roy Orbison song "Oh, Pretty Woman" for their song "Pretty Woman."[55] The defendants argued that the fair use doctrine protected them from infringement since their song was a parody of Orbison's.[56] The Supreme Court agreed and applied a four factor test[57] focusing on the fact that the defendants had transformed the original work for parodic purposes, and that they occupied a different segment of the market

and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures. . . . This matter is respectfully referred to the United States Attorney for the Southern District of New York for consideration of prosecution of these defendants . . . .").

[47] 827 F. Supp. 282 (D. N.J. 1993).

[48] *Id.* at 295.

[49] *Id.* at 290.

[50] *Id.* at 289 ("[T]he copied parts could not be more similar—they were digitally copied from plaintiff's recording.").

[51] *Id.* at 289 (stating this represented "fragmented literal similarity" which occurs when literal verbatim similarity exists between plaintiff's and defendants' works) (citing 4-13 Nimmer on Copyright, § 13.03[A][2] (2003)).

[52] 827 F. Supp. at 291.

[53] *Id.* at 296.

[54] 510 U.S. 569 (1994).

[55] *Id.* at 571.

[56] *Id.*

[57] *Id.* at 576-77 (*The* court examined "(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.").

than Orbison.[58] The court rejected the appellate court's position that the commercial nature of the defendant's work should preclude a fair use defense.[59] Despite the judgment in favor of the defendants, the parodic nature of the work in question distinguished the *Acuff-Rose* from most sampling cases. Artists creating parodies must incorporate a significant proportion of the original compositional work so that the audience will immediately recognize the association with the transformed composition.[60] Only if the defendant takes more than a reasonable portion of the original to draw that parodic connection will infringement exist.[61] Most artists engaging in sampling techniques take duplicated portions of an original work to make a derivative type of composition without the goal of drawing a parodic association from the listening audience. For that reason, *Campbell v. Acuff-Rose Music* would only be of marginal value to most sampling artists wishing to assert a parodic fair use defense.

IV. *NEWTON V. DIAMOND*: THE DISTRICT COURT DECISION

The District Court for the Central District of California immediately noted that the Beasties had obtained a license to the sound recording of "Choir", leaving only Newton's compositional copyright infringement claim in question.[62] The court then focused on whether or not the abstract three note sequence (C—D-flat—C) used by the Beasties was protected by copyright.[63] Newton argued that the sampled notes standing alone were distinctive.[64] The court determined that while a "musical composition's copyright protects the generic sound that would necessarily result from any performance of the piece,"[65] the defendant's own unique performance techniques of the three note

[58] *Id.* at 593-94.

[59] 510 U.S. at 593-94.

[60] *See id.* at 588 ("When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable."); *see, e.g.*, Elsmere Music, Inc. v. National Broadcasting, 623 F.2d 252, 253, n.1 (2d Cir. 1980); Fisher v. Dees, 794 F.2d 432, 438-9 (9th Cir. 1986) (what makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know).

[61] *Acuff-Rose Music*, 510 U.S. at 588. ("Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.").

[62] *Newton,* 204 F. Supp. 2d at 1247.

[63] *Id*.

[64] *Id.*

[65] *Id*. at 1249.

sequence made it distinguishable.[66] Those performance techniques received protection only from the sound recording which the Beasties properly licensed.[67] The court then attempted to determine if three note sequence itself could receive protection and whether the defendant's use of the sequence, which had lasted six seconds in "Choir", constituted infringement.[68]

The court began its discussion by noting that "not every element of a song is per se protected."[69] Only the "original and non-trivial" portions of the plaintiff's composition may receive copyright protection.[70] Adam Diamond, a member of the Beasties conceded that the group had taken the "best bit" of "Choir" for their song "Pass the Mic", but contended that Newton's performance of the piece was what made it distinctive.[71] The court held that the three note sequence was not protectable even when accompanied by standard vocalization techniques.[72] However, the court specifically distinguished that standard vocalization from Newton's own unique performance techniques, which the compositional copyright did not cover.[73] Newton pointed to cases which held that short sequences of notes were protectable, but the court distinguished those as all involving more than that three notes.[74] The court also distinguished cases where as few as three words received protection, stating that "unusual words or sounds are necessarily more distinctive than a few generic notes of music."[75]

Alternatively, the court held even if the three notes were protected, the Beasties use of the three notes was a *de minimis* taking which did not constitute infringement.[76] A defendant's taking is *de minimis* where an average audience would not recognize the misappropriation.[77] Following the

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[66] *Id.* at 1252 ("In sum, what makes Plaintiff's performance "unique," according to his own experts, is the combination of performance techniques Plaintiff employs in the execution of his composition, consisting largely of techniques not notated in the score.").

[67] *Id.* at 1251 ("'[T]he Newton technique'—Newton's practice of overblowing the 'C' note to create a multiphonic sound, and his unique ability to modify the harmonic tone color—do not appear in the musical composition, they are protected only by the copyright of the sound recording of Plaintiff's performance of Choir, which Defendants licensed.").

[68] *Newton,* 204 F. Supp. 2d at 1252.

[69] *Id*. at 1253.

[70] *Id.*

[71] *Id.* at 1258.

[72] *Id.* at 1253.

[73] *Id*. at 1256 ("[A]ny originality of the sample comes from Plaintiff's particular performance techniques, which are not at issue in this litigation.").

[74] *Newton,* 204 F. Supp. 2d at 1254.

[75] *Id.*

[76] *Id.* at 1257.

[77] *Id.* at 1256 (citing Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986)).

court in *Jarvis*, the district court noted that the sampling constituted a "fragmented literal similarity," and that the proper *de minimis* inquiry for audience recognition involved determining the significance of the quantitative or qualitative elements taken from the original. The court held that the three notes had no quantitative significance, and that the qualitative analysis showed the notes to be unoriginal and unimportant to the complete "Choir" composition.[78] The court emphasized that the quantitative inquiry focused on the appropriated segment of the plaintiff's work taken, not the extent to which the defendant incorporated that segment into the new work.[79] The fact that the Beasties had looped Newton's three note segment continuously throughout their song did not matter in the analysis, and the court awarded summary judgment to the Beasties on the copyright infringement claim.

V. *NEWTON V. DIAMOND*, THE NINTH CIRCUIT DECISION

On appeal, the Ninth Circuit only addressed whether the Beasties' use of the three notes constituted a *de minimis* taking. The court immediately acknowledged that "trivial copying does not constitute actionable infringement."[80] The court also placed little weight on the fact that the Beasties' acknowledged the copying of Newton's segment.[81] The court reiterated the importance of appropriation recognition by the average audience in the *de minimis* test. Where an average audience would not recognize the appropriation, one could not consider the works substantially similar.[82] Because the Beasties had obtained a license for the sound recording, the court only considered the use of the compositional work in the *de minimis* inquiry.[83]

During the inquiry, the court removed the legally licensed elements from consideration.[84] Significantly, the court disregarded Newton's performance techniques which only constituted part of the sound recording copyright.[85] Newton's own experts seemed to bolster the court's opinion that the unique portions of the three note sequence in "Choir" was due to Newton's talent as a musician, and not to the composition itself.[86] The court then proceeded to

[78] *Id.*

[79] *Id.*

[80] *Newton,* 349 F.3d at 595.

[81] *Id.* at 595 ("[E]ven where the fact of copying is conceded, no legal consequences will follow from the fact unless the copying is substantial.") (citing Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Newton,* 349 F.3d at 595 ("Indeed, as Newton's expert Dr. Oliver Wilson explained: The copyrighted score of 'Choir', as is the custom in scores written in the jazz tradition,

duplicate much of the district court's analysis in finding the three-note sequence was neither qualitatively nor quantitatively significant when compared to the composition as a whole.[87] In the quantitative analysis, the court added that the six second, three-note segment only constituted two percent of the total time length of "Choir."[88] The court also stated that qualitatively, the segment was "no more significant than any other section."[89] In affirming the lower court's decision of a *de minimis* taking, the court noted that none of Newton's experts were persuasive in establishing that the three-notes were uniquely significant, and that one expert had referred to the notes as "a simple neighboring tone figure" while stressing the performance contributions of Newton.[90] The expert for the Beasties referred to the segment as a "common, trite, and generic three-note sequence, which lacks any distinct melodic, harmonic, rhythmic, or structural elements."[91] The fact that the court limited the impact of Newton's performance contributions to the sound recording served as a key element in the both the expert testimony assessed and the court's final decision.

VI. CONCLUSION

The district court and Ninth Circuit decisions have established that if an artist obtains a license to a sound recording copyright, the compositional copyright infringement analysis will focus on the significance of the appropriated notes as drafted. Newton failed to convince the Ninth Circuit that a small sequence of notes could be unique when analyzed in the abstract. The very small number of notes used and the expert testimony were important factors in the court's holding. The court did not hold that sampling artists will never need to obtain both compositional and sound recording copyrights. However, if an artist obtains a sound recording license and samples only a few notes, that should be enough to make the sampling legal under copyright law. In such cases, the original musician's unique performance techniques and artistic influence do not factor into the analysis, even for qualitative aspects. This legal standard could make compositional copyright infringement extremely difficult to prove when the samples consist of a small number of notes. The fact that the sampled sound recording is used repeatedly throughout the new musical work would make little difference under the court's analysis.

The Ninth Circuit's decision could help define the boundary of what

does not contain indications for all of the musical subtleties that it is assumed the performer-composer of the work will make in the work's performance.").

[87] *Id.* at 597.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

constitutes legal musical sampling in the absence of a compositional copyright. However, the case could easily be distinguished by the fact that the Beasties only sampled three notes. Some composers still worry that the precedent could allow other artists to freely appropriate musical works.[92] The Beasties never dealt with Newton in obtaining the sound recording copyright, and originally offered him no compensation for the use of "Choir." Newton stated that the Beasties did offer to compensate him in a later settlement offer, but that the figure was "insulting."[93] The Beasties' offer for settlement and their concession that they had appropriated the "best bit" was the same type of evidence which caused the district court to lash out at Marcel Hall (a.k.a. Biz Markie) when it proclaimed "thou shalt not steal."[94] Unlike the Beasties, Hall appropriated three words in addition to a portion of the sound recording.[95] A more significant distinction was the fact that the Beasties obtained a sound recording license which Hall did not. But if artists only need an ASCAP or BMI sound recording license to sample short musical segments which appear commonplace when analyzed as written compositions, many composers may share Newton's frustration.

[92] *See* Wiltz, *supra* note 16; *see also, Response to L.A. Times Article by composer Jon Jang*, www.meetthecomposer.org, *available at* http://www.meetthecomposer.org/newton.html#jang (last visited Mar. 20, 2004); Emmett G. Price III, *Jazz Under Attack,!!!*, allaboutjazz.com (Oct. 2002), available at http://www.allaboutjazz.com/articles/jazz1002.htm (last visited Mar. 22, 2004).

[93] *See* Wiltz, *supra* note 16.

[94] *See Grand Upright Music*, *supra* note 44.

[95] *Id.*