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# Giant in the Hillside: Hip-hop and Copyright Law

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# Giant in the Hillside: Hip-hop and Copyright Law

An Honors Thesis

Presented to

The Faculty of the Department of Music

Bates College

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Degree of Bachelor of Arts

by

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## Introduction

The proverbial Giant named hip-hop is no longer coming down from the hillside to visit the townspeople; it has made permanent residence in the town. Hip-hop culture is one of the most visible, controversial, and discussed musical genres in contemporary popular culture. Originating in New York City in the 1970's, hip-hop is firmly embedded within the music and culture of the African diaspora, especially jazz, blues, funk, gospel, and soul music. This thesis will focus on the practice of sampling, the musical technique of taking a portion of a sound recording and reusing it to create an entirely new song. In the late 1980s, hip-hop experienced its "Golden Age", with many of its artists becoming certifiable pop stars. As the music became more popular, the music industry began to take notice, helping to distribute this exciting new genre. The hip-hop of this era is characterized for its liberal use of samples – often from well-known songs – that created a collage aesthetic immediately identifiable with the era. In 1991, rapper Biz Markie was sued for copyright infringement, ultimately going to court and losing the case in a decision that forced hip-hop artists to seriously consider the legal risks associated with sampling.

In an ideal world, copyright law promotes the creative rights of artists, protecting their economic rights so that they have an incentive to create. Obviously we don't live in an ideal world, but hip-hop music has revealed that copyright law has not come close to its ideal. In the wake of the Biz Markie copyright infringement case, the music industry eventually realized that there were many unlicensed samples used in popular hip-hop songs. In subsequent copyright infringement claims levied against hip-hop artists, courts overwhelmingly favored the plaintiffs, agreeing that many hip-hop artists willfully broke the law with their sampling practices.

Gradually, a narrative began to emerge that equated sampling with theft, with plaintiffs claiming that sampling was a predatory art form in which hip-hop artists borrow the popularity of the artists they sampled to increase their sales. Critics of sampling have argued that sampling is an unethical musical practice, a veritable free-for-all where, instead of playing “real” instruments, hip-hop producers are using technology and artifice to create music more easily. The purpose of this thesis is to lay out the legal landscape in which this argument of “theft” has been used to impede the creativity of hip-hop artists. In the current legal environment, copyright is more efficient at protecting the rights of copyright holders, more often than not the few corporations that dominate the music industry. Hip-hop music has challenged assumptions about artistic creativity, originality, and authorship that indicate that the current copyright law must be reformed.

In the first chapter, I will explore the historical context of hip-hop culture from its emergence in New York City up to the present day. I will detail the emergence of the musical practice and the larger culture with an emphasis on the development of sampling techniques. In addition, I will also explore the effect that the corporations that comprise the music industry have had on the development of hip-hop, particularly in their promulgation of many of the false negative assumptions that have contributed to the overall narrative equating sampling with theft. The endpoint of the first chapter will be an explanation of the internal set of rules that represent hip-hop artists’ ethics of sampling. In the second chapter I will give an overview of the United States copyright law, focusing on the parts of the law that challenge the practice of sampling. I will also explore the philosophical and historical origins of copyright law dating back to early iterations of copyright law in Europe. The philosophical aspects of copyright law will be a central focus later in the chapter when I explain how the important concepts of authorship,

ownership, and originality developed within copyright law. The third chapter will be structured as a series of case studies, which will further illuminate the issues that sampling causes within copyright law. In the fourth and final chapter, I will continue my discussion of problematic areas of copyright, specifically the inexact fit of property law theories that run throughout copyright law. I will also introduce some possible reforms to the current copyright system that have been proposed by legal scholars. Finally, I will update my earlier definition of internal sampling ethics focusing on the effect that technology has had on hip-hop production, and the ways in which producers have overcome the obstacles that arose from copyright law.

## Chapter 1: Standing on the Shoulders of Giants: Hip-hop and the Ethics of Sampling

In this first chapter I will introduce hip-hop culture, discussing various issues pertinent to the hip-hop community, as well as common external misconceptions that have formed a negative stigma surrounding hip-hop from the beginning. Hip-hop has an incredibly rich musical and cultural history, following a similar trajectory to that of other African American music such as jazz and blues. Both of those early forms of black music were dismissed as fads when they first became noticed. Hip-hop is certainly no different, despite becoming one of the most recognizable and lucrative musical genres today. Many of its musical practices have made their presence felt in popular music, and it is virtually impossible to ignore its influence. Many hip-hop producers, such as Pharrell, Timbaland, and Kanye West, have transcended boundaries by producing pop hits for a variety of artists in other genres. Furthermore, hip-hop culture has permeated every layer of popular culture, much to the dismay of some observers. Many of its critics -- particularly the media, the legal world, and politicians -- fixate on the violence, misogyny, and hatred towards white people, while also criticizing the use of illegal samples (Rose 1). Some critics have even gone so far as to say that hip-hop should not even be considered music, dismissing it as noise. These criticisms, while sometimes valid (particularly with respect to violence and misogyny in some rap lyrics), oftentimes consist of little more than shallow, philistine remarks.

One of the most important techniques used to construct hip-hop songs heard today is sampling, the basis for hip-hop beats. The second musical element of hip-hop composition is rhymes performed by the MC, also more often referred to as a rapper (Schloss 2). The aesthetic effect of this type of composition creates a sonic collage, borrowing any sound and

reappropriating, remixing, and recontextualizing to create a unique song with a new meaning.

Sampling is a consistently controversial subject. Hip-hop dee-jays and producers each have their own set of rules in their approach to sampling, and there has emerged throughout hip-hop a coherent set of internal sampling ethics. These ethics range from vague aesthetic convictions, to more specific technical aspects of sampling that are condemned by many hip-hop purists.

Copyright infringement exists to protect artists' original ideas, but inevitable difficulties arise when the law tries to determine what constitutes an original idea, and especially when courts are asked to determine whether or not a use of a sample is legal. Unfortunately, the application of the law has become increasingly restrictive when applied to hip-hop, negatively affecting many producers and forcing them to react by changing their use of samples. Many producers view the threat of litigation as a "threat to their aesthetic ideals and has caused them to redouble their efforts to emphasize sampling in their work", while others have been "increasingly rejecting the use of samples in favor of other sound sources" (Schloss 6). Many of the legal decisions seem puzzling when viewed from an insider's perspective, and many of the judges, lawyers, and non-hip-hop musicians demonstrate an inherent lack of knowledge about hip-hop culture.

The issue of sampling ethics is a divisive, labyrinthine discussion among hip-hop insiders, and for this reason it is frightening that an outsider is able to wield so much influence determining and critiquing this internal ethic. In other words, there is a well-established discourse of sampling ethics within hip-hop, which will be necessary to define in order to apply them in a substantive way to copyright infringement cases. One of the unique aspects of hip-hop culture is the reverence current artists have for those who came before them. What many outside observers might view as theft might be more properly described from an insider perspective as homage. Modern practices in hip-hop culture can only be fully understood within the context of

its history. The goal of this chapter is to discuss the internal code of sampling ethics, in order to properly frame the culturally illiterate angle from which the legal world views hip-hop and sampling. Before I explain sampling ethics, I will explore early hip-hop culture, issues surrounding the related concepts of authorship, originality, and authenticity, the ways in which constructions of race have framed and influenced the discussion surrounding hip-hop, and finally the transformative effect of technology on sampling practices.

### Cultural and Musical Foundations of Hip-hop

All hip-hop, and all music for that matter is built on the music of previous artists. The giants of early hip-hop cast a very large shadow and their influence helped enormously to shape modern hip-hop musical and cultural practices. According to one of the first hip-hop artists Afrika Bambaataa, there are five pillars of hip-hop: MC-ing, Dee-jaying, b-boying, graffiti, and Knowledge, Culture, and Overstanding (Price 21, 37) (Kitwana 10). However, the author Bakari Kitwana notes that this definition has expanded enormously with the commercialization of hip-hop, or more simply rap, and refers to “hip-hop specific language, body language, fashion, style, sensibility, and worldview” (Kitwana 10). I will use the term rap to refer to the musical compositions and hip-hop to refer to cultural aspects of the music both of which might seem foreign outsiders. In addition, hip-hop borrows elements of black cultural and musical practices that help to illustrate the hereditary aspect of the culture. It is the next evolution of the black music and cultural practices that preceded it.

Hip-hop combines an enormously diverse range of black cultural and musical practices spanning many years. Tricia Rose, in her seminal book on hip-hop culture, framed rap as a post-literate practice that combines elements of both written and oral cultures. A post-literate practice such as rap music merges:

orally influenced traditions that are created and embedded in a postliterate, technologically sophisticated context. It also has the capacity to explain the way literate-based technology is made to articulate sounds images and practices associated with orally based forms, so that rap simultaneously makes technology oral and technologizes orality”(Rose 86).

These traditions complicate some of the important issues regarding authorship that copyright law often deals with. In a concrete sense, each rap song is its own unique composition created by one or more authors. However, the concept of authorship is blurred by both sampling and rap lyrics. The artistry of a rap song is not in the originality of the story, but rather the style in which it is performed. Technology has taken these oral practices and transformed them so that practices used for a more ephemeral art form can be used to create a tangible object.

Hip-hop began in the South Bronx, originally in the form of live performances in which a deejay would play highly rhythmic, danceable music on turntables (Rose 2) (Schloss 2). Put simply, hip-hop began as party music. These parties were spontaneous in nature, with deejays connecting their turntables to any available electrical source (Rose 51). Kool Herc, Afrika Bambaataa, and Grandmaster Flash are most often identified as the pioneering deejays and eventually producers of hip-hop music (Fricke 22). They threw parties in the Bronx where they sampled the percussion breaks and extended them using turntables to create the earliest instance of hip-hop production. All three of these original deejays had enormous musical and cultural influence, pioneering some important deejay techniques. Afrika Bambaataa refers to himself as the Godfather of deejaying and Kool Herc as the father (Fricke 45). Bambaataa was also especially known for finding the most obscure records, and the influence of traditional African musical rhythms was clearly heard in his style (Fricke 46). Grandmaster Flash was especially

known for his use of much shorter breaks, finding it a challenge to take multiple breaks and blend them into one cohesive, continuous track; this also led to his perfection of an incredibly influential technique: scratching (Fricke 61). Although Grand Wizard Theodore is credited with inventing scratching, he was not well enough known to be truly influential with the technique (Rose 53). Scratching allows the deejay to improvise a rhythm over the breaks, adding a more traditional performance element. Eventually, the deejay was joined by the MC, who helped to keep the crowd dancing. The melding of the MC and the deejay as a singular performance unit created the foundation for the typical composition of the modern hip-hop group.

Deejay performances attracted larger and larger crowds that began to require more than a deejay. This void was filled by the MC, short for Master of Ceremonies. Originally existing to primarily keep the crowd engaged in the performance, the role of the MC evolved enormously (Price 36). Eventually the MC was not simply a sideshow, becoming just as popular as the deejays. This rise in popularity was the precursor to many popular early hip-hop groups forming, and was an important benchmark in the evolution of what was largely a performance-based musical form into something that could be recorded and consumed. In addition to being a founding hip-hop DJ, Grandmaster Flash also started one of the first and most recognizable, influential, and popular hip-hop groups: Grandmaster Flash and the Furious Five. He recruited three friends, Kid Creole, Cowboy, and Melle Mel, to perform boasts during his shows (Rose 54). Their success prompted them to start recording, which led to the classic song “The Message”. Much like the sampling and deejaying practices of hip-hop producers, MCs borrowed heavily from a legacy of African American orality. These Afrodiasporic practices are not highly visible within mainstream culture which led to confusion about the origin of certain musical and cultural features of hip-hop within the media and especially the legal world. However, musical

and cultural practices of the African diaspora were incredibly important for the disenfranchised youth community that existed at the beginning of hip-hop, and served a necessary purpose.

Identity and style are incredibly important within hip-hop. This is in part due to the competition between different artists and their control over certain geographical areas. Deejays and MCs alike fought to set themselves apart from their contemporaries and were determined to create a unique persona and recognizable style. Tricia Rose writes at length about the importance of style, particularly for the youth. Hip-hop began as:

a source for youth of alternative identity formation and social status in a community whose older local support institutions had been all but demolished along with large sectors of its built environment....Identity in hip-hop is deeply rooted in the specific, the local experience, and one's attachment to and status in a local group or alternative family" (Rose 34).

The "local experience" that Rose explains was one factor that created the unique competitive nature among hip-hop artists. There was a desire to be the best, most original artist, developing a style that sets one apart from everyone else. This identity formation existed outside of traditional means of social status attainment, and as Rose notes, this is also evident within what she identifies as three artistic characteristics of hip-hop: flow, layering, and ruptures in line (Rose 38). These characteristics are especially recognizable – even to outsiders – in rap. MC's and rappers constantly highlight flow as an important element of style, and explicitly reference it in their lyrics. Furthermore, rappers will switch up the tempo of their flow, rapidly moving through one passage before unexpectedly stopping or stuttering, realizing an aesthetic of rupture. The deejay layers over the MC's flow and vice versa. These common musical characteristics create a recognizable aesthetic that "suggest affirmative ways in which profound social dislocation and

rupture can be managed”, creating a “blueprint for social resistance and affirmation” (Rose 39). Early hip-hop was largely underground, and that is where it remained until the 1980’s when hip-hop began to reach a wider, mainstream audience that fundamentally transformed the culture, presenting numerous challenges and criticisms.

### Fear of a Black Planet: The Hip-Hop Colony

Race is inseparable from the historical legacy of hip-hop, and has been at the forefront of the public discussion and dissection of hip-hop. This is clearly evident in the way that the media, politicians, and the music industry have fostered a myopic view of hip-hop within popular culture that legitimizes base condemnation of the hip-hop culture and its distinct musical practices. Hip-hop’s popularity exploded in the 1980’s, with multiple artists becoming highly successful, culturally recognizable icons. From 1987 to 1990 hip-hop culture became more visible within popular culture with numerous rap groups – such as Public Enemy, De La Soul, NWA, and A Tribe Called Quest – coming into prominence, not only within hip-hop but within the mainstream world. These groups, with their commercial success helped record industries understand that rap could be popular with white teenagers, despite the Afrocentricity of the lyrics and the culture. In fact, this Afrocentricity was actually a part of the draw among white teenagers, and “the conscious manipulation of racial stereotypes had become rap’s leading edge”, particularly in the form of the stereotypical gangsta rapper: a “thug” and “misogynist...from whom you would flee in abject terror if you saw him walking toward you late at night”(Samuels 151). As it is with much of black cultural practice, extensive white participation has inevitably led to reappropriation and reinterpretation of black culture; white teenage rap fans are particularly attracted to black culture as a site of difference, and hip-hop takes on a rebellious image much like that of early rock and roll. The explosion of rap during this time was enhanced

by the expansion of local cable access, more sophisticated mixing and recording technology, and the partnership between major record labels and independent labels (Rose 6). All of these factors dramatically altered the direction and audience of hip-hop, but not necessarily for the better.

Major record labels and the corporate media were largely responsible for the widespread dissemination of the revolutionary hip-hop artist that emerged during the late 1980's. It was also around this time that many of the still common mainstream characterizations of hip-hop and particularly rappers – the stereotype of the hypersexual, violent “thug” – were recognized by major record labels as an important ingredient for a successful hip-hop record. This seems counterintuitive, however the role of the corporate media was the driving force behind the creation of the outsider rhetoric and popular conception of hip-hop culture. Hip-hop concerts were condemned by the media for random acts of violence and criminal activity that occurred, a classic example of paranoia – particularly among law enforcement – about the congregation of Black youth in public spaces (Neal 378). The media created criminalized hip-hop concerts to the degree that “in the eyes of many suburban whites, hip-hop concerts in places like Long Island’s Nassau Coliseum represented a temporary threat to the day-to-day stability of white suburban life”(Neal 378). This mainstream perspective undoubtedly increased the exotic allure of hip-hop to the white teenage consumers. This surprisingly rapid transmutation of hip-hop culture radically changed hip-hop, in subtly racist and disingenuous ways. As Mark Anthony Neal explains:

In less than a decade, hip-hop culture had been transformed from a subculture primarily influenced by the responses of black urban youth to postindustrialization into a billion-dollar industry in which such responses were exploited by corporate capitalist and petit bourgeois desires of the black middle class. The latter developments offered little relief to

the realities of black urban youth who remained hip-hop's core constituents, though the economic successes of hip-hop artists and the black entrepreneurs associated with contemporary black popular music were often used to counter public discussions about the negative realities of black urban life. Economic issues aside, corporate control of black popular expression, often heightened the contradictions inherent in music produced across an economically deprived and racially delimited urban landscape (Neal 381).

This quote highlights not only the racial element of this cultural shift, but also the class dimensions that led to the black middle class playing a role in the transmutation of hip-hop culture. With this enormous cultural shift, a mainstream conception of hip-hop had emerged that willfully ignored the broader context of the music's violent and misogynistic content, while simultaneously using this controversy as a cog for boosting record sales and creating a new mass market of hip-hop consumers.

Many critics blame the major record labels and corporations particularly for this perpetuation of negative hip-hop stereotypes. One such critic, Jared Ball introduces a number of interesting concepts in *I Mix What I Like: A Mixtape Manifesto* that help to explain the subtle tactics often used by corporations to control and create popular culture. Ball views the "Black American" struggle as distinct, and more specifically a "Hip-hop nation" that has been colonized. This nation has become a distinct entity with a shared history, language, culture and territory that meet some basic tenets of nationalism (Ball 22). He uses a theoretical approach known as Internal Colonialism theory, which argues that Black America is a distinct entity colonized within the United States, with colonialism meaning a "relationship between two (or more) racially, ethnically, culturally, and spatially distinct and defined groups between which there is an absolute *imbalance* of power, whereby one determines the 'social, political, and

economic' condition of the other" (Ball 30). This theory provides the framework for his later assertion that the music industry and corporate media are able to take a distinct culture and change it dramatically. The political, economic, and cultural power of the media is particularly staggering, and there is an undeniable influence that the music industry has within politics, simply because of the economic power wielded by a small number of corporations.

The hip-hop music industry is dominated by four main corporations, which Ball refers to as the "Musical OPEC": Sony, Universal Music Group (UMG), Warner Music Group (WMG), and EMI, each of whom are themselves part of larger corporations (Ball 72). These corporations wield enormous power, enhanced by the fact that they "have assumed the fourteenth amendment right to legal personhood and have become extensions of a shift in need among the ruling class to cloak this 'power elite' and their 'invisible class empire' in anonymity" (Ball 71). Furthermore, these corporations collect between ten and thirty-five million dollars in revenue per year; In addition, Sony and UMG combined own eighty to ninety percent of the songs played across national radio during any given week (Ball 72). This kind of economic control has a profound effect on the creation of culture, and helps to explain how hip-hop culture changed so drastically and irrevocably in the late 1980's. It is also important to realize the repercussions that the colonization of the hip-hop nation has for the legal issues surrounding sampling, decontextualizing many of hip-hop's creative practices, and dramatically distorting the outsider, mainstream view of hip-hop. An understanding of internal hip-hop culture is clearly necessary for making informed legal decisions in sampling cases, and as Ball's analysis suggests, this context of cultural colonization exacerbates the philosophical and semantic gap separating legal discourses of sampling ethics from hip-hop's own internal ethical codes.

## How Technology Continues to Transform Hip-hop

Hip-hop started with turntables and vinyl records. With the advent of digital sampling technology the number of deejays and producers skyrocketed, leading to the increased popularity of hip-hop, and contributing to the legal troubles arising from more transparency with sampling. The proliferation of sampling technology, both hardware and Digital Audio Workstations (DAWs) has created a new generation of bedroom producers. These new producers were and are aided further by the internet, which has replaced vinyl as the primary way that many producers consume and acquire their samples. While the ease of access facilitated by the internet might seem on the surface to be beneficial for hip-hop it complicates many purist definitions of sampling ethics, which I will explain in depth later in the chapter. In this section I will chronologically outline some of the most important technologies that revolutionized hip-hop production and performance, specifically recent technological advances that have further complicated sampling ethics.

The technology that was used to create early rap music was pioneered by deejays who used turntables, vinyl records, and mixers in revolutionary ways that helped create certain seminal hip-hop aesthetics. The technology also relies on reappropriation and reassignment of music technologies (Forman 389). These technologies are generally used in ways for which they were not originally intended. For example, the turntable, mixer, and vinyl records were manufactured as a way for people to consume music in their own homes. Instead, deejays used them as an instrument of production and “rocking a beat between two turntables, aided by electronic mixers rebuilt with efficient cross-fade switches” (Forman 390). The turntables were used to isolate the breakbeat section of the record, and then that was looped using the turntables and the cross-fade switches, allowing for an uninterrupted flow of music. Along with other

techniques developed for deejaying, such as scratching and cutting, breakbeats became a core aesthetic for hip-hop, which is still prevalent today and would not have developed without the use (perhaps more appropriately misuse) of turntables. The effect of these techniques was to establish a modern precedent for the way modern producers use digital sampling technology (Rose 74). These revolutionary musicians expanded the definition of a deejay from simply someone who selects and plays recording on the radio at social function to include “performative” deejays and turntablists who manipulated the music in live performance (Katz 125). Turntablists still practice many of these now outdated techniques, using the same (although more advanced) technology in live performances and “DJ battles”. These turntablists have the added benefit of using specialty machines that are specifically designed for use in a hip-hop setting taking away some of the early do-it-yourself aesthetic (Katz 128). Even their use of records is different from the pioneers with special breakbeat compilation discs and battle records compiled by better known deejays (Katz 128). Unlike turntablists, modern producers use digital sampling technology to reproduce this same aesthetic.

It wasn't until 1980's that newer sampling technology specifically, digital samplers, drum machines, and MIDI (Musical Instrument Digital Interface) became sufficiently prevalent and easy to use that the practice of sampling became more popular with musicians. As with early hip-hop pioneers' misuse of turntables and records, producers used samplers and drum machines in unintended ways, novel ways that helped further define important aesthetics of hip-hop music production. Samplers were originally used as production shortcuts for producers, engineers, and composers, adding different musical sections that limited the expense and effort required to bring in a studio musician. Furthermore, the samples were most commonly masked when they were used to make it more difficult to locate the original (Rose 73). Hip-hop producers were the first

to use samplers as the primary means of composition, “using samples as a point of reference, as a means by which the process of repetition and recontextualization can be highlighted and privileged”(Rose 73). The rise of the digital sampler progressed with the introduction of two marquee instruments: the E-mu SP-12 and the Roland TR-808. The less expensive of the two was the E-mu SP-12, which was the first sampler intended to allow a producer to create rhythm tracks from individual drum hits (Schloss 35). Producers further expanded the use of these devices by also using the SP-12 to sample entire melodies, a technique pioneered by the producer Marley Marl (Schloss 35). The TR-808 is arguably the single most recognizable drum machine within hip-hop, and its classic deep kick bass drum, handclap sounds, snare and hi-hats are instantly recognizable sonic aesthetics within the genre (Rose 75). However, the rigidity of drum machines requires producers to differentiate themselves from other producers in non-traditional ways. It is more difficult for the hip-hop outsider to hear the subtleties that separate different producers’ styles because of the predominant use of a relatively small number of samplers. If digital samplers and drum machines became popular, it was due just as much to their decrease in price as well as their ease of use. Along with the synthesizer, MIDI is widely regarded as one of the most important technological advances made in making electronic music (Theberge 74). MIDI was seen initially as a way to upgrade compatibility issues between synthesizer and drum machines. The introduction of MIDI contributed to increased compatibility between instruments by different manufacturers (Theberge 89).

In our contemporary moment, the prevalence of personal computers, and the increased ease of access to samples through the internet has created a new subculture of bedroom producers who have different perceptions of what it takes to be a legitimate producer. The internet has completely revolutionized the way in which many people share, consume and create

music. Paul Miller a/k/a DJ Spooky the Subliminal Kid argues that the internet represents a “kind of legacy of the way that DJs look for information – it’s a shareware world on the Web, and the migration of cultural values from one street to another” (In Through the Out Door 14). This idea obviously evokes the crate digging roots of early deejay culture, and Miller further expands the idea by introducing the concept of a “Semantic Web” describing a new type of hierarchy and standardization of an immense repository of information that is always accessible (In Through the Out Door 15). This ease of access has only further complicated the legal issues surrounding hip-hop, and copyright has reacted by only getting stricter and seeking to restrict this seemingly limitless access that has helped hip-hop continue to grow in new and increasingly interesting ways.

Rap producers are at the forefront of popular musicians who occupy an increasingly liminal space, actively consuming and using samples to create their own music, blurring the traditional distinction between composer and listener. They are not solely composers, but consumers as well:

Digital musical instruments are hybrid devices: when one plays (or programs) a drum machine, synthesizer, or sampler, one is not only engaged in the production of sound and melodic or rhythmic patterns but in their technical *reproduction* as well. Popular musicians who use new technologies are not simply the producers of prerecorded patterns of sounds (music) consumed by particular audiences; they, too, are consumers – consumers of technology, consumers of prerecorded sounds and patterns of sounds that they rework transform, and arrange into new patterns (Theberge 2-3).

In the edited collection *Technoculture and Music*, editors Rene Lysloff and Leslie Gay lay out their definition of technoculture, which is a useful prelude to my discussion of issues authenticity

and of hip-hop's internal ethical code for sampling. Technoculture "refers to communities and forms of cultural practice that have emerged in response to changing media and information technologies, forms characterized by technological adaptation, avoidance, subversion, or resistance" (Lysloff 2). Essentially, technoculture is an attempt to overcome the distinction and ultimately imagined conflict between technology and music. The claim that technology corrupts music composition – with machines becoming surrogate composers for those lacking "real" musical ability – is an antiquated and fallacious argument. While it is true that some composers use music technology as a crutch, it also changes the way that musicians compose, creating new creative processes previously unavailable for musicians. Rap producers' use and misuse of technology has always been an easy target for detractors who decry the lack of "authenticity" in their compositional processes, as well as the absence of formal musical instrument among certain producers. However, musical authenticity is not an easily definable concept.

### Determining Authorship: Is Hip-hop Original?

Authenticity is an incredibly problematic term for both hip-hop artists and their critics. The artists have an intimate knowledge of the musical beginnings of hip-hop and there is an internal divide within hip-hop between purists, who identify more with the aesthetics of early hip-hop, and those who seek to rewrite the rules. Critics argue that sampling constitutes theft, and is not an authentic or original form of authorship. Digital sampling and electronic music composition has challenged many normative assumptions regarding compositional originality and authenticity, blurring an already opaque definition. Originality and authenticity are at the heart of the debate over the ethics of sampling, and undoubtedly the criticisms directed towards sampling have contributed to judges' decision making on cases that have unseen widespread impact on creative practices within the rap music industry. Even before many momentous

decisions changed the sampling culture within hip-hop, many law review articles were written about the threat that sampling posed for the future place of “live musicians” and the more general impact on more “authentic” composers (Schumacher 447). One problematic area of copyright law is the legal definition of artistic originality, which is diametrically opposed to originality in hip-hop. Even more problematic is the legal definition of authorship, because “authorship can now be assigned to corporate entities instead of artists, and even though originality has come to mean origination...copyright is still influenced by the ideological construct of ‘author’ as a singular ‘origin’ of artistic works (Schumacher 447). The legal world must expand their definition and incorporate what these concepts mean within hip-hop to better protect the rights of musicians.

With respect to production, the insider discussion of authenticity is central to many producers personal set of ethics that guide their own composing. While there has been an enormous amount of literature written about the concept of authenticity in relation to lyrics, Joseph Schloss outlines some key terms to understand when considering authenticity in relation to production. Using the interviews he conducted with numerous hip-hop producers, Schloss argues that “producers have developed an approach to authenticity that is characterized by a sort of aesthetic purism; certain musical gestures are valued for aesthetic reasons, and one’s adherence to this aesthetic confers authenticity”. The most crucial part of this quote is the idea of “aesthetic purism” since, as Schloss notes, he wants to distinguish purism as it relates to other aspects of hip-hop culture such as ethnicity and class and to emphasize the importance that abstract ideas of beauty play for aesthetic purism. One issue with this is how aesthetic purism can clear up issues surrounding authorship. If the only qualifier determining creation “authenticity” as Schloss defines it is adherence to these relatively subjective, highly abstract

principles, then how is someone unfamiliar with hip-hop, for example a judge, supposed to unequivocally determine that the use of a certain sample is lawful? Furthermore, aesthetic purism is presented as a coherent definition that is broadly applicable; however, music is inherently subjective, and while there are certainly aesthetic qualities within hip-hop that are universally recognized as “beautiful”, does that make it ethical for a sample to be deemed inauthentic simply because it is not “beautiful”. While there are no clear answers to these difficult questions, they will be important to keep in mind as I further explain Schloss’s definition of sampling ethics, and more importantly, how his definition could be applied to the legal world, so that copyright law can truly protect artists’ individual writes as authors and creators.

## Hip-hop Sampling Ethics

Incorporating these central ideas of authorship and originality within hip-hop, in this section I will introduce Joseph Schloss’s overview of internal sampling ethics from his ethnography *Making Beats*. In the book, Schloss interviews multiple hip-hop producers to discuss their own approaches to sampling, focusing on their aesthetic and moral goals. While the discussion is incredibly useful, many of the producers fall into what one might call the purist category of hip-hop producers. Moreover, because the book was written over the course of ten years and released in 2004, the discussion is perhaps somewhat out of date and, although no fault of Schloss, does not reflect the transformative effect that the internet has had on sampling. In addition to Schloss, I have supplemented my definition with more current discussions as well as my own personal explorations into hip-hop producing.

The concepts of originality, authorship, and authenticity are incredibly important to internal sampling ethics as it relates to the law, however Schloss is concerned with producers’ ethics regarding “strategies” towards sampling as opposed to the whether the practice of

sampling is ethical (Schloss 101). While this may at first make the usefulness of his definition questionable, it is necessary to understand that for hip-hop insiders the ethics of sampling are not up for debate. For these producers, sampling is the musical foundation of hip-hop, and the set of insider ethics that Schloss presents help the outsider better understand the nuances, but more importantly appreciate the incredible artistry that goes into sampling. The amount of thought that goes into the sampling ethics of the producers he interviews indicates just how important the practice is to them personally. In addition, a more intimate understanding of the ethical standards that producers follow will allow hip-hop outsiders to contextualize different uses of sampling. In addition, the rules that Schloss introduces help to show that even though the ethics are somewhat subjective, there is a clear cohesiveness. The simple act of crate digging is one of the single most important elements of sampling for the producers in Schloss's ethnography, and serves a number of other purposes besides simply being the sample source, such as manifesting ties to the hip-hop deejaying tradition, "paying dues", educating producers about various forms of music, and serving as a form of socialization between producers (Schloss 79). Hip-hop sampling ethics are also indebted to the legacy of collective authorship that characterizes African diasporic musical practices, a theme that I will discuss in later chapters. Clearly, sampling is inseparable from hip-hop, and needs to be legitimately recognized by the law as well. The argument that Schloss gives builds a strong foundation for a clear definition of internal sampling ethics that can address the issues that arise within copyright.

The first important point to note about internal sampling ethics is the unbreakable connection between ethics and aesthetics. Many of the rules that Schloss introduces originated because producers agree that those certain production techniques make hip-hop music "better". These rules also originate from the purist hip-hop producers perspective, and there are certainly

some popular producers that violate these ethics. In fact, hip-hop producers effectively police themselves within the community, since for purists, the ethics are one of the major tools of preserving the essence of hip-hop; producers will even create new rule for themselves in order to maintain the quasi-religious character of sampling ethics (Schloss 104). Schloss introduces six foundational rules of sampling ethics, each of which I will address separately and modify where necessary: One, No Biting: one can't sample material that has been recently used by someone else; Two, records are the only legitimate source for sampled material; Three, one cannot sample from other hip-hop records; Four, one cannot sample records one respects; Five, one cannot sample from reissues of compilation recordings of songs with good beats; and Six, one cannot sample more than one part of a given record.

The first rule is deals indirectly with the concept of originality. "Biting", as understood within hip-hop, is a term that "refers pejoratively to the appropriation of intellectual material from other hip-hop artists. Generally speaking, it *does not* apply to the appropriation of material from outside the hip-hop community" (Schloss 106). Schloss also introduces three other production-oriented definitions that are important for this rule: "flipping" which refers to creatively and substantially altering material, "chopping" which is the alteration of a sampled phrase by dividing it into smaller segments and reordering, and "looping" which refers to sampling a longer phrase and repeating it with little or no alteration (Schloss 106). These three techniques are important for producers, and mastery of these techniques is necessary to be a respected producer within the hip-hop community. It is exactly the same as learning technique for any other more "traditional" musical instrument, and helps to give each producer their own unique style. There are however three exceptions to the no biting rule. If one flips the sample, if one is specifically parodying the other known usage, or if the bite is unintentional, then it does

not violate the rule. Interestingly enough, all three of these exceptions have analogous arguments within the legal world, and all three have been used to defend the use of a sample in a courtroom, which I will discuss more in chapter 3. This rule highlights the importance that producers place on creativity, and each producer must be able to differentiate his style from other hip-hop producers, while remaining firmly within the hip-hop production aesthetic.

The second rule – records are the only legitimate source of samples – is one that needs to be modified slightly, since as I explained earlier, technology in recent years has transformed the way in which people consume music, and certainly producers are no exception. However, the aesthetic elements of records, the scratchy, often softer, mellower sound, are still idealized by hip-hop purists. There are still many modern producers that use records and have enormous record collections from years of extensive crate digging. As Schloss notes, there is also a practical connection to vinyl records, since many producers start out as deejays and already have easy access to vinyl records (Schloss 109). Using vinyl is also seen by many producers as a way of paying dues, and they are committed to the “*idea of tradition*” (Schloss 109). However, it is becoming increasingly expensive and unrealistic for many, more casual producers to maintain large record collections, and the internet is a vast resource of virtually any sound one could imagine to sample. With the ubiquity of file-sharing networks it is incredibly easy for a producer to hear sample and instantaneously find it on the internet, download and be able to sample it.

The third rule – one cannot sample from other hip-hop records – reinforces similar ideals as the second rule, defining strict parameters for where a producer can find samples. This rule also illuminates the importance of differentiating yourself from other producers. Crate digging is incredibly important for producers because it allows them to impress their peers with the obscurity of their samples, and the unique ways in which they can combine seemingly disparate

sounds. However, not all producers strictly adhere to the third rule. As Schloss notes, some producers have admitted to sampling individual drum hits from certain hip-hop records (Schloss 116). One of the producers that Schloss profiles, Domino, feels that ethics related to crate digging have become obsolete, citing the popularity of breakbeat compilation records (Schloss 116-117). While I agree with Domino that traditional crate digging is dead, as a direct result of the decline in the number of record stores and the cultural centrality of the internet, I do not think it necessarily means that the ethic is obsolete. The ethics of crate digging for hip-hop producers is centered on finding an obscure record that illustrates both a producer's musical taste, and their willingness to spend hours searching for the right sample. This is an area that I will explore more in-depth later, focusing on how technology has revolutionized the practice of crate digging

The fourth and fifth rules (one cannot sample records one respects and one cannot sample from reissues of compilation recordings of songs with good beats) are very similar to each other, and so I will address the two of them together. Schloss explains that the fourth rule rests on three pillars: that sampling may be disrespectful to a great artist, that some music is so good that sampling does not improve it, and that sampling something that good is not enough of a musical challenge. The fifth rule ties in directly to the last pillar of the fourth rule, and is an incredibly important part of sampling ethics for producers. One of the most important and recognizable aspects for listeners in appreciating any form of music is very often the skill that shows through, whether it be the incredible range of a singer, or the clarity and precision with which a pianist is able to play an incredibly fast, difficult passage. This is very often one of the most easily recognizable indicators of the amount of practice and dedication it takes for any form of music-making, and it is especially important for hip-hop sampling. The easiness of sampling is one of the most common criticisms leveled at hip-hop producers by their detractors, and these rules

address this criticism by creating an internal ethical standard that scorns any sort of sampling shortcut.

The sixth rule – one cannot sample more than one part of a given record – continues a common theme through these rules that reinforces the idea that sampling should not be easy, and that producers must constantly challenge themselves. It also recalls ideas about creativity and originality that were expressed in earlier rules. Schloss explains that one of the aesthetic rationales behind this rule is that much of the artistry from sampling often comes from the blending of two samples that one wouldn't necessarily put together, and by sampling from the same record one does not have to worry about whether or not they sound good together, since they presumably already do (Schloss 130). Furthermore, this rule reinforces a collective sense within hip-hop culture that each producer must value the code of ethics, and that material effort, hard work, intellectual effort and creativity are incredibly important within hip-hop. One other important point that Schloss makes is that adherence to these principles is not enough to be respected within the community, and “the acceptance of one's musical peers requires a keen grasp of a more abstract and malleable set of standards, of what might be termed ‘aesthetic expectations’ – collective ideas about what sounds good” (Schloss 132).

I am a relative newcomer to hip-hop culture, and have only recently begun producing my own beats using FL Studio 11, one of the more popular Digital Audio Workstations, as well as an Akai MPK 25. I mention my own involvement because as I have become more accustomed to the composition techniques of producers, I have encountered some ethical dilemmas in my quest for samples. When I first began experimenting with the software and keyboard, I had only the stock instruments and sounds that come pre-loaded with the software. Every attempt I made to create even a simple loop ended in frustration that led me to search for more sounds. I soon

discovered that there was an overwhelming amount of material available for free in the form of breakbeat compilations, beat packs of popular producers, and songs that were sampled often within hip-hop. I was amazed by how easily I could throw a simple four bar loop together that sounded nearly professional. Once I began reading Schloss's book, specifically the section on sampling ethics, I felt incredibly guilty about what I had done. While my musical pursuit is purely for my own enjoyment, I couldn't help but feel like any track I made with these samples would be inauthentic from the perspective of the hip-hop community. Most of the producers that Schloss interviewed in his ethnography undoubtedly spent countless hours digging through crates of records, and even more time in the studio perfecting the sound of each individual drum hit, instrument sound, or unique sample that helps to create each producers individual style. In a matter of hours I had accumulated an overwhelmingly vast array of unique samples. This is a classic example of one of the tenets of Sampling Ethics in *Making Beats*: biting. This is one of the worst offenses a producer can make in the eyes of many old-school producers. My own songs sounded better because I was reappropriating samples that have already been used in hip-hop, and are wholly sonically unoriginal. I initially did not expect the production learning curve to be so steep. As a musically literate person who has studied music theory extensively and played the piano for over ten years, I feel truly humbled. It helped me further realize how rich and demanding the artistic craft of the hip-hop producer is which gave me invaluable perspective on the arguments decrying the unoriginality in sampling that dominate legal discourse.

Hopefully, this chapter helped to illuminate the perspective of hip hop's musical insiders, particularly insider issues regarding sampling, the rich and long tradition of hip-hop, and the myopic view of hip-hop perpetuated by popular media and reinforced by the record companies. Sampling is clearly and unequivocally a rich and challenging musical legacy that deserves to be

treated as such. The internal ethics that I have explored in this chapter will help in applying a corrective lens towards the legal conceptions of sampling ethics, devised without regard to hip-hop culture's creative dynamics. However, as will be explained later, law has a much more difficult job since the often abstract discussion within hip-hop regarding ethics must be made into a much more concrete set of definitions and rules, so that copyright can truly protect the rights of the artists. Moving towards the next chapter dealing specifically with the history and nuances of copyright law, hopefully these arguments will help us to keep in view the ideas of authorship, originality, and authenticity specific to hip hop, because of the central space these same ideas occupy within the ethical logic of copyright law.

## Chapter 2: The Development of United States Copyright Law

In this chapter, I will highlight the salient features of the United States Copyright Law that directly apply to the practice of sampling. Before explaining the minutiae of current copyright law, it is important to grasp the slow, methodical process by which the law changes. Copyright law protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” (17 U.S.C. Sec. 102.a). Hip-hop is firmly within a tradition of collective authorship in African diasporic culture, a concept which is in some ways diametrically opposed to the legal conception of authorship. In addition to challenging conceptions of authorship, hip-hop sampling practices also challenge normative legal assumptions about originality and creativity. Copyright law seeks to protect the rights of the artists, but it has increasingly restricted the creative rights of hip-hop producers. Hip-hop’s internal code of sampling ethics that I introduced in chapter 1 contain many useful concepts that copyright law could possibly incorporate in a way that substantively changes legal assumptions about authorship, originality, and authenticity. Copyright law contains a significant legal grey area, which sampling cases have made painfully clear. Another contributing factor is the glacial pace at which the law progresses, evidenced by the fact that the 1909 Copyright Act still has an important effect on the way the law views certain types of technology. For this reason, it is necessary to explain the history of copyright law, starting with the Copyright Act of 1909, then the Copyright Act of 1976 – the main source of current copyright law – and finally, the Digital Millennium Copyright Act of 1998 which was a direct reaction to the transformative effect the internet had on music consumption. It is also important to note that the history of copyright in the United States draws heavily from western philosophical notions, and especially

the legal system in England. Copyright law, as of yet, has been unable to accommodate for sampling, and until significant changes are made the rights of hip-hop artists continue to be restricted. First, it is important to understand the purpose and scope of copyright law.

### Purpose of Copyright Law

The justification for copyright law comes from Article 1, section 8 of the United States constitution which states that congress shall have the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”(US Cons, art. I sec. 8). There are two justifications for copyright law that directly come from this quote. First, copyright is intended to promote the arts, and second, it should provide authors with the exclusive rights to reproduce and profit from their respective creations for a limited time. Legal scholar and copyright expert William Patry poses two questions about these somewhat vague justifications; “First, what is the purpose of copyright? Second, to whom should benefits be granted?” (Patry 907). While it would seem logical to assume that the single most important goal of copyright is to protect the rights of the author, this has not been the case throughout copyright’s history. Patry explains that “copyright legislation usually has been enacted in response to interest group pressures...and more recently, there has been congressional inattention to serious divergences between rhetoric and reality, resulting in laws that bear little relationship to the objectives espoused at the time of passage” (Patry 907). This quote is emblematic of guiding themes throughout his book, *How to Fix Copyright*, which identifies three justifications for copyright law that policymakers (i.e. Congress) favor: One, copyright law should provide incentives for authors to create works they would not create in the absence of that incentive; Two, it should provide that the public has access to those works; Three, it should provide respect, via non-economic rights, for those who

create cultural works (Patry, 75). The first justification is the most relevant to the discussion of copyright in this thesis. Essentially, the first justification argues that copyright laws exist to promote creativity. The argument claims that, but for copyright laws, artists would not have incentive to create, and overall cultural creativity would remain stagnant. This is a highly contentious claim which I will address more specifically later in the chapter. Even more contentious is policymakers' claims that it is possible to impose all three of these goals at once.

As Patry explains:

this assertion is based on the unproven and implausible idea that there are people sitting around either doing nothing or doing something else, and that once a new, stronger law is passed, they will automatically switch to producing copyrighted works. Another version of this idea is that people are producing some works but if the laws were stronger they would produce more (Patry, 78).

The justification for copyright law, in this case stronger laws, is one of the fundamental philosophical questions within the legal discourse of copyright law. It is interesting to consider how more restrictive copyright law would affect hip-hop producers. If a law was introduced that provided more specific guidelines for sampling without licensing, would that increase the creativity of hip-hop producers? It would obviously provide judges with an explicit statute to reference in sampling cases, and it could also benefit producers by clearly outlining what type of sampling is legally permissible. These are all questions to keep in mind throughout this chapter.

### Scope of Copyright Law

The first chapter of U.S. Copyright codified law explicitly defines a number of significant terms, and more importantly sets definitive guidelines that help to explain what types of works are protected. Copyright exists in order to protect :

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

(2) musical works, including any accompanying words;

(7) sound recordings; ( 17 U.S.C. sec. 102.a)

I included only the types of relevant works that are protected. The first sentence introduces one of the central issues within copyright. What exactly constitutes an “original work of authorship” and what guidelines should be used to define the terms? The ambiguity of this language is problematic, and is an area where revision should be considered in order to provide better guidelines for decision-making in copyright cases. Interestingly, musical works, which I will refer to as compositions, are separate from sound recordings and have different legal definitions. A composition is “an original work consisting of musical material (some combination of melody, harmony, and rhythm). Lyrics to nondramatic musical works are included in the composition copyright”, while a sound recording is “any work in which musical, spoken, or other sounds are fixated onto any medium (including sounds accompanying films)” (Demers 22). There are two very important differences between these compositions and sound recordings. First, most record companies require control of a sound recording as well as the composition many times as a condition for release of the work; However, if the composition is self-released then the author owns the copyright (Demers 22). Second, sound recordings and compositions have different sets of guidelines for derivative works, often called mechanical reproductions (Demers 22). For compositions, mechanical reproductions are covered under a compulsory license allowing anyone who sends written notice to the Copyright Office and pays the royalty rate on each record

made and distributed. Sound recordings are not covered under the same compulsory license, meaning that the license must be negotiated before the recording is appropriated into a new work (Demers 22). This legal distinction was first defined under the 1909 Copyright act, reacting to recent advances in sound recording technology and the implications for music copyright holders.

### Copyright Act of 1909

The Copyright Act of 1909 was enacted in reaction to the Supreme Court case *White-Smith Music Publishing Company v. Apollo Company*. This case dealt with the infringement of the copyrights of two different musical compositions published originally as sheet music entitled, “Little Cotton Dolly”, and “Kentucky Babe” by Adam Geibel. The defendant was a proprietor of player pianos known as the “Apollo”, which used the fairly recent technology of perforated rolls of music that when used with the instrument can reproduce the authored work. The appellant argued that under the copyright act, he had all of the rights to any actions involving the reproduction of his work because he is the author. The central question considered was whether or not the piano rolls constituted copies of the composer’s work. This case was one of the first that dealt with the impact of technology on the production and distribution of music. Justice Day, delivering the opinion of the Supreme Court, asserted that since perforated rolls are a mechanical invention and are completely illegible to musicians, then they are not covered by the copyright act. He wrote that the “ordinary signification of the words ‘copying’, ‘publishing’ etc., cannot be stretched to include it [perforated rolls]”. He also referenced a case in the English courts that dealt with the same issue and noted that “these perforated rolls did not infringe the English Copyright Act protecting sheets of music” (*White Smith Music v. Apollo Co.*).

This case had unintended consequences for future musical practices, foreshadowing the increasing issues that copyright began to deal with as a result of technological advances. The

Supreme Court's decision also introduced the concept of mechanical licensing, originally called the "cover license" in the 1909 act (Demers 37). Immediately following this decision, Congress passed the Copyright Act of 1909 in direct response to the White-Smith decision, which highlighted the importance of making sure the author's rights extended beyond the reproduction of the sheet music (Demers 37). Under this act, the composer of a work was granted exclusive rights to the first mechanical reproduction of his/her piece (Copyright Act of 1909). However, once this right had been exercised, anyone else was allowed to make a reproduction as long as the composer received certain royalties (Copyright Act of 1909). The White-Smith case also revealed the economic motivations behind music copyright law. A composer's economic rights are a central concern of copyright law, and there are large property interests touching on the rights of the musician and the publisher in this case.

Although the 1909 act was meant to increase protection of artists' rights, it favored the manufacturer of piano rolls who benefited directly from the copies of the composition. This trend continued with respect to licensing, contributing to the staggering decline of the sheet music industry (Demers 38). Copyright law's protection for the music industry's economic rights is even true with sampling, especially because of popular negative connotations of hip-hop culture, specifically that sampling is derivative, and therefore unoriginal. As author Kembrew Mcleod notes:

Notions of originality and authorship are deeply embedded in capitalist relations.

Copyright is a culturally bound law that could not deal with the collision of a particular form of cultural production rooted in the European practice of notating music and the more improvisatory African-American tradition of Jazz. Just as copyright law did not

know how to deal with jazz artists' appropriation of certain phrases and whole choruses from popular songs, copyright law still has not come to terms with sampling (Mcleod 77). These issues highlight the concepts that occupy the philosophical distance between copyright and sampling, and in a broader sense many forms of black music. The philosophical impact of this 1909 act manifested itself in significant changes made to Copyright law in the form of the Copyright Act of 1976.

### Copyright Act of 1976

The Copyright Act of 1976 is the most recent instance of significant revision made to the codified law. It made a number of important additions and revisions prompted by the proliferation of new sound recording technologies which revolutionized the music industry's ability to distribute sound recordings to consumers. The substantive changes that the Copyright Act of 1976 introduced have proven fundamental to modern copyright law, especially when the laws have been applied in hip-hop sampling court cases. This law introduced a number of important changes, updating the definitions of the types of works protected as explained earlier in the chapter, the exclusive rights of the copyright holder, copyright duration, and most importantly instituting the fair use doctrine.

Much like the Copyright Act of 1909 before it, The Copyright Act of 1976, was a reaction to remarkable technological advances in the field of sound recording. Many of the sections that were revised or added to the existing body of law were instituted in order to deal with the potential problems that new technology posed for copyright holders. One of the most important changes extended the duration of copyright. For all works created on or after January 1, 1978, protection begins the moment the work is fixed in a form of tangible expression and lasts for seventy years; Before this, the author had the option to extend the copyright in its

twenty-eighth year (Demers 21). If the work is anonymous, or of corporate authorship, that length skyrockets to ninety five years from its publication, or one hundred and twenty years from its creation, whichever comes first. Clearly, part of the reason for this change in the law arose from the burgeoning market of technical sound recordings (records, tape cassettes, CDs etc.) and their significant economic value. It was not until the Sound Recording Act of 1971 that copyright protection was extended to all sound recordings regardless of the medium on which they were fixed; The Copyright Act of 1976 took this a step further by markedly increasing the length of copyright protection for author's works (Demers 23). The increase in copyright length had a seismic effect on copyright culture, and reflected the enormous influence corporations have had on policy-making. It is also a significant turning point in copyright's historical development. The law evolved from a limited set of rules governing only books to a "source of generalized protection for a class of newly valuable market commodities: 'works'" (Aufderheide 36). The Copyright Act of 1976 has been described as a marked shift away from the regulatory approach to copyright, towards one based purely on property rights (Aufderheide 36). The regulatory approach towards copyright was characterized by a "limited set of rules governing only books" while the Copyright Act of 1976 "reflected the interest of the major media corporations" and their desire to protect their economic rights (Aufderheide 36). An important legal concept that contributed to the shift towards protecting corporations' property rights is corporate authorship, a concept which I will explore more in-depth later in this chapter.

The most important and influential measure that was instituted by the Copyright act of 1976 was the doctrine of fair use, contained within section 107, with four factors to be considered in determining whether or not a particular use is fair:

1. The purpose and character of the use, including whether such use is of 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
4. The effect of the use upon the potential market for, or value of, the copyrighted work (The Copyright Act of 1976).

Scholars have simplified fair use, presenting two distinct iterations. One use is an individual's own personal use of copyrighted material (i.e. no monetary benefits are received); The second use is the reuse of copyrighted material in the process of making something else, sometimes referred to as "productive" fair use (Demers 18-19). While the second type of fair use is especially relevant in the context of sampling, the first type is also incredibly important because of the explosion of digital culture, with some content industries arguing that private fair use does not exist anymore on the internet (Demers 19). For example, it is unclear whether an individual would be protected by fair use if they were to release a mash-up – especially if it combined multiple popular songs – through a social media website for free. The second type of fair use is one that has been fairly restricted by court decisions, and is one of the areas that I will discuss more in depth later as a possible change that could be made to copyright law.

An expansion of the second, productive type of fair use would undoubtedly ease the concerns of the countless musicians and remix artists operating in numerous mediums, who would be able to produce and share a substantial amount of material over the internet. Furthermore, this type of fair use encourages participatory collective culture, while "copyright today heavily emphasizes individual authors, individual works, and the notion that creativity is

an individual act – a notion that only emerged recently” (Aufderheide 20). Collaborative culture is already the dominant form in many digital mediums, with online video platforms, blogs, and other web pages full of spontaneous, collective cultural expression done for the love of art (Aufderheide 21). Fair use is an important part of our modern copyright law, demarcating space within copyright law in which artists can legally create art using other people’s intellectual property. Its complex historical development helps demystify some of the more seemingly arcane traditions embedded within the law. I will discuss the history of fair use more in depth later, since it ties in directly to the three central legal concepts, originality, creativity, and authorship. First, it is important to highlight some of the more recent changes made to copyright law.

The cultural influence of the internet irreversibly transformed popular consumption and creation in ways that increasingly challenge copyright law. Traditional copyright law based on the protection of tangible works becomes much more complex in the digital age, where the concept of a work becomes more abstract. Corporate providers of copyrighted material are particularly concerned by some aspects of internet culture, despite the economic opportunities it presents by allowing them to directly interact with consumers. One of the main changes made to copyright law was the Digital Millennium Copyright Act of 1998 (DMCA) which “provides civil and criminal remedies against those who circumvent technological safeguards and tamper with copyright management information” (Leaffer sec. 1.09b). The influence of the internet with regard to cultural consumption has boldly underlined the difficulty associated with building upon previous legal concepts. Technology changes much more rapidly than the law could ever possibly keep up with. Inevitably, new technology will continue to cause unforeseen difficulties, complicating the present as well as future law.

## The Evolution of Authorship, Ownership, and Originality

The legal concepts authorship, ownership, and originality are markedly different from their colloquial definitions. However, it is the purpose of the law to define these concepts explicitly, so that they can be directly applied to situations where issues of authorship, ownership, and originality arise. While my previous discussion of the history of copyright law was limited to American copyright, these three concepts are embedded within some of the earliest identifiable forms of copyright that developed over the course of hundreds of years in Europe. The evolution of copyright in Europe also illustrates the influence that property laws have had on these three concepts, concepts which are continually challenged as the tangibility of copyrighted works becomes increasingly abstract. The influence of the history of property law on intellectual property is a central concern of this thesis, one that I will address more in-depth in chapter four. In this section, I will give a brief overview of the history of copyright in Europe, focusing specifically on early legal documents that dealt with intellectual property, as well as some philosophical works that dealt with the issues of authorship and ownership in the realm of cultural expression.

Conceptions of intellectual property rights can be traced back as far as ancient Greece, ancient Jewish law, and the Roman publishing system (Bettig 11). Interestingly, the Greeks' own conceptions of Intellectual property seem much more modern when compared to United States copyright law. The Ancient Greeks' oral culture, producing works of epic poetry, such as the works of Homer, and the lack of a written culture in Ancient Greece have complicated the recording claims of authorship, although claims of individual ownership may not have been made in the first place since the poets saw their work as a collective achievement (Bettig 11). In the Hebrew Talmud, the oral reporters were required to identify contributors of a new principle,

signaling “something akin to an author’s moral right to attribution” (Bettig 12). The dominance of oral culture in ancient societies makes it difficult to locate clear instances of early conceptions of intellectual property. It was not until the invention of the printing press that any clear beginning to copyright law can clearly be identified.

The effect of the printing press on the dissemination of written work is rivaled perhaps only by the Internet. Invented in 1476 by Englishman William Caxton, the printing press was seen by publishers as a considerable economic opportunity, while the Crown was concerned with the dissemination of works advocating religious heresy, and controversial political ideas (Leaffer 2). A number of statutes and decrees were enacted in response, most famously the first Copyright Act, The Statute of Queen Anne, passed in 1710 (Leaffer Sec. 102). Most notably, the Statute rewarded authors for their creations, while also recognizing public domain, by limiting the number of years an author has rights (Leaffer Sec. 102). Important to note as well is that this Act concerned the right to copy, and nothing else, and was aimed at providing order for the book industry and preventing monopoly (Bettig 23). This signaled an important ideological transformation in English society at the time. Initially, writing was viewed as a leisurely pursuit, but after centuries of printing, compensation for publishing became a legitimate and sometimes lucrative career (Bettig 18). Clearly, written culture required a different definition of authorship. The concept of collective authorship that pervaded oral culture did not carry over to written culture. More specifically, the inalienable, natural right of the copyright holder to publish, and copy their work was central to the early conception of copyright law in Europe. United States Copyright law descends directly from this tradition. Between 1783 and 1786, twelve of the thirteen original colonies passed copyright laws; All of these laws were generally based on the language and structure of the Statute of Queen Anne (Bettig 24). The first United States federal

copyright act was enacted May 31, 1790 and was structured after the Statute of Queen Anne (Bettig 26).

There are many western philosophers whose writings are particularly germane to the discussion of copyright, although the work of John Locke and G.W.F. Hegel. There are two competing narratives that emerge from their respective writings. John Locke was an influential eighteenth century British philosopher whose writings about natural law and the natural rights of man were, and remain influential on legal and political scholarship. The most applicable concept of Locke's in the context of copyright law is the natural rights theory, which focuses on the author as an individual who morally deserves to be compensated for their work. More specifically, the moral rights of an author to see rewards for their creations based on their contribution to society is one of the central tenets of Locke's natural rights of man (Leaffer Sec. 107b). While it is noted that Locke's writings about the natural rights of man had minimal impact on the passage of the Statute of Queen Anne, his "emphasis on 'authorship' and 'authors' rights' provided the primary ideological justification for the recognition of new legal interest in literary and artistic creations" (Leaffer Sec. 107b). Locke's natural laws, and especially his natural laws of man are still a central part of copyright jurisprudence rhetoric, evidenced by the commonly held assumption that an author has a right to receive monetary compensation for their artistic work. However, there are some issues that arise in the application of Lockean concepts to copyright, specifically how much control an author should have, and how long that control should last (Leaffer Sec. 107.b).

The second influential school of philosophical thought relating to copyright law comes from the German philosopher Hegel, and his theory of moral rights, also known as the personality model. Essentially, this theory posits the idea that "property provides a means for

self-actualization, for personal expression, and for the dignity of the individual” (Leaffer Sec. 107c). This theory of personality rights is found in some parts of the Berne convention – an international agreement governing copyright that was adopted by the United States in section 106A of the Copyright Act of 1976 – that specifically mentions an author’s rights of integrity and attribution (Leaffer Sec. 107c). The theories of Locke and Hegel have been incredibly influential in the history of Anglo-American copyright law, and have been successfully deployed to explain or justify expansions or revisions of the scope of copyright law (Leaffer Sec. 107c). However, notably missing from both is any discussion of collective authorship.

Embedded within the philosophical discourses of both Locke and Hegel is the notion of the romantic author, a quintessential example of the singular “genius” author. Copyright law has supported this narrative of the romantic author, conveniently ignoring the history of borrowing “as a characteristic feature of musical production in different contexts and historical periods” for which hip-hop music is criticized (Arewa 584). In legal discourse:

the distinction between genius and craftsmanship was a key aspect of conceptions of musical authorship. This distinction is still evident today, for example, in discussions of whether hip hop should be considered music. As the compositional process of many composers suggests, this vision of musical authorship based upon notions of creativity, invention, originality, and even genius is far too restrictive a representation of musical creation (Arewa 587).

Copyright law ignores collective authorship, instead only dealing with the legal rights of a single author. The sacralization of authors has contributed to the preference of singular authorship; sacralization of authors refers specifically to western forms of cultural production and entails:

the separation of elite culture from popular culture and the creation of sacred authors. Works of these sacred authors could not be abridged or altered and ... hierarchies of taste, in turn, influenced the formation, development, and operation of intellectual property frameworks (Arewa 588).

The quasi-deification of singular authors helps illustrate why conceptions of collective authorship were not included in copyright law.

In order to protect the “sacred” rights of the singular author, courts and corporations have pushed the need to protect these authors from theft; “The author was deployed as a straw man in the debate. The unrewarded authorial genius was used as a rhetorical distraction that appealed to American romantic individualism” (Vaidhyathan xxv). Ironically, the same corporations peddling this rhetoric appear overly concerned with the rights of the author, specifically the economic rights of the author. Corporations are perpetuating the exclusionary concept of the singular author in order to protect their property. In the twentieth century, copyright has been more concerned with the rights of the publishers, while the rights of the author and the consumer are overlooked (Vaidhyathan xxv). Author and copyright law critic Siva Vaidhyathan argues that the concepts of authorship, ownership, and originality are distorted when viewed through the lens of intellectual property, and the discussion should be changed to the question of intellectual policy (Vaidhyathan xxvi). The power of corporations is a concern, and much of their legal power can be traced back to the creation of corporate personhood.

### Corporate Personhood and the Economics of Intellectual Property

The economic argument for copyright is, in the eyes of corporations like Bridgeport Music Incorporated, the most compelling argument in favor of strict copyright law. In their view, copyright exists to protect the economic viability of the works owned by the copyright holder.

Corporations use the notion of the romantic author to construct a narrative characterizing hip-hop musicians as an “other” operating outside of traditional (i.e. legal) forms of musical composition. The exorbitant licensing fees required to sample a sound recording are another hindrance to sampling artists. While many artists responded with a movement away from sampling, some artists – for example, mash-up artists – remained defiant, refusing to clear their samples. The time, effort, and resources it would require to clear the samples make full legality impossible for artists who aren’t supported by a major label record company, with both the capital and the legal team to support sampling.

The establishment of corporate personhood gave corporations all of the property rights to which a natural person is entitled, contributing to the rise in corporate power in America. In the 1886 Supreme Court Case, *Santa Clara County v. Southern Pacific Railroad*, the Court decided that:

a private corporation is a person and entitled to the legal rights and protections the Constitution affords to any person....Far more remarkable, however, is that the doctrine of corporate personhood, which subsequently became a cornerstone of corporate law, was introduced in this 1886 decision without argument (Korten 267).

In fact, Justice Morrison Remick Waite said that the court did not wish to hear an argument on the question of whether the provision in the Fourteenth amendment to the Constitution applied to corporations, because “we are all of the opinion that it does” (Korten 268). These few sentences dramatically changed the evolution of copyright by vastly increasing the legal power of corporations. Furthermore, as author David Korten notes, corporate personhood created an interesting legal contradiction. Because a corporation is owned by its shareholders, it is the shareholders’ property; since a corporation is also a legal person, then the shareholders

ownership of a corporation could legally be considered slavery (Korten 268). Despite the many legitimate reasons for not allowing corporate personhood, courts have continued to expand corporate rights allowing them to “enjoy virtual unlimited life; virtual freedom of movement anywhere on the globe; control of the mass media; the ability to amass legions of lawyers and public relations specialists in support of their cause; and freedom from liability for the misdeeds of wholly owned subsidiaries” (Korten 268). The legal recognition of corporations as people allows companies like Bridgeport Music to wield an enormous amount of legal power, continuing the trend of copyright moving to protect the rights of publishers first and foremost. Ironically, in colonial America, the first copyright was considerably anti-monopolistic; Many of the founding fathers were against copyright altogether, with Thomas Jefferson arguing that binding cultural expression by law would violate its essence (Aufderheide 27). As American businesses began to become more invested in the dissemination of works of cultural expression, competition within the industry led to more stringent copyright laws (Aufderheide 28). Corporations have always played a central role in pushing new copyright legislation, and the:

legal fiction that the corporation is a natural person is a major lever by which corporations...claim free speech rights for themselves in promoting their products without public oversight and in seeking to influence public policy, while they use a combination of speech and property rights to prohibit the exercise of the right to free speech by real people” (Korten 276).

The legal power held by corporations – specifically recording companies – is best seen in the increase in sampling fees that continue to rise, making sampling particularly difficult for independent hip-hop producers.

The increase in licensing fees is one of the most troubling trends within the music industry. The lack of a compulsory licensing fee for sound recording allows the free market to take complete control, to the detriment of sampling artists. A recent article in the music magazine SPIN puts the average base price to clear a sample at \$10,000, with the threat of lawsuits over copyright infringement looming over both artists and labels potentially increasing that figure (Newton). The article also notes the recent trend in hip-hop production towards synthesizers, drum machines, and auto-tune as musical replacements for sampling have increased along with licensing fees (Newton). The producer and MC RZA from the Wu-tang Clan remembers the “old days” when samples were \$2500 or \$1500 (Newton). Today, sampling a major artist like James Brown could cost \$20,000 dollars to clear (Newton). More recently, a new type of corporation, the sample troll has become more prevalent in the music industry. In a recent article on Slate exploring this phenomenon, Bridgeport Music Incorporated was profiled as a leading corporation participating in this trend. Along with other similar catalog companies, Bridgeport holds portfolios of old rights (most notably the oft-sampled George Clinton of Funkadelic and Parliament fame) and uses lawsuits to receive monetary benefit for unlawful sampling (Wu). George Clinton himself has stated that he does not mind the sampling of his music, and has claimed that Bridgeport stole some of the copyrights to his songs by faking his signature on a number of contracts (Wu). This predatory corporate behavior is justified under current copyright law and underscores the need for revision of licensing practices within the industry.

Copyright law continues to be challenged by new art forms that do not fit neatly into the romantic notions of authorship, originality, and ownership that are embedded in copyright law. Furthermore, the inexact fit of property law theories is a significant factor in the development of

copyright law notions which sampling directly challenges. The inexact fit of property law is a topic I will explore more in depth in chapter four. As long as hip-hop maintains its current visibility in popular culture, companies like Bridgeport Music Incorporated will continue their pursuit of sampling artists. In the next chapter, I will explore a number of important cases that helped shape the current legal climate, focusing especially on cases involving Bridgeport. I will analyze both the legal reasoning of the cases as well as the musical tracks themselves, giving specific examples of the ways in which sampling contradicts fundamental aspects of copyright law.

### Chapter 3: The Giant Goes to Court

This chapter remixes the previous two chapters, continuing the normative assumption running through this thesis that hip-hop has challenged fundamental aspects of copyright law, illustrating the need for reform. There are not as many cases as one would think, considering the staggering number of samples used in hip-hop production, as well as hip-hop's increasing popularity throughout the 1990s and into the 2000s. However, the few cases that have gone through the courts have produced decisions that have directly impacted artists' attitudes toward sampling. There has been no clear legal precedent established in any of the courts' decisions that clearly outline legal reasoning that can be applied to subsequent cases. The unclear legality of sampling has been met with uncertainty by the hip-hop community, as evidenced by heavily biased decisions by some courts. One such case is the 1991 case of *Grand Upright Music v. Warner Brothers* dealing with the Biz Markie song "Alone Again", and his reappropriation of the chorus from the original song by Gilbert O'Sullivan "Alone Again (Naturally)". While I will save in-depth analysis for later, this case will be important to keep in mind throughout the chapter.

As the first two chapters illustrated, copyright law and hip-hop culture are increasingly at odds, and the sheer amount of litigation that exists dealing directly with copyright infringement from the unlawful use of samples continues to expand. As the previous chapter explained, written and oral cultures share very different conceptions of authorship and ownership. The legal definitions of authorship and ownership support the notion of the Romantic author, an inherently singular entity. This definition of authorship leaves no room for the type of collective authorship prevalent in hip-hop culture. In this chapter, I will first give a brief overview of the *de minimis* defense – a ubiquitous and often ambiguous legal defense in these cases – as well as a

description of the burden of proof required for the claimant to show there was infringement. All three terms, as well as fair use, are central legal concepts in copyright infringement cases dealing with hip-hop. The next section of the chapter will feature four specific case studies, *Newton v. Diamond*, *Campbell v. Acuff-Rose*, *Grand Upright Music Lmtd. v. Warner Brothers Music*, and *Bridgeport Music v. Dimension Films*. In addition to analyzing the cases from a legal perspective, I will also analyze the songs at question in the cases, explaining how the song is remixed and given a new meaning. The *Bridgeport Music* case is one of numerous infringement cases filed by Bridgeport against hip-hop artists, and the case itself will lead into further discussion of the relatively new phenomenon of copyright “trolls”. After the case study, I will also discuss a few more recent instances of lawsuits against hip-hop artists, although these instances have been settled out of court generally. Most sampling lawsuits settle outside of court, and companies like Bridgeport Music actively search for any sampling of works for which they own the sound recording copyright. Suing artists for infringement, particularly popular artists, can be a significant source of income for companies which own large catalogs of often sampled music. There are also instances where the owners of the composition rights to a work object to the sampling context and assert their right to exclude in order to punish perceived damaging reappropriation of their work.

### The De Minimis Defense, Substantial Similarity, and the Ordinary Observer Test

Along with the fair use doctrine, de minimis, substantial similarity, and the average-audience test constitute the legal terms that appear most commonly in the cases I will analyze. It is important to have a basic understanding of these concepts before moving into their specific applications, especially considering their ambiguity within legal discourse. The three terms are also inextricably linked, and to fully understand one it is necessary to understand how they interact

with one another. All three terms are especially important in the first two cases I will explain, *Newton v. Diamond* and *Campbell v. Acuff-Rose*. The discussion of these three concepts in both cases helped to set precedent for the application of these terms in later cases dealing with hip-hop sampling. A copyright infringement allegation must show proof of ownership, copying, and unlawful appropriation (Wilson 183). The burden of proof most relevant within the cases dealt with in this chapter is unlawful appropriation. After the court establishes ownership and copying, it applies what is called an unlawful appropriation analysis where “the trier of fact determines whether a substantial similarity exists between the original and infringed work that exceeds the threshold for an unlawful appropriation” (Wilson 184).

There are two common defenses that appear in sound recording infringement cases: fair use and *de minimis*. Fair use was originally created to protect the right of a third party who wants to use a copyrighted work without consent of the author of the original work. As the subject matter of copyright expanded, the shortcomings of fair use have become more evident (Evans 11). There is a four-pronged test for fair use whereby the court examines the alleged infringer’s purpose, the nature of the use, the substantiality of the sample, and the impact of the use on the potential market for the copyrighted work (Wilson 184). Substantial similarity and *de minimis* use are intrinsically linked and often overlap (Evans 11). There are two different types of substantial similarity, but the type most commonly seen in sampling cases is fragmented literal similarity. Fragmented literal similarity is distinct from substantial similarity; for example, the sampling of one note is generally not recognized as constituting substantial similarity, rather it is considered fragmented literal similarity (Wilson 186). The fragmented literal similarity test – a quantitative and qualitative analysis examining the amount of appropriation and the way in which the sample is situated within the new track – is used to determine whether there is

substantial similarity between the tracks (Wilson 186). If there is fragmented literal similarity, but no substantial similarity, then the use is considered de minimis, meaning that the copying is trivial and insignificant so no liability can result (Evans 11).

One unclear musical practice that has been discussed with substantial similarity and de minimis use is the issue of looping. When a producer samples a small two bar section from the song, and loops it throughout their recording, it could be argued that there is substantial similarity because of the prominence that that sample plays in the new work; however, two bars sampled from a much longer work could just as easily (and should) be considered de minimis use (Wilson 187). Another issue that should be considered is the application of the ordinary observer test to determinations of substantial similarity and de minimis use. The general test for determining the triviality of a sample is whether or not the ordinary observer would recognize the sample (Miller 6). This is particularly problematic because of the ambiguity of the term average audience. There is no clear precedent established that codifies the specifics of the average audience test. Most often in the cases I examine, the court determines whether or not the average audience would recognize a sample based on analysis of an expert witness's (often a musicologist) testimony. It is important to note that de minimis is not a part of codified law, but rather a legitimate defense that has long been part of copyright case law (Miller 6). For example, in the case of *Newton v. Diamond* which I will explore later, the Ninth circuit court first established its acceptance of the de minimis doctrine before concluding that "a successful de minimis defense to a copyright infringement claim will depend on whether the average audience, or ordinary observer, is able to recognize that a copying has taken place" (Miller 6). It is also disconcerting that a complex moral, ethical, and legal issue in determining the legality of sample should be left to the ordinary observer test. Additionally, the ambiguity of substantial similarity

and de minimis defenses, as the case analyses will explain, is a roadblock that courts have been unable to successfully navigate.

For each of the case studies, I will first present the facts and method of argument used by both parties, accompanied by my own analysis of the tracks. My analysis will use the structure of a close listening, analyzing the sampled portion in the context of the original work and its reappropriation in the new work. Then, I will explain the court's reasoning and decision, drawing upon the court's opinion as well as relevant legal scholarship. Finally, I will discuss the legacy of the case, explaining how the decision affected both the legal and hip-hop communities respectively.

### Grand Upright Music Limited v. Warner Brothers Music

The first case I will explore, Grand Upright Music Limited v. Warner Brothers Music is the most emblematic of the issues at stake in the application of copyright law to sampling based music. Not only did the decision affect later decisions in similar cases, but it also forced hip-hop producers to reconsider the collage style of sampling that was prevalent during the late eighties and early nineties. This case is a clear example of the types of prejudices that exist towards sampling, further highlighting the issues with applying the idea of collective authorship to a copyright law which has not historically recognized that type of authorship.

Unlike the other cases I will explore, the opinion by Judge Kevin Thomas Duffy of the United States District Court for the Southern District of New York is notable for its structure and style of writing. Only three pages in length, the opinion has a decidedly editorial feel encapsulated in the now infamous opening line which quotes Exodus, Chapter 20, Verse 15 "Thou shalt not steal" (Grand Upright Music Limited v. Warner Brothers Music 2). Judge Duffy ended his opinion by "referring the matter to the U.S. attorney to consider prosecuting the

defendant for criminal copyright infringement” (Music Copyright Infringement Resource). The case deals with hip-hop artist Biz Markie’s song “Alone Again” which was featured on his record *I Need a Haircut* (Grand Upright Music Limited v. Warner Brothers Music 2). The song appropriated musical elements, as well as the title from the 1972 song “Alone Again (Naturally)” by Gilbert O’Sullivan. Duffy states that it is clear that the sample was improper and unlicensed, and “the only issue, therefore, seems to be who owns the copyright to the song ‘Alone Again (Naturally)’ and the master recording thereof made by Gilbert O’Sullivan (Grand Upright Music Limited v. Warner Brothers Music 2). Duffy then gave three reasons leading him to the conclusion that the plaintiff (O’Sullivan) owned the copyrights to both the composition and the recording: One, A deed transferring the original copyrights from NAM Music Inc. to Gilbert O’Sullivan; Two, testimony from Gilbert O’Sullivan, who is both the composer and performer featured on the recording of the original song; Three, the defendants attempted to contact O’Sullivan’s agent in order to obtain a license to sample O’Sullivan’s song, were denied permission, and decided to release the song anyway (Grand Upright Music Limited v. Warner Brothers Music 2). Judge Duffy used this reasoning to conclude that “From all of the evidence produced in the hearing, it is clear that the defendants knew that they were violating the plaintiff’s rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records” (Grand Upright Music Limited v. Warner Brothers Music 4).

This case presents an opportunity to explore the musical elements that could have been used to determine whether or not “Alone Again” infringed on Gilbert O’Sullivan’s original recording and composition. In an appearance at a film festival, O’Sullivan was asked a question about the case and said that Biz Markie approached him to sample the song in 1990. Subsequently, O’Sullivan asked him to send a copy of the track; Upon discovering that Biz

Markie was a “comic rapper”, O’Sullivan became concerned that the serious nature of his song would be tarnished, saying that he will “go to his grave to make sure it is never used in the comic scenario which is offensive” (Billyjam). “Alone Again (Naturally)” is about a man left at the altar, who is on his way to commit suicide. During the course of the song, the man reflects upon the deaths of his mother and father, punctuating each instance with the refrain “alone again, naturally”. The Biz Markie song samples the opening piano chords of “Alone Again (Naturally)” layering the chords over a drum loop. These musical elements comprise the main production techniques used throughout the song. Biz Markie also uses the same repeated refrain “alone again, naturally”. The lyrical content of Biz Markie’s version is much more light hearted, focusing on “how the rapper [Markie] received no respect as a performer back when he played in combos with old friends, but since he had become a solo performer his career had been satisfying” (Vaidhyanathan 125). Although there are undeniable similarities between the two tracks, the transformative elements of Biz Markie’s track should have been considered in the context of a fair use analysis or de minimis defense, especially considering that the main similarity between the two tracks is the repeated refrain of “alone again, naturally”.

The case *Grand Upright Music Limited v. Warner Brothers Records* has been dissected by numerous law review articles, virtually all of them critical of the decision. One of the primary criticisms is the tone used and lack of substantive discussion in Judge Duffy’s opinion. He has also been criticized for his lack of sound legal reasoning, because his “opinion essentially ignored the de minimis and fair use defenses and characterized sampling as de facto theft” (Vrana 9). Judge Duffy is not the first person to equate hip-hop music with theft. His decision reveals “a disdainful, if not contemptuous, view by the judges for the type of musical borrowing involved in hip-hop as a genre”(Arewa 581). Classifying hip-hop as theft ignores the long,

documented history of borrowing in all musical forms which indicates a “tendency to detach hip-hop from the broader history of musical borrowing” a tactic that is “central to representations of hip hop and hip hop musical practices as an ‘other’” (Arewa 581). Furthermore, legal discussions of hip-hop reflect the preference for the use of nineteenth century hierarchies of musical description, which only further separates hip-hop from the more mainstream view of musical production (Arewa 10). These “discourses of difference have the effect of characterizing and framing hip-hop in a way that justifies negative evaluations of hip-hop’s aesthetic value” (Arewa 584).

The Grand Upright decision affected hip-hop artists almost as significantly as it did future sampling cases. After 1991, there was an undeniable decline in the amount of samples used in the typical hip-hop song. While the decision did not completely remove sampling from the music industry it caused “the death of tricky, playful, transgressive sampling” because the “courts and the industry misapplied stale, blunt, ethnocentric, and simplistic standards to fresh new methods of expression” (Vaidhyanathan 127). The decision set a precedent which allowed artists to deny sampling requests if they objected to the subject matter, or simply for no reason other than the fact that it is their property, and they can do with it what they please (Vaidhyanathan 127). There are critics who still argue that declaring the death of liberal sampling is inaccurate, with one such critic claiming that this reactionary discourse is emblematic of the tendency of scholars to “overstate copyright’s inhibiting influence on recoding” (Joo 16). This same critic refutes the claim that the Grand Upright decision emboldened copyright owners contributing to the rise in burdensome licensing costs, arguing that “samplers paid for copyright permission since the beginning of recorded hip-hop” (Joo 17). Furthermore, the critic supports Duffy’s lack of response to the question of whether Biz Markie’s

use of the sample constituted de minimis or fair use, arguing that because the infringing party knew that a license was not obtained, they knew that it was theft (Joo 18). This argument is problematic in the casual dismissal of the completely legitimate argument that could have been made for de minimis or fair use. Furthermore, this type of legal writing perpetuates the discussion of hip-hop musical aesthetics as being an “other” that evident in a large amount of legal discourse.

*Grand Upright Music Limited v. Warner Brothers Music* emphasizes the need for revision of our copyright laws. The ambiguity of the language of copyright laws, its preference for nineteenth century musical evaluation discourse, and the categorization of hip-hop as an “other” restrict sampling artists’ creativity. The next two cases that I will explore put forward decisions that were much more favorable for hip-hop artists. However, there are significant shortcomings with each case, and the legacy of both cases remains uncertain.

## Campbell v. Acuff-Rose

The 1994 case of *Campbell v. Acuff-Rose* is particularly influential because it is one of the few copyright cases that went to the Supreme Court. It was also only the second time ever that the Supreme Court addressed the fair use defense in the context of a parody (Babiskin 194). While the case went through a number of lower courts on the way to the Supreme Court, I will focus my analysis on the opinion delivered by Justice Souter of the Supreme Court.

The 1989 song “Pretty Woman”, composed by Luther R. Campbell of the popular rap group 2 Live Crew, was a satirical take on the song “Oh, Pretty Woman” (*Campbell v. Acuff-Rose Music* 1). “Oh, Pretty Woman” was written in 1964 by Roy Orbison and William Dees, who after recording the song, subsequently gave their rights to Acuff-Rose Music, who

registered the song for copyright protection (Campbell v. Acuff-Rose Music 1). 2 Live Crew's manager sent a letter to Acuff-Rose music informing them that they had recorded a parody of "Oh, Pretty Woman", enclosing both a copy of the lyrics and the recording; In addition, 2 Live Crew's manager stated that they would give all authorship and ownership of the original song to the copyright holders, and that they were willing to pay a licensing fee (Campbell v. Acuff Rose Music 1). 2 Live Crew was denied permission, but they decided to release the song anyway, still crediting Orbison, Dees, and Acuff-Rose as the authors and publisher of the original song in the liner notes (Babiskin 210). The 2 Live Crew album *As Clean as They Wanna Be*, on which "Pretty Woman" appeared, went on to sell nearly a quarter of a million copies before Acuff-Rose Music sued for copyright infringement (Campbell v. Acuff-Rose Music 1). The District Court that first heard the case determined that 2 Live Crew's song made fair use of the original, before that decision was reversed and remanded by the Court of Appeals for the Sixth Circuit (Campbell v. Acuff-Rose Music 2). The Court of Appeals reasoned that the district court had put too little emphasis on the commercial use of the track, asserting that the track's blatantly commercial use prevented the parody from being considered a fair use (Campbell v. Acuff-Rose 2).

It is important to remember that in all determinations of fair use, the court must refer back to section 107 of the United States copyright law. In order to be considered fair use, the court examines the work based on four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market for or value of the copyrighted work (17 USCS Sec. 107). In his opinion, Justice Souter notes that:

From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts....' U.S. Const., Art. I sec. 8, cl. 8. For as Justice Story explained, 'in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before (Campbell v. Acuff-Rose Music 2)

Souter's inclusion of this quote is particularly interesting when examined within the context of the notion of the Romantic author. As I explained in Chapter 2, the idea of the singular author is synonymous with the notion of the Romantic author. Interestingly, this quote is more evocative of post-modern theory than legal writing. This quote also helps contextualize Justice Souter's reasoning as he examines the Campbell v. Acuff-Rose case, looking at the four factors necessary for fair use.

In his opinion, Justice Souter focuses on the first factor of fair use, the purpose and character of the use. In the case of a parody, Souter argues that the mode of enquiry adopted by the court, should determine to what extent the work is transformative, especially considering that "the more transformative the new work, the less will be the significance of the other factors"(Campbell v. Acuff-Rose 3). He then proceeds to define parody within a strictly legal context, concluding that "the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works"(Campbell v. Acuff-Rose 3). Furthermore, Souter distinguishes between parody and satire, noting that "parody needs to mimic an original to make its point" whereas "satire can stand on its own two feet and so requires justification for the very

act of borrowing”(Campbell v. Acuff-Rose 3). He then moves to an examination of the elements that make “Pretty Woman” a parody, focusing on the transformative nature of the lyrics. Justice Souter notes that, although the District court found that the first line of “Pretty Woman” was the same as the original, the 2 Live crew song “quickly degenerates into a play on words, substituting predictable lyrics with shocking ones”(Campbell v. Acuff-Rose 4). The fair use factor most deserving of attention according to Justice Souter was the fourth factor, which focused on the commercial nature of the use; this fourth factor was an important point of issue for both of the District Court’s and Court of Appeal’s decisions, especially the latter, having used the commercial nature of the work to overturn the District Court’s ruling of fair use (Campbell v. Acuff-Rose 8). Justice Souter criticized the Court of Appeals decision for focusing too heavily on the fourth factor (Campbell v. Acuff-Rose 8). As to the question of how the parody will affect the market for the original, Justice Souter argued that “it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is , by acting as a substitute for it” (Campbell v. Acuff-Rose 8). Finally, Justice Souter concluded that the Court of Appeals erred in their decision that the commercial nature of the parody of “Oh, Pretty Woman” made it unfair. The Supreme Court also determined that the Court of Appeals erred in asserting that 2 Live Crew excessively copied from the Orbison original and reversed the judgment (Campbell v. Acuff-Rose).

This case is unique because it is a parody, and doesn’t require the same type of close listening as other cases in regards deciphering samples. As I listened to both tracks, the most striking aspect of 2 Live Crew’s “Pretty Woman” was its simplicity. “Oh, Pretty Woman” is a very recognizable song, and one that I first heard years ago, unable to escape its ubiquity in popular culture. The most instantly recognizable aspect of the original is the opening guitar riff.

Its repetition throughout the song enhances its memorability. Unsurprisingly, the guitar riff is the sample used in the 2 Live Crew parody to form the basis of the underlying musical track. The construction of “Pretty Woman” is very simple, consisting of a rudimentary drum beat and vinyl scratches layered under the guitar riff. The production for the verses is even simpler, featuring only the drum beat with the occasional accent of a brief sample of the guitar riff. Clearly, the most transformative aspect of the parody is the lyrics, which are thematically much different from the original. The 2 Live Crew lyrics subvert the original image of the pretty woman embodied in “Oh, Pretty Woman” by focusing on the negative characteristics of the women portrayed in their song. The repetition of the phrase “Pretty Woman” in the Orbison version is only used in the first verse of the 2 Live Crew version. The phrase changes to “Big hairy woman” in the second verse, “Bald headed woman” in the third, and finally “Two timin’ woman” in the final verse. Clearly, the transformative elements of “Pretty Woman” make it clear that the song is a parody of the original.

Despite the enormous legal influence wielded by the Supreme Court, the legacy of this case is unclear. The narrow subject matter of the case inherently makes it difficult to determine what exactly its effects could have been within the hip-hop community. Obviously, the Supreme Court was only able to comment on parodies. However Souter’s discussion of fair use and his assertion that all works of art rely on previous works, shows the importance that the Supreme Court places on fair use. The Court’s decision illustrated a desire to balance the issues that could arise between “too narrow a construction of fair use which would stifle free speech and too liberal a construction which would openly incite litigation and abuse” (Babiskin 224). Another crucial aspect of the decision was a desire not to base its ruling on the court’s perception of artistic merit, which could set precedent for judges to essentially become cultural police,

determining which works are allowed to legally exist based on artistic merit (Babiskin 225). Justice Souter's illuminates the difficulty of attempting to set legal precedent. In their decision, a court must consider the effect that their legal reasoning could have on later cases.

### Newton v. Diamond

The 2003 case of *Newton v. Diamond* is another influential decision in copyright law. The plaintiff, jazz flutist James W. Newton claimed infringement of a six-second sample of his song "Choir" on the grounds that the defendants, The Beastie Boys, did not acquire a license for the composition (James W. Newton v. Diamond). The Beastie Boys used a sample from "Choir" in their 1992 song "Pass the Mic", which "looped said sample as a background element...so that it appears over forty times in various renditions of the song (James W. Newton v. Diamond 593). Newton first learned of his appearance in the song and the popularity of that song from one of his students at California State University (Blessing 2399). Newton composed the song in 1978, and then recorded and performed it in 1981, licensing the rights to the sound recording to ECM records, from whom the Beastie Boys paid a fee of one thousand dollars in exchange for a license to portions of the sound recording (James W. Newton v. Diamond 593). Newton was inspired to write "Choir" from his earliest memory of music watching four women singing in a church, and the composition "intended to incorporate elements of African-American gospel music, Japanese ceremonial court music, traditional African music, and classical music among others" (James W. Newton v. Diamond 592). The sampled portion of the original composition consists of three notes, C, D-flat, C which were sung over a background C note played on the flute (James W. Newton v. Diamond).

One important caveat to this case is that the only consideration of infringement relates to whether or not there are any infringements on the compositional uniqueness of the original work,

because the Beastie Boys acquired a license for the sound recording. Newton and his experts argued that the sound recording of “Choir” is “the product of Newton’s highly developed performance techniques, rather than the result of a generic rendition of the composition” (James W. Newton v. Diamond 595). Essentially, the plaintiff argued that the sophistication and uniqueness of Newton’s performance technique embodied in the original sound recording would be clear to an average observer, and therefore the sample should be considered copyright infringement. However, the court ruled that this argument was invalid because the uniqueness of the technique is not clear from the transcribed composition and therefore, the real question is whether or not the unauthorized use of the composition was substantial enough to constitute infringement (James W. Newton v. Diamond 596). The Beastie Boys and their expert argued that the sample is:

‘merely a common, trite, and generic three-note sequence, which lacks any distinct melodic, harmonic, rhythmic or structural elements’. Dr. Ferrera [the expert] also described the sequence as ‘a common building block tool’ used over and over again by major composers in the 20<sup>th</sup> century, particularly the ‘60s and ‘70s, just prior to James Newton’s usage (James W. Newton v. Diamond 598).

The defense essentially used this testimony to argue that there is no inherent uniqueness embodied in the recording, and it is impossible for there to be any substantial similarity between the two works. Therefore, the use of the sample would be qualified as *de minimis*.

In my own listening analysis of “Choir” and “Pass the Mic”, I was easily able to recognize the sample clearly in both iterations. In “Choir”, the sample first appears at the beginning of the recording, and is then heard again towards the end. In the sound recording, James Newton uses the appropriately named “Newton technique”, simultaneously playing a held

c on the flute while singing overtop. He varies the sung melody throughout the use of the technique before moving into a new section, where he plays the flute more traditionally. He then reuses the same intro section with the “Newton technique” as an outro to end the song. In “Pass the Mic”, the sample is also first heard at the beginning of the song, however it is clearly pitched down and there are almost certainly other effects used to alter the sample. The sample is heard only once before the looped drum sample starts, and then heard multiple times throughout the rest of the recording. While someone intimately familiar with “Choir” would most likely recognize the sample at the beginning of “Pass the Mic”, the context of the sample is radically different. In a procedure typical of hip-hop, the Beastie Boys looped the sample throughout the song, layering on different musical elements (i.e. other samples, drum loops, vocals) to create the aesthetic of the entire track. The “Choir” sample is simply one small musical element of “Pass the Mic”. If the Beastie Boys had used that sample more often, and also appropriated the more traditional melodic section of “Choir” as the hook, then a more compelling argument could have been made for infringement. It is clear to me from listening to both tracks that, although Newton’s technique is certainly distinctive, the use of the sample in “Pass the Mic” is only a smaller part of the rest of the song.

The opinion of the court in the *Newton v. Diamond* case was delivered by Chief Judge Schroeder, who asserted that “in relation to Newton’s composition as a whole, the sampled portion is neither quantitatively nor qualitatively significant” and that “it is difficult to measure the precise relationship between this segment and the composition as a whole” (*James W. Newton v. Diamond* 597). The main issue with Newton’s charge of infringement is the fact that he must prove that the three-note sample is original in the context of the transcribed composition. The testimony provided by Newton’s musical experts focused on the significance of the

performance in the context of the sound recording, which the Beastie Boys properly licensed, and therefore was not particularly relevant to the case. Judge Schroeder further explained that “On the undisputed facts of this case, we conclude that an average audience would not discern Newton’s hand as a composer, apart from his talent as a performer, from Beastie Boys’ use of the sample” (James W. Newton v. Diamond 598). In conclusion, the court found that the works are not substantially similar to one another, and that the Beastie Boys’ use of the “Choir” composition was a case of de minimis use.

Interestingly, in the dissent written by Circuit Judge Graber, the Graber argued that the sampled portion of “Choir” qualifies as original and is copyrightable; furthermore, a jury should be able to reasonably assert that the Beastie Boys use of the sample was substantially similar to the original work and therefore does not constitute de minimis use (James W. Newton v. Diamond 598). The Judge continued the argument by writing that the “presented evidence that the compositional elements of “Choir” are so compositionally distinct that a reasonable listener would recognize the sampled segment even if it were performed by the featured flautist of a middle school orchestra” (James W. Newton v. Diamond 598). It is important to note that Judge Graber agreed with the majority, but disagreed with the court’s analysis of the expert testimony (Miller 9). The decision handed down in Newton v. Diamond was straightforward, particularly in its application of the de minimis doctrine, and seemed to establish a legally sound application of the de minimis doctrine that could also be applied to sound recordings. However, as the next case illustrates, the ambiguity of the de minimis doctrine – and to a much larger extent copyright law – allows for individual courts to produce significantly different decisions in similar cases.

## Bridgeport Music v. Dimension Films: A Sample “Troll” is Born

The most recent and dissected of all of the cases that I have explored, Bridgeport Music v. Dimension Films is reminiscent of Grand Upright Music Limited v. Warner Brother Music for its effect on both the hip-hop and legal communities. Although the Bridgeport case discusses musical elements in the opinion, the strict application of legal principles, and general discussion of hip-hop musical aesthetics are reminiscent of the Grand Upright Case. Bridgeport Music v. Dimension Films is notable because it is part of a larger group of claims of infringement filed on May 4, 2001; Bridgeport and its related companies, Southfield Music, Westbound Records, and Nine Records, alleged nearly 500 counts against 800 defendants for copyright infringement for the use of samples without permission in various new rap recordings (Bridgeport Music, Inc. v. Dimension Films 1). Bridgeport Music v. Dimension films is also notable for establishing a rule applying to the sampling of sound recordings that essentially eliminated the de minimis doctrine as a viable defense. Bridgeport is what has been called a sample troll: “Similar to its cousins the patent trolls, Bridgeport and companies like it hold portfolios of old rights” and “use lawsuits to extort money from successful music artists for routine sampling, no matter how minimal or unnoticeable” (Wu). After I explain the significance of the Bridgeport Music v. Dimension Films decision, I will elaborate on the sample troll phenomenon giving a few examples of notable artists caught in the crossfire.

The 2005 case of Bridgeport Music v. Dimension films concerns the use of a sample from the song “Get Off Your Ass and Jam” by Funkadelic in the song “100 Miles and Runnin’” by the rap group N.W.A. (Bridgeport Music v. Dimension Films 1). The case was first heard by the District court who determined that the defendant’s copying was de minimis; the decision was appealed by the defendant and subsequently heard by the Sixth Circuit Court of Appeals (Brodin

849). Bridgeport and their sister companies owned the copyrights to “Get Off You Ass and Jam”. The song “100 Miles”, by rap group N.W.A. was featured on the sound track of the movie *I Got the Hook Up*, which is owned by the defendant in the case (Bridgeport Music v. Dimension Films 1). The sample in question was a “three-note combination solo guitar ‘riff’ that lasted four seconds”; “100 Miles” used a two-second looped sample from the guitar solo, lowered the pitch, and then looped the sample for sixteen beats (Bridgeport Music v. Dimension Films 2). The defendant argued that “the sample was not protected by copyright law because it was not ‘original’” and “that the sample was legally insubstantial and therefore does not amount to actionable copying under copyright law”(Bridgeport Music v. Dimension Films 2). The Sixth Circuit Court of Appeals first summarized the District Courts’ decision writing that the court found that the sample passed de minimis analysis because “no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source” (Bridgeport Music v. Dimension Films 3). The Sixth Circuit Court overturned this decision reasoning that “no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording” (Bridgeport Music v. Dimension 3). The court further enforced this claim using Section 106 of the U.S. Copyright law which gives the owner of the copyright exclusive rights to “prepare derivative works based on the copyrighted work” (17 USCS Sec. 106.2). Section 114(b) also states that this right 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” (17 USCS Sec. 114.b).

The reasoning that the Sixth Circuit Court gave completely eliminated the de minimis and fair use defenses in any case of unlicensed sampling of a sound recording, establishing a

bright-line rule that was intended to expedite the other 800 case in which Bridgeport is currently embroiled (Brodin 851). The decision has been criticized as being “an example of the stifling effect of copyright law on music” and it has been argued that the “infringement rule should be overturned and the traditional defenses of de minimis and fair use should be applied in all sound recording infringement cases” (Evans 14). The decision has also been criticized by other circuit courts, with some courts refusing to apply the bright-line rule in similar cases leading to a split that could “prove to be the tipping point leading at a minimum to a judicial remedy, or more necessarily, a legislative one” (Evans 14). Despite the overwhelming negative response to the decision, there are still some supporters of the Bridgeport decision who argue that critics are engaging in a misreading of the decision, particularly in the effect the decision has had on the hip-hop community. One critic argues that the Bridgeport rule “expands sound-recording copyrights in a direction denied to other copyrights” (Joo 34). As to the question of the effect of the decision on the music industry, the same critic argues that the reasoning in the case is consistent with the “well-established practice in the music industry by the late 1980s to seek copyright permission for both lengthy recognizable samples and for briefer, slice-and-dice samples” (Joo 34). The term “slice-and-dice” is an inaccurate way to refer to sampling, reflecting an ignorance of hip-hop musical aesthetic. “Slice-and-dice” is used to refer to sampling specifically within a hip-hop context. This type of inexact terminology encourages the narrative that situates sampling practices outside of more accepted forms of musical composition, despite the long history of borrowing and appropriation in all forms of music.

The emergence of sampling trolls like Bridgeport Music signal the need for reform in our copyright law system. A sampling troll “strategically stockpiles musical rights (sometimes through unscrupulous means). Using first threats and then lawsuits, it shakes musicians and

labels down for suspected sampling ‘no matter how minimal and unnoticeable’” (Ashtar 268). These companies like Bridgeport, often do not represent the original artists, “but are merely catalog companies that create profits by suing infringers of copyrights they have purchased” (DeBriyn 86). This is a troublesome trend in the music industry, and it does not make sense that copyright law should exist to protect the interests of opportunistic corporations who are using the current system to attack sampling artists. This litigious environment only deters more artists from using sampling in their songs. New artists are not the only possible targets of companies like Bridgeport, as another sample troll, Drive-In Music Company, filed suit against Sony BMG Entertainment for the use of a sample from *Come On In* by Music Machine in the 1991 Cypress Hill song “How I Could Just Kill a Man” (DeBriyn 87). The ability afforded to sample trolls to make money “simply by enforcing rights in old works without creating their own new works” is a troublesome trend in the music industry, and signals the need for serious discussion about possible reforms for copyright law (DeBriyn 87).

Despite the ever increasing popularity of sample-based music – and the ever increasing popularity of litigation involving sampling based music – copyright is not any closer to a solution to deal with sampling. The application of the law in these cases is decidedly inconsistent, as individual courts attempted to establish clear precedents that were largely ignorant of the musical aesthetic of hip-hop sampling practices. These cases also reinforce the difficulty arising from attempts to establish clear, definable guidelines that can be applied to sampling on a case-by-case basis. In the next chapter, I will attempt to bridge the seemingly limitless philosophical gap between copyright law and hip-hop music by explaining some possible reforms that have already been suggested. In light of the material presented in the previous two chapters, I will also update my definition of internal hip-hop sampling ethics.

## Chapter 4: Copyright Reform and the Ethics of Sampling Redux

The emergence of hip-hop has accentuated unclear aspects of copyright law that have been discussed and debated for decades. The rapid increase in the popularity of sample-based production in the 1980s and 1990s was accompanied by an increase in sales. As hip-hop became more lucrative, there was more incentive for artists whose music was sampled to pursue litigation, especially if the new song that featured their sample was popular. As I explained in chapter 3, although hip-hop has been discussed and dissected in the courtroom since the first case in 1991 *Grand Upright Limited v. Dimension Films*, there has not been any significant movement towards a clearer understanding of when a license is needed for sampling. Furthermore, the increased cost of licensing in the wake of the *Grand Upright* decision has only continued to increase. As a result of this environment, companies like Bridgeport Music have pursued litigation for any unlicensed sampling from the vast library of copyrights that they hold. Many hip-hop artists have reacted to this new industry practice by becoming much more cautious in their sampling practices, sometimes abandoning the practice altogether.

While the previous two chapters have focused on narrower issues within copyright law, the first part of this final chapter will explain what I see as the central issue with Copyright law: the inexact fit of property law theories and rights when applied to the field of intellectual property. The concept of property is one that is central to the United States Constitution and has historically been seen as a moral right. However, if property generally is a better way to deal with the issue of tangible goods, it has been particularly problematic when applied to the decidedly less tangible realm of musical ideas. Central to this problematic application of property law theories has been the adoption of the most important of the “bundle” of rights afforded to property owners: the right to exclude. While I will explain the specifics of this right later, it is

important to remember back to the last chapter, and the Grand Upright decision. The plaintiff in that case, Gilbert O'Sullivan the composer and copyright holder of the song "Alone Again (Naturally)", objected to Biz Markie's use of the sample because it changed the original meaning of the song. The right to exclude grants the author significant power, as they are able to legally contest arguably transformative uses of their songs if they disagree with the changed context. A related issue, one that has been just as troublesome in copyright law as the inexact fit of property rights, is the legal power granted to the author, or the "owner" as understood in property law. As I explained briefly in chapter two, the author is a particularly problematic term within copyright law. The author is a decidedly ambiguous term not only within a legal context, but in the artistic world as well. Sampling further complicates the already problematic conception of authorship, particularly the notion of the romantic author that is deeply embedded within copyright law. The conception of the author is no less clear outside of the legal realm, with postmodern discourse most notably grappling with the definition of the author.

In this chapter, I will explore the issues of the inexact fit of property rights to intellectual property – specifically the right to exclude, which is the exclusive right of a property owner to refuse the use of their property to another person. In order to address these issues, I will introduce postmodern concepts from the writings of Jacques Derrida, Roland Barthes, and Michael Foucault. In contrast to the right to exclude, I will introduce Derrida's concept of iterability and the related concept of authorial intent. The Barthes and Foucault writings will present postmodern theories regarding the role of the author. In addition to this, I will present some possible reforms that have been proposed that could potentially ameliorate the effects of the issues discussed throughout this thesis. Finally, I will update the internal definition of sampling ethics that I presented in chapter one by profiling El-P, one of the most influential

underground hip-hop artists of the last twenty years. His unique production techniques will help to explain the changes that have occurred in hip-hop production contemporaneous with the legal decisions that I have explored in the previous chapter. Furthermore, this section will help to apply all of the previous discussion about effect of copyright to the hip-hop community.

## The Right to Exclude and Iterability

In this section, I will introduce the concept of the right to exclude. The right to exclude is part of the bundle of rights that characterize property law; The other rights include the rights to consume a resource, to transfigure it, to transfer it, to bequeath or devise it, to pledge it as collateral, to subdivide it into smaller interests, etc. (Merrill 730). The right to exclude is fundamental to the concept of property and these other rights are all purely contingent on the right to exclude when referring to the bundle of rights (Merrill 731). The concept of the right to exclude has been a central part of property law for hundreds of years. Historically, there have been three distinct arguments used to support the primacy of the right to exclude. According to Merrill, the first argument runs as follows:

if one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarification about the domain of the exclusion right. On the other hand, if one starts with any other attribute of property, one cannot derive the right to exclude by extending the domain of that other attribute; rather, one must add the right to exclude as an additional premise (Merrill 740)

According to Merrill, the second argument supporting the notion of the right to exclude has its roots in primitive property rights systems, and the other rights evolved as property systems became increasingly complex indicating that the right to exclude is the key right to

understanding property (Merrill 745). Finally, according to Merrill, the argument regarding existing legal practice stipulates that in all instances where the law has recognized a right to property, it recognizes a right to exclude (Merrill 747).

Because intellectual property borrows so many key concepts from property law, the right to exclude occupies a similar position in regards to the intangible possessions that comprise copyright, patent, and trademark law. It is important to note here that the legal precedent of the right to exclude has its roots firmly embedded in the eighteenth century, when English legal theorist Sir William Blackstone published a series of four volumes that explored the right of property and its centrality to human life (*How to Fix Copyright* 177). The principle of the right to exclude has remained virtually unchanged since the time of Sir William Blackstone. One prominent critic of modern copyright law, William Patry, made the point that it is:

as if rhetorical views expressed about English landed estates at a time when England first passed the stamp tax against the American colonies can resolve the question of whether an internet video hosting service should be liable for making Danger Mouse's *Grey Album* mash-up of the Beatles *White Album* and Jay-Z's *Black Album* available for viewing (*How to Fix Copyright* 178).

This example reinforces the absurdity of attempting to apply the right to exclude to the wide variety of intellectual property issues that are discussed today. Obviously, when the right to exclude was developed as an inalienable property right, it was not meant to apply to the issues of whether or not a musician has the right to exclude another musician from sampling their work. The right to exclude as has been described has been more striking in the case of intellectual property. More specifically, the right to exclude is just as inseparable when it is applied to intangible goods (Merrill 749). What is particularly problematic about the right to exclude is how

the concept of the owner translates over to copyright law. Copyright law recognizes the rights of the author, who is essentially the owner of the copyrights. The right to exclude puts enormous power into the hands of this author (owner) which allows them to exclude other artists from using their work. The owner can exclude even if that reuse is transformative, changing the context and therefore the original meaning.

Jacques Derrida's concept of iterability may be helpful here, in that it underlines problems with granting the author the right to exclude. In his essay "Signature, Event, Context" Derrida explores the term communication, first as it is understood in writing. His goal for the essay is to "demonstrate why a context is never absolutely determinable, or rather in what way its determination is never certain or saturated" (Derrida 310). In the essay, Derrida is dealing specifically with writing, but he also notes how his ideas are not only limited to text. Inherent in the communication of any idea or thought through signs is absence. As Derrida explains, in order for a text to be considered writing, it must be able to exist absent the author:

My "written communication" must, if you will, remain legible despite the absolute disappearance of every determined addressee in general for it to function as writing, that is, for it to be legible. It must be repeatable – iterable – in the absolute absence of the addressee or of the empirically determinable set of addressees. This iterability (iter, once again, comes from *itara*, *other* in Sanskrit, and everything that follows may be read as the exploitation of the logic which links repetition to alterity), structures the mark of writing itself, and does so moreover for no matter what type of writing...A writing that was not structurally legible – iterable – beyond the death of the addressee would not be writing (Derrida 315).

Essentially, the right to exclude is based on assumptions that contradict the concept of iterability that Derrida introduces. The power granted to the author by intellectual property law allows them to exclude the grafting of alternative meanings onto their work. To borrow from Derrida's terminology this means that the work itself is illegible because "for the written to be written, it must continue to 'act' and to be legible even if what is called the author of the writing no longer answers for what he has written" (Derrida 316). Derrida's conception of iterability also relies on the key idea that there is the possibility of "citational grafting which belongs to the structure of every mark...as writing, that is, as a possibility of functioning cut off, at a certain point, from its 'original' meaning and from its belonging in a saturable and constraining context" (Derrida 320).

The ability for composers to refuse licensing the rights to their work to a sampling artist ignores iterability, the way in which a text inevitably deviates from its original meaning, with the possibility of new contexts and meanings being created. Also important in Derrida's definition of iterability is the way in which it challenges copyright's privileging of authorial intent. The right to exclude gives the author the ability to control the range of meanings that are attached to their work, limiting the ability of consumers to attach their own meanings to the work. Iterability, however clearly explains that once a text is written and distributed in the world, the author loses the ability to control the meanings. The attempt to limit the meanings of a work ignores the infinite number of interpretations that different people will derive from an original work. It is not uncommon for artists to simply refuse a licensing request simply because they object to the new context. The implications for this were seen in the case of *Grand Upright Music Limited v. Warner Brothers Records* in which Gilbert O'Sullivan objected to Biz Markie's use of his song because it changed the original meaning. It has also more recently been seen in a lawsuit brought against Rick Ross for a sample used in his 2012 song "3 Kings". Ross was sued

in early 2013 by Clara Shepherd Warrick and Jimmy Lee Weary, members of the Gospel group Crowns of Glory for sampling the 1976 song “I’m So Grateful (Keep in Touch)” (Carpenter). In the lawsuit, the defendants claimed that the music and lyrics were hijacked, and meant to only be performed as “spiritually uplifting gospel music” (Watkins 1). The Rick Ross version of the song features unsavory language that according to Crowns of Glory “continues to destroy the value of the [original] song in gospel circles” (Watkins 2). This lawsuit is a perfect example of the type of power afforded to copyright owners, and how it directly contradicts the concept of iterability. Warrick and Weary object to the use of their song simply because of the drastically different subject matter that the lyrics of the Rick Ross version convey. The sample absorbs the context and meaning that Rick Ross applies to his song, diverging from the authorial intent applied to the original Crowns of Glory song. The Rick Ross lawsuit also reinforces the need for a better understanding of the author, hopefully so that copyright can move away from the ultimately restrictive notion of the romantic author, which will be the focus of the next section.

### Moving Towards a Better Conception of the Author/Owner

As I explained in chapter two, the concept of the author is a particularly important site of conflict between copyright law and hip-hop. The author is essentially interchangeable with the owner in copyright law, even though the owner of a copyright is not always the original author of a work. The author is a particularly ambiguous concept within copyright law, one that has been discussed at length in other literature. The works of Roland Barthes and Michael Foucault raised a number of important questions about notions of western authorship that dominate copyright law.

Before discussing Barthes and Foucault, it will be useful to revisit the notion of the romantic author. In copyright law, the romantic author embodies the essence of true authorship

and originality, reinforcing the image of a lone genius (Arewa 567). Originality “serves as a minimum threshold for copyrightability”; Inherent in the legal definition of originality is an “independent creation, which essentially appears to rule out or significantly limit borrowing” (Arewa 566). Furthermore, genius is important to the legal definition of an author because “such conceptions were used to justify allocation of property rights to authors, who were deemed worthy of such ownership rights by virtue of their genius and originality” (Arewa 566).

Roland Barthes criticized the western conception of the author in his essay “The Death of the Author”, defining the author as:

a modern figure, a product of our society insofar as, emerging from the Middle Ages with English empiricism, French rationalism and the personal faith of Reformation...which has attached the greatest importance to the ‘person’ of the author...The *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author* ‘confiding’ in us (Barthes 143).

This conception of the author is clearly the one that dominates copyright law, and is part of the reason that the author is afforded so much control over their work. Furthermore, this definition helps to illuminate the difficulties a sampling artist must face when they are explicitly borrowing from another author. Barthes challenges the conception of the omnipotent author, endowing his work with delimited meaning, by arguing that “a text’s unity lies not in its origin but in its destination” (Barthes 148). This means that the creation of meaning is centered on the reader, not the author. It is in this way that Barthes claims the death of the author.

Michael Foucault took Barthes’ ideas further, reviving the idea of the author, and challenging normative assumptions about the role of an author. Foucault does not declare the

death of the author, but rather redefines the western conception of the author in a way that could be particularly useful when applied to copyright law. Before Foucault discusses the author more simply, he introduces the concept of the “author function” which is “characteristic of the mode of existence, circulation, and functioning of certain discourses within a society” (Foucault 108). This definition differentiates between an author and a writer; Foucault gives the example of random text on a wall that probably has a writer, but not an author (Foucault 108). Foucault further defines the author function by introducing four characteristic traits:

- (1) The author function is linked to the juridical and institutional system that encompasses, determines, and articulates the universe of discourses; (2) it does not affect all discourses in the same way at all times and in all types of civilization; (3) it is not defined by the spontaneous attribution of a discourse to a producer, but rather by a series of specific and complex operations; (4) it does not refer purely and simply to a real individual, since it can give rise simultaneously to several selves, to several subjects – positions that can be occupied by different classes of individuals (Foucault 113).

This conception of authorship is particularly useful because it challenges the notion of the lone genius embedded within romantic authorship. While Foucault’s definition of the author is certainly important, it is important to realize the larger goal of the chapter which is to apply these concepts to copyright in a meaningful way. Furthermore, it is important to remember that very often, the legal author is not a musician, but rather a corporation. The author Siva Vaidhyathan reinforces some issues with this mode of philosophical discourse, writing: “We can deconstruct the author for six more decades and still fail to prevent the impending concentration of the content, ownership, control, and delivery of literature, music, and data” (Vaidhyathan xxiv).

While this is certainly a valid point, this in-depth deconstruction of the term authorship is necessary to gain a complete understanding of the philosophical dilemmas that legal discourse must attempt to overcome. What is especially useful about Foucault's conception of the author is that it allows for enough room to accommodate collective authorship, a central part of the production of hip-hop music.

There are numerous examples of collective authorship in hip-hop and other African diasporic music that challenges the assumption within copyright law that the label of genius can only be applied to the lone author. Duke Ellington and Kanye West are two artists firmly situated within the tradition of collective authorship, who have also both been called geniuses. Duke Ellington is a well-respected jazz musician who "made a regular habit of borrowing melodic fragments composed by the soloists in his famed orchestra, then transforming them into hit songs" (Poppova). However, some of the musicians in his band objected to this practice because Ellington claimed the compositions as his own, although other band members had no problem with Ellington's compilation style of composing (Poppova). It is important to acknowledge the musical talent necessary to remember disparate fragments of various melodies and rhythms, and then compile them into a hit song. The image of:

Ellington as a compiler was a recurring impression, but one of ambiguous interpretations – was it a creative genius that transformed forgettable bits into timeless masterpieces, or an act of betrayal and artistic vanity at the expense of integrity? ....But the real question, of course isn't whether creativity is combinatorial and based on the assemblage of existing materials – it is. What Ellington did was simply follow the fundamental impetus of the creative spirit to combine and recombine old ideas into new ones (Poppova).

This quote directly challenges the assumption within copyright that genius can only manifest itself in the form of a singular author. Duke Ellington was firmly embedded in the tradition of collective authorship, yet his genius as a composer is undeniable. Despite the narrative that equates sampling with theft, all music is “combinatorial” and requires the use of preexisting materials to create something new and original.

Kanye West’s talent reveals itself in his obsessiveness over the sound of individual elements in his music. An important way that West is able to achieve the sound he hears in his head is by relying on other people’s musical abilities. Craig Bauer— a successful sound engineer who mixed West’s first two albums *The College Dropout* and *Late Registration* – describes the frustration of working with Kanye on a song remembering a message he received after he mixed a track saying “Kanye liked the mix, but sent back a laundry of tweaks, including a request that the drums ‘knock’ more. ‘Knock’ is a big term in hip-hop these days that relates to frequency” (Daley). Bauer also notes that Kanye had “a proclivity to twist sounds” especially his drums which are “his signature. There’s always a certain grit to them” (Daley). While Kanye might break some rules, he does it in the name of artistry, and his talent as a musician is reminiscent of the way in which Duke Ellington was also able to listen to other people’s music and then compile it in a unique way.

The way in which Kanye composes his music exemplifies collective authorship, a pervasive type of authorship in African diasporic music. The best example of this collective authorship can be found in the production of Kanye’s 2010 album *My Beautiful Dark Twisted Fantasy*. In an article for *Complex* magazine, journalist Noah Callahan-Belver describes traveling to a secluded Hawaiian studio where Kanye was working with some of the biggest names in hip-hop, which Callahan-Belver named “Rap Camp” (Callahan-Belver 1). He describes

Kanye's unusual composing style when trying to finish his song "Power": "Kanye's process is communal—he literally goes around the room asking everyone there what 'power' means to them, throws out lines to see how they're received, and works out his exact wording with whomever is around to help" (Callahan-Belver 3). One of the musicians at the studio was legendary producer Pete Rock who describes hearing another song from the album for the first time, "Runaway":

as soon as I heard the drums come in, I just started laughing. He used my drums from *Mecca and the Soul Brother!* I used these drums in an interlude before this record called 'The Basement' and those drums come on before the song. I never heard anybody make a song the way he made it out of those drums. I thought that was genius (Callahan-Belver 4).

This quote reinforces the earlier point that because of the nature of collective authorship, and especially challenges to copyright law's conceptions of artistic genius. Kanye directly borrows a recognizable element from Pete Rock, but even Rock is amazed by the recontextualization of his own unique sound. West reveals his genius in the way that he is able to compose by compiling sounds in a way that sets him apart from other artists.

It is important to note the moral and ethical complexities of collective authorship. The examples of Kanye West and Duke Ellington challenge the narrow conceptions of authorship that are embedded within copyright law. The type of collective authorship that characterizes West's music is markedly different from Ellington. While West might reuse a portion of an obscure song the same way Ellington uses a melodic riff, Ellington mostly borrowed from his bandmates. This means that he interacts musically with his bandmates in a way that is physically impossible for West. While there was controversy with the way Ellington reused some of his

bandmates musical ideas without giving official credit, the bandmates still knew that Ellington used their idea. West could use a portion of an obscure record without giving any kind of acknowledgement to the original artist, official or otherwise. Is it ethical for West to sample an artist without giving any credit? This is a particularly thorny issue which artists must grapple with as well as the legal world.

The examples of collective authorship that I explained in the previous two paragraphs present a narrow view of collective authorship. Collective authorship is an ambiguous term, and can reference many different musical practices. While collective authorship is a central feature for African diasporic music, this type of creative collaboration is not distinctly characteristic of music of the African diaspora. Western classical music is one genre that contains numerous instances of collective authorship. Musical borrowing is pervasive in the substantial canon of western classical musical works. While the musical borrowing in classical music is categorically different from digital sampling, both sampling and classical music illustrate the complexity with which the borrowed musical elements are incorporated into a composition. Western classical composers most often recycled melodic, harmonic, and rhythmic themes and motifs from earlier compositions. The composer George Frederick Handel was involved in some controversy during his lifetime as a result of some of his compositions, which noticeably borrowed from other composers; later on in his career he often self-borrowed from his earlier compositions, a common practice within western classical music (Arewa 602). One of his most inflammatory compositions was his oratorio “Israel in Egypt” that used material from every movement of the composer Erba’s “Magnificat” (Arewa 601). His reliance on Erba’s piece was so extensive that it “engendered significant discussion as to whether Handel should be considered a plagiarist” (Arewa 601).

Another composer who frequently borrowed from existing compositions was Johann Sebastian Bach. Bach was a prolific composer, and practiced extensive self-borrowing in addition to borrowing from his numerous family member as well as the composers Telemann, Frescobaldi and Albinoi (Arewa 603). Ludwig van Beethoven is yet another example of a composer who reworked existing music, most notably using a variety of Ranz, a traditional Swiss melody played on an alphorn clearly heard in the opening of the last movement of his Pastoral Symphony (Arewa 604). There are numerous other examples within classical music of musical borrowing that is firmly rooted in a tradition of collective authorship. As the previous examples illustrate, western classical composers borrowed extensively from previous music, in a way that has been largely ignored by copyright law. The examples within western classical music provide a more complete picture of collective authorship.

The discussion in this section of iterability, authorial intent, and collective authorship illustrates the Herculean task given to lawmakers. Copyright law defines the author in a way that has its roots in the definition of an owner within property law. However, the author is a decidedly more ambiguous entity. Up to this point, copyright law has not dealt with collective authorship despite its pervasiveness throughout all different types of music, not simply digital sampling. In the next section, I will introduce some possible reforms that have been suggested that could possibly help ameliorate some of the issues presented in this section.

## Moving Towards Reform

Up until this point, my focus has been on specific issues within copyright law as it presently exists, and I have repeatedly referenced the need for reform. In this section, I will present some possible reforms to the current copyright law that could reduce some of the problems that have plagued copyright when it has been applied to hip-hop music. I am not

attempting to propose any significant changes to the law in this section, but am merely presenting some of the more commonly discussed reforms that I have encountered in my research. The possible reforms that I will explain are all specific policy changes that could be made, but they are all based on two general principles: One, copyright should be simplified; Two, the reforms should come from within the existing body of copyright. These two principles will guide my discussion of the reforms, and are principles that should seem fairly obvious. I will present three possible policy changes: One, move away from fair use by clearly demarcating which works are public domain; Two, create a compulsory licensing system; Three, move towards a liability rule instead of a property rule. These three possible changes almost completely cover all of the issues that I introduced over the first three chapters, and they would be beneficial for hip-hop artists, the music industry, and the courts who deal with sampling cases.

Fair use has been turned into a site of “moral panic” by companies who have a “vested interest to preserve the status quo through creating a false enemy” (How to Fix Copyright 212). This moral panic is completely fabricated and is supported by entities that “lack any practical experience in practicing the doctrine” (How to Fix Copyright 212). A fundamental purpose of copyright law is to incentivize the creation of new works, a purpose that could be aided with an expansion of fair use. Unfortunately, as my discussion of the cases in chapter 3 illustrated, it is very difficult to mount a fair use defense in court. Furthermore, “fair” is an ambiguous concept, and one that courts have had difficulty establishing in any clear way (Demers 120). Corporations have made it clear that they will vehemently litigate any instance of unlicensed sampling. Additionally, these same corporations petition Congress and the Supreme Court to extend the length of copyright (Demers 121). All of these factors have led some people to declare that fair

use is dead (Demers 121). However, there are ways around fair use that can benefit hip-hop artists, as best evidenced by Lawrence Lessig and his company Creative Commons.

In his book *Free Culture*, Lawrence Lessig offers an alternative route for sampling artists that allows for transformative use without having to invoke fair use. Creative Commons takes the ideals of free culture and puts them into practice. Its aim is to “build a layer of *reasonable* copyright on top of the extremes that now reign. It does this by making it easy for people to build on other people’s work, by making it simple for creators to express the freedom for others to take and build upon their work” (Lessig 282). Authors have the ability to choose from a set of free licenses that allow them to establish what other authors can do with the work; These licenses range from one that permits any use, so long as attribution is given, to one that permits any use so long as no derivative use is made (Lessig 283). What is particularly interesting about Creative Commons is that its aim is to “build a movement of consumers and producers...who help build the public domain, and, by their work, demonstrate the importance of the public domain to other creativity” (Lessig 283). What is particularly attractive about this ideal is that it does not require any substantive change to copyright law, but rather it operates inside the existing structure of copyright law. It also is a positive step towards reducing the influence of corporations by creating a public domain which will help by “showing people how important that domain is to creativity and innovation” (Lessig 286). The construction of a true public domain will help to further the goal of achieving public good, a central purpose of copyright.

Implicit in this move towards free culture and a true public domain is the need to reduce the length of copyright. The term of copyright has gone from fourteen years to ninety-five years for corporate authors and the life of the author plus seventy-five years for natural authors (Lessig 292). This grants substantial power to corporations in particular, and as long as the author still

owns the copyright, they still have the right to exclude which discourages sampling practices. Lessig explains four principles that can be used to ameliorate this problem: one, keep it short enough to incentivize creation, but no longer; two, keep it simple by making the line between public domain and protected content explicit so that there is no reason to navigate the complexities of fair use; three, require the copyright owner to renew their copyright periodically; four, keep it prospective, meaning that whatever the term copyright should be, once the term is given it should not be extended.(Lessig 292). The biggest advantage of decreasing the length of copyright is the effect it could have on sampling. A decrease in the length of copyright would mean that more works will enter the public domain. As more works enter the public domain, artists have an increasing sample size to choose from to produce transformative works. A movement towards free culture, a clearer demarcation of what works are in the public domain, and an effort by artists to support these goals will drastically reduce the negative effect that copyright has had on sampling.

The establishment of a legal framework for hip-hop sampling would also be beneficial in reducing confusion over what constitutes a transformative use of a work that is not in the public domain. One possible framework that has been suggested would distinguish between three distinct types of sampling: sampling in which the original source is unrecognizable, de minimis use of a recognizable sample, and finally, instances of sampling where the original source is recognizable and not de minimis use (Arewa 641). The framework for determining whether or not the sample is recognizable would be the intended audience test as opposed to the current system of the average audience test (a problematic legal concept requiring the court to interpret an expert witness's testimony in order to determine whether or not the average observer would recognize the source of a sample). It is important to explain one of the potential setbacks of an

intended audience test as well as the key benefit to present a full picture of the issue. One commonly discussed shortcoming of the intended audience test would be the increased burden it would place on the court that results from increased issues of facts, meaning the court would need to conduct more analysis (Miller 15). As I explained in chapter 3 when discussing the *Newton v. Diamond* case, the average audience test is a vague and ambiguous concept that is therefore extremely difficult to apply in any rigorous, repeatable way. The intended audience test would allow the courts to only base their opinion of de minimis use on the testimony of musical experts in a case, “essentially looking to the reaction of those with sufficient expertise to understand the language of the work, or the intended audience” (Miller 16). There would be decreased burden on the court to interpret experts’ testimony as it applies to the average listener which would significantly expedite their decision in sampling cases.

The second possible reform that has been suggested is movement away from a property rule towards a liability rule. As I explained earlier in the chapter, one of the fundamental issues with copyright law is the inexact fit of property law theories to issues of intellectual property. Scholar and copyright critic Siva Vaidhyanathan has argued that the debate surrounding intellectual property should move towards intellectual policy because “copyright issues are now more about large corporations limiting access to and use of their products, and less about lonely songwriters snapping their pencil tips under the glare of bare bulbs (Vaidhyanathan xxvi). The discussion should move away from determining ways to prevent theft towards a copyright policy that would “encourage creative expression without limiting the prospects for future creators” (Vaidhyanathan xxvi). The notion of copyright infringement as theft is particularly pernicious because it completely ignores the practice of borrowing in all types of musical composition. By referring specifically to hip-hop sampling as theft, copyright law makes a value judgment about

the practice of sampling, inaccurately differentiating it from other types of musical production. One possible way to reduce the positioning of sampling as theft, would be to move to a liability rule, which would be particularly useful by abolishing the right to exclude.

Law professor Olufunmilayo B. Arewa explains that a liability rule could significantly “facilitate access to copyrighted works for those whose aesthetic style incorporates use of existing works while retaining the economic rights of copyright owners” (Arewa 638). A liability rule is related to torts which are civil wrongs resulting in injury; the primary aim of torts is to provide relief for the damages incurred (“Tort”, Legal Information Institute). A liability rule is particularly useful for sampling cases because it creates an environment where borrowing is normal. This would mean that certain types of borrowing would be permitted under the framework, and in the event of an unfair use the copyright owner would be entitled to compensation (Arewa 639). A liability rule also fosters more innovation with future creators having less restricted access to use existing material creatively, and the ability to deal with issues of liability and compensation after the fact (Arewa 639). The establishment of a liability rule is would also make the establishment of a compulsory licensing system much more realistic and beneficial for sampling artists.

The third and final possible change that could be made to copyright law is directly related to the establishment of a liability rule, and would benefit from having that system in place. The final possible reform I will explain is the establishment of a compulsory licensing system for sound recordings. This is a solution that numerous scholars have already proposed and would be fairly simple to enact since a compulsory licensing system already exists for licensing the rights to an original composition as explained in section 115 of the United States Copyright law. The benefits of such a system are numerous and clearly explained in the current literature. However,

it is important to also note some of the possible shortcomings of a compulsory licensing system. A compulsory licensing system would benefit hip-hop artists because it would make licenses for transformative sampling much easier to obtain, more clearly demarcate the line between fair use and when a sample should be licensed, and eliminate a confusing distinction between covers and transformative sampling of sound recordings (Vrana 859). Furthermore it would remove “artistic determination from courts that seem unwilling to make the case-by-case decisions that transformative uses depend on” (Vrana 860). The system would also financially benefit all artists involved, both the sampled artist and the artists who transform the sample. Some of the most compelling arguments against a compulsory licensing system claim that the system creates “too much of a bright line rule” and that it would “require reform of the entire copyright system including the composition compulsory license” (Vrana 856). Despite these perceived shortcomings, the benefits of a compulsory licensing system for sound recordings would be a significant improvement over the free market system that exists which inevitably leads to licensing fees that are only affordable for the wealthiest artists. While these three possible reforms would certainly be somewhat difficult to enact, they could significantly aid the effort to demystify some of the more confusing elements of copyright law. The reforms would be an important step towards creating a legal environment that is not only conducive to sampling, but one that encourages borrowing as the norm.

The three reforms that I have explored in this section attempt to deal with the issues of originality and authorship within a specifically legal framework. However, it is also important to consider these issues outside of a legal perspective. There could be simpler changes that artists themselves can make that would not require the intervention of the law. The main area I would like to explore is the issue of sampling artists acknowledging the original musicians of the

music they sample. The previous example of Creative Commons provides a basic framework for the creation of a community that values collaborative creation, while still protecting the importance of the rights of the author. Creative Commons sets clear legal guideline that allow for individual authors to determine the amount of access other artists have to their compositions. Although the right of an artist to sample is a central concern of this thesis, it does not mean that the rights of the author are any less important. The issue of artistic integrity is central in this discussion. Using the framework provided by Creative Commons, it is possible to imagine an artistic community that values the rights of the author as much as the sampler from a moral perspective. It is problematic that a hip-hop artist can sample a breakbeat from an obscure soul or funk artist and not give any indication where they took the sample. The sampling artist could give credit to the original artist by simply saying where the sample is from, without any monetary compensation. Maybe that could lead to people listening to the original artist because they heard the breakbeat and knew where they could find it. A community that values this sort of public recognition could help to resolve some of the issues of authorship and ownership in a way that does not require legal intervention. This collaborative environment is attractive because it can accept the ambiguities of originality and authorship in ways that are impossible for the law. In the next section, I will continue this discussion by revisiting sampling ethics within the hip-hop community.

### Conclusion: Sampling Ethics Redux

At the end of chapter 1, I introduced Joseph Schloss's rules that he formulated based on his research conducting interviews with underground hip-hop producers. I would like to reflect back on those rules, updating them based on the technological changes that have occurred since Schloss performed his research. The corporations that exert significant control over the music

industry have tried to establish a narrative that equates sampling with theft. The corporations try to act as cultural gatekeepers, determining what kind of music is objectively accepted by popular culture, and attempting to undermine musical pursuits like hip-hop that they ostensibly view as objectively less artistic. My goal in presenting Schloss's rules of an internal sampling ethic was to counter the narrative that hip-hop artists sample out of laziness. Schloss's rules were very helpful in this respect because they illustrated that hip-hop is able to police itself through the lens of hip-hop authenticity. The internal lens of authenticity is a mechanism for other hip-hop artists to determine what types of sampling are acceptable, and when the line is crossed that makes sampling unethical. The only issue with Schloss's definition is that it is narrow in its scope, applying generally to underground hip-hop artists in the 1990s. In this section, I will profile one of the most influential underground hip-hop producers today: El-P. I will also introduce the term "virtual digging", a variation of crate digging – the mode of acquiring samples favored by early producers, which generally involves going to a record store and looking for vinyl records to sample from – which has become increasingly popular among producers due to the ease of technology for locating samples, and the decline of traditional record stores around the country.

El-P is one of the most influential underground hip-hop artists currently making music. In an interview with Pitchfork back in 2002, the interviewer, Sam Chennault wrote that, "Perhaps no other individual over the past five years has been as important in the formation of what we call underground hip-hop as El-P" (Chennault). El-P has been a producer and rapper for 21 years. Starting off as a member of popular underground group Company Flow, he later went on to start the influential hip-hop label Definitive Jux and now works with some of the most influential rappers in underground hip-hop including rap group Das Racist and Killer Mike ("Behind the Boards Producer Profile: El-P"). El-P's production style while he was in the group

Company Flow is noted for its “slightly distorted samples [that] blend horns, a funky beat, and a recording of someone whistling together into a cohesive whole, ending up as a more lo-fi take on the traditionalist boom-bap that ruled NYC in the early ‘90s” (“Behind the Boards Producer Profile”: El-P). El-P’s unique production style continued to progress adding “touches of weirdness, including sci-fi-esque sound effects...and a generally chaotic feel absent from most hip-hop of the era” (“Behind the Boards Producer Profile:El-P”).

El-P is noted for his experimental approach to production, especially when it comes to his incorporation of samples. When asked about his approach to sampling, El-P has said that “you really have to be a different type of producer now, so that you can create without having to worry about being sued”(El-P: Def by Manipulation). He also said that he liked to “take the mood of a sample and completely manipulate and change it to the point where it’s totally unrecognizable, but it still retains some spirit of the original” (El-P: Def by Manipulation). An example of this technique can be heard on his song “Tasmanian Pain Coaster” from his album *I’ll Sleep When I’m Dead*, which features a chopped up sample of a sitar, that El-P manipulated by changing the order of the notes and running it through tremolo and other effects to get the final sound (El-P: Def by Manipulation).

El-P is unique as a modern hip-hop producer because he uses an overwhelming amount of outboard gear – equipment that is not a part of the Digital Audio Workstation’s effects used to alter sounds – mainly made up of “pedals and filters and oscillators” used “to take a sample, change it and bring it back into the computer” (Noz). El-P’s musicianship shines through in his mastery of the music equipment and technology available to modern producers. He is a self-described “producer nerd” who doesn’t want “people to listen to [his] records and feel like they can identify where the sounds are coming from. I want them to feel like it’s something that they

don't understand or that they can't pigeonhole"(Noz). Recently, El-P released a unique mash-up track where he asked his fans on Twitter who the "most anti downloading/digital music musicians were" and decided on Metallica and Prince (Young). He then released a mash-up for free which combined Metallica's "Unforgiven Part 2 with Prince's "Purple Rain". El-P has shown throughout his career that he is truly unique, yet he works within the classic hip-hop styles. His technique of obscuring samples to the point of unrecognizability shows how hip-hop artists will continue to sample in unique ways, and do not rely on the popularity of the records they are sampling to make music.

Technology has revolutionized hip-hop, especially when it comes to the practice of crate digging. As I noted in chapter one, crate digging is the practice by which producers look for records that they can sample from historically going to record stores. However, the growth of music distribution online has forced many record stores to go out of business, and many producers have started taking advantage of the ease with which they can acquire sound recordings instantly on the internet (Rocca). I will refer to this new type of digging as "virtual digging", a term which nicely encapsulates the various methods that are used to acquire samples online. "Virtual digging" is a contentious issue within the hip-hop community, mainly because of the switch from the vinyl records of classic crate digging, to the mp3 which the most common format for virtual digging. A producer sampling an mp3 that they found on the internet violates another one of Joseph Schloss's observed rules, specifically the rule that a producer can only sample from vinyl. Despite this desire to cling to the vinyl roots of hip-hop,

[t]he need for discovery outweighed the limitations of the marketplace. Hip hop producers began evolving in response to the shuttered windows of record stores...In 2005, the birth of YouTube and the widespread access of free obscure music via blogs

changed the process for traditional hip hop sampling forever. This began the separation of 'Collection and 'Tools'; a crate digger's vinyl collection stalled as their online tools for the trade of making beats expanded exponentially (Rocca).

A quick Google search reveals a number of different blogs and online forums filled with crate diggers searching for obscure records. One such blog is called the Vinyl Frontier, run by one user named Reef Ali who posts nearly an album a day, and seems to particularly favor records from the '60s, '70s, and '80s (The Vinyl Frontier).

YouTube seems to be the most popular location for producers to find their samples. Paul White, a producer from the U.K. says that he samples mainly from YouTube and MP3s, and says that "you'd be surprised how much material released has come from YouTube" (Rocca). One younger producer named Small Professor has been strictly sampling from MP3s his entire beat making career, but he pays homage to the vinyl lineage by layering static sampled from vinyl to achieve a more authentic sound (Rocca). Another technique that Small Professor uses when digging is to "type something crazy" generally involving the word trippy on YouTube and going through the results (Rocca). This do-it-yourself aesthetics illustrates the powerful effect that the collective hip-hop aesthetic has on any young artist who begins making hip-hop music. Another way that producers challenge themselves is to search for obscure samples. One producer named Blockhead, "never wants to know an artist existed prior to finding them" (Rocca). Modern day producers, while not adhering to the Schloss's strict guideline of sampling ethics, still use their own newly developed techniques to challenge themselves. The way in which a producer digs for samples online is not overly dissimilar from crate digging. The goal is to find a unique sample that fits into the producer's own aesthetic which helps them to craft their own style, which simultaneously differentiates them from other producers while still being firmly within a hip-hop

tradition. This aesthetic is common throughout hip-hop. Artists develop their own style by using unoriginal sounds and making them original. The phenomenon of “virtual digging” still valorizes many of the same aesthetic ideals of crate digging, and represents a recognizable hip-hop aesthetic.

Corporations acting as cultural gatekeepers for the music industry will undoubtedly continue to litigate, increase licensing costs, and use any other method to discourage the practice of unlicensed sampling. Despite increased costs associated with sampling that have made some producers wary of using samples in their work, hip-hop artists create new techniques that obscure, transform, and recontextualize their samples. The narrative that emerged from sampling critics who argued that hip-hop and other sampling based music is a musical shortcut for producers is simply untrue. Hip-hop culture’s rich history of collective authorship has created a strong sense of community with a set of clearly definable set of internal sampling ethics that govern artistic integrity for hip-hop producers. Hip-hop culture collectively challenges their artists, producers especially, to create music that is new and exciting, yet undeniably hip-hop. While the specific set of ethics may differ depending on when the artist began producing, and what subgenre of hip-hop they identify with, they still work within an ethical code. It is clear that copyright needs to be reformed to incorporate concepts of originality and collective authorship that are associated with music of the African diaspora. Until it does, copyright will not be able to fulfill its true purpose, completely and unequivocally protecting the creative rights of artists.

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